

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**The impact of Brexit in relation to
the right to petition and on the
competences, responsibilities
and activities of the
Committee on Petitions**

STUDY FOR THE PETI COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
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PETITIONS

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to petition and on the competences,
responsibilities and activities of the
Committee on Petitions**

STUDY

Abstract

Upon request by the PETI Committee, this study considers issues raised in petitions to the European Parliament by citizens concerned about the way Brexit will impact on their rights. In particular, it first looks at the changes that Brexit will determine in relation to voting rights, the right to petition, the right to apply to the European Ombudsman and the European Citizens' Initiative. It then focuses at length on the way Brexit will affect UK citizens in the EU-27, and EU citizens living in the UK. In this respect, it considers challenges and risks for both citizens who have resided in the EU-27 or the UK for less than 5 years, and for those who have already acquired the right to permanent residence at the time of Brexit.

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LIST OF ABBREVIATIONS

- CJEU** Court of Justice of the European Union
- Charter** Charter of Fundamental Rights of the EU
- CML Rev** Common Market Law Review
- EL Rev** European Law Review
- EP** European Parliament
- EU-27** European Union minus United Kingdom
- TCN** Third country national
- MJ** Maastricht Journal of European and Comparative Law

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EXECUTIVE SUMMARY

The UK withdrawal from the EU poses unprecedented questions. For citizens, both UK nationals in the EU-27 and EU nationals in the UK, the most important question relates to the extent to which their situation will be safeguarded after Brexit. Not surprisingly then the Committee on Petitions has received a number of petitions in relation to Brexit. Those petitions can be grouped in three different categories: (i) petitions concerning the Brexit referendum and electoral franchise; (ii) petitions concerning the rights of UK nationals living in the EU-27 post Brexit; and (iii) petitions concerning the rights of EU citizens living in the UK after Brexit.

This study therefore looks at those issues in some detail. It focusses first, on the loss of citizenship rights which results from the loss of EU citizenship status or from the UK's withdrawal. Secondly, and most importantly, the study looks at how migrant EU and UK citizens are going to be affected by Brexit. Here, it is important to note that both the EU institutions and the UK government have indicated that the treatment of each other's citizens is a key priority in the withdrawal negotiations. This study however is not intended to look at the different options open to negotiators. Rather, it aims to detail the loss of rights and the risks that would arise should an agreement not be reached, as well as identifies the most vulnerable categories of Union citizens. The study will then make policy recommendations in relation to the rights of Union and UK citizens.

The study looks first to the right to vote and stand in local and European Parliament elections. It should be noted that some of the petitions received complained about the lack of franchise for the Brexit referendum of some UK citizens resident in the EU-27, and for the EU citizens resident in the UK. However, given that Union citizenship is *additional* to national citizenship, it was for the UK alone to determine its electoral franchise. This said, Brexit will have the following effects on the electoral franchise: firstly, British citizens in the UK will no longer be allowed to vote in EP elections. This loss of voice is justified by the fact that EU legislation will no longer apply to the UK. Secondly, EU citizens resident in the UK will lose the possibility to vote for the EP as citizens resident in another Member State. They will however not lose their right to vote for the EP as such and, depending on the rules applied by their Member State of nationality, might be able to vote from abroad. EU citizens in the UK will lose the possibility to vote in British local elections, including devolved elections, unless a special regime is carved out for them. Thirdly, British citizens residing in the EU-27 will also lose the possibility to vote for the European Parliament and local elections. The latter right might be provided for by national law (but there would be no competence for the EU to provide such a right). The right to vote for the EP could be granted by the Member State of residence, or be provided through a Treaty amendment.

The right to petition and to the protection of the European Ombudsman will be lost by UK non-migrant citizens, but will be maintained by both UK citizens in the EU-27, and EU citizens in the UK. Here, one identifiable risk is the loss of English as a Treaty language. This might also affect third country nationals (TCNs) resident in the EU, as they might prefer to write to the institutions in English given its wide use as a first or second language. The European Citizens' Initiative is only available to EU citizens, and hence all UK citizens, also those residing in the EU-27, will no longer be able to participate in an Initiative. The effectiveness of the Citizens' Initiative for EU-27 citizens might be reduced if English is not maintained as an official language.

The great majority of petitions received by the European Parliament in relation to Brexit focussed on the changes that Brexit will produce on UK citizens' right to reside in the EU-27, EU citizens' right to reside in the UK, and on the loss of Union citizenship for all UK citizens. Accordingly, the second, and more extensive part of the study, analyses the effect of Brexit on UK citizens in the EU-27 and EU citizens in the UK. It first considers the situation

of citizens who will not have gained the right to permanent residence at the point of Brexit and then looks at the status of those who had already gained that right.

UK citizens in the EU-27 should at the point of Brexit be considered as 'former EU citizens' and maintain most of the rights provided for by Directive 2004/38/EC (the Citizenship Directive), which should be applied by analogy. This interpretation is warranted by the fact that UK citizens have moved exercising fundamental EU rights, and recognises the significance and centrality of EU citizenship. As a result UK citizens resident in the EU-27 at the point of Brexit would continue to be protected by EU law, enjoying equal protection across the territory of the EU. They would maintain a right to reside, as long as they exercise an economic activity or are economically independent. They would have a right to a residence card and the right to move visa free across the territory of the EU. Pensioners would however be at risk of not being able to continue to exercise said rights, unless social security co-ordination is maintained. Students would be at risk of not being recognised as beneficiaries of the 'former citizen' status, unless they have comprehensive health insurance.

EU citizens in the UK would face enormous challenges unless their situation is protected by the withdrawal agreement. Workers might be subjected to visa rules, including visa restrictions for unskilled jobs. Part-timers, those in atypical employment contracts, work-seekers, and those with a non-continuous employment history will be particularly at risk. Self-employed might be subjected to minimum investment/threshold requirements. Fees for visa and evidence required might also pose significant challenges. Economically independent EU citizens might face minimum income and health insurance requirements.

UK citizens in the EU-27 who have matured the right to permanent residence at the point of Brexit should maintain such right as a matter of EU law. This is warranted not only by their status as former citizens, but also because their right to permanent residence had been already matured at the point of Brexit. The study highlights the difference between treatment of permanent residents and third country nationals who are long term resident, and shows the considerable loss of rights that would ensue from the transition from permanent to long term residence.

EU citizens in the UK might be transitioned to 'indefinite leave to remain' status. Here the main risks for EU citizens are the very high fees required, minimum income requirements to enjoy the right to family reunification, minimum investment requirements for self-employed applied retroactively, minimum income requirements for economically independent applied retroactively, and discretion for refusal.

Finally, the study considers the UK/Irish situation. In particular, the two countries recognise an almost 'national' status to each other's citizens. The EU institutions and the British government have indicated their intention to maintain a special regime between Ireland and the UK, not least to ensure the integrity of the peace process. The study considers the extent to which the current special regime might be considered problematic from an EU law perspective. In particular, the privileged treatment of British nationals in Ireland might be open to challenge as Member States are limited in the extent to which they can treat non-EU citizens better than EU citizens, even when there is an international agreement between a Member State and a third country. This would be a problem, particularly, if British work-seekers are entitled to welfare provision in Ireland, whilst EU citizens are not and if British students are entitled to maintenance aid whilst EU citizens are not.

GENERAL INFORMATION

KEY FINDINGS

- The electoral franchise for the EP will be lost by UK citizens. EU citizens living in the UK will maintain the franchise but the extent to which they will be able to exercise the right to vote from the UK will depend on national law.
- UK citizens will lose the right to be protected by diplomatic and consular representation of the EU-27 and EU-27 citizens will not be able to rely on UK protection.
- UK citizens in the UK will lose the right to petition the EP, to apply to the European Ombudsman and to participate in the European Citizens' Initiative. EU citizens in the UK will maintain all of those rights. UK citizens in the EU-27 will lose the right to participate in the European Citizens' Initiative. Loss of English as a Treaty/official language might impact on the effectiveness of those instruments.
- UK citizens residing in the EU-27 at the time of Brexit should be treated as 'former Union citizens' and not as third country nationals. This new category would be consistent with Union citizenship, and would afford UK nationals protection similar to that enjoyed under the Citizenship Directive.
- EU nationals in the UK face considerable challenges lacking an express agreement: issues of definition of economic activity, compliance with existing residence rules and evidence required increase the risks faced by EU nationals. The application of current immigration rules (including the application of very high fees for visa application) would be particularly problematic for low-skilled workers, part-timers, those in atypical employment, self-employed, pensioners and students.
- UK nationals who have gained the right to permanent residence in one of the EU-27 countries will continue to be protected by Directive 2004/38/EC.
- EU nationals who have resided lawfully in the UK for at least 5 years might be transitioned to the 'indefinite leave to remain status'. This status is much less favourable than the permanent residence status under EU law.
- The Anglo-Irish arrangement whereby those two countries treat each other's citizens as almost nationals might be problematic under EU law, especially in relation to work-seekers' access to benefits and students' access to maintenance aid.

This study looks at the impact of Brexit in relation to the right to petition and the responsibilities of the Committee on Petitions. In particular, it looks at the changing legal landscape in relation to two distinct issues. The first part of this study will look at the implications of Brexit for the right to vote, the right to petition and the European Citizens' Initiative. The second, and more extensive part of this study, will consider the implications of Brexit for free movement and residence rights. The latter issue is considered in detail as it is by far the issue which attracted the most petitions. In this respect, the study will first recall the existing citizenship rights, and then proceed to look at the changes that will occur with Brexit. Building on these findings, the study will also make policy recommendations. A very short summary of the impact of Brexit on citizenship rights is annexed to this study. Tables are also included to illustrate the different legal regimes that might be applicable post-Brexit. Here it is important to note that the time of Brexit is either that indicated in the withdrawal agreement, or the 29th March 2019 lacking an express indication.

It should be noted that Union citizenship is *additional* to national citizenship and does not replace it, and that, for the time being, Union citizenship is bestowed *only* on citizens of the Member States. However, there is no Treaty bar to the possibility of conferring Union citizenship to third country nationals (TCNs). Indeed, there has been a long-standing debate on the need to bestow Union citizenship onto TCNs who are long term resident in the territory of Member States.¹ We will come back to this issue when analysing the potential for UK citizens maintaining rights post-Brexit.

Section 1 – Electoral rights and right to diplomatic representation provides an outline of existing electoral rights and how those will be affected by Brexit. UK nationals residing in the UK will lose the right to vote for the European Parliament. EU citizens residing in the UK will lose the right to vote in UK local elections (including devolved administrations). However, they will maintain the right to vote for the EP, and they might be able to exercise such right from the UK if the rules of their Member State of nationality provides voting rights for non-resident citizens. UK citizens residing in the EU-27 will lose the right to vote for local elections, unless national rules of their state of residence allows lawfully resident TCNs to vote for local elections. UK citizens in the EU-27 will also lose the right to vote for the European Parliament. EU-27 citizens will no longer be able to rely on diplomatic and consular protection afforded by UK representations and UK citizens will no longer benefit of the EU-27 diplomatic and consular protection.

Section 2 – The right to petition the EP, the European Ombudsman and the European Citizens' Initiative UK citizens in the UK will lose those rights and EU citizens in the UK will maintain those rights. UK citizens in EU-27 will maintain the right to petition and to submit complaints to the European Ombudsman but will not be able to participate in the European Citizens' Initiative. The loss of English as a Treaty and/or official language might weaken the effectiveness of those rights for EU citizens and third country nationals.

Section 3 – Main rights of migrant EU citizens details the existing rights of migrant Union citizens, focussing in particular on medium term residence rights and the right to permanent residence.

Section 4 – Migrant Union citizens having resided in the EU-27 and UK less than 5 years at the time of Brexit This section advocates a new category, that of 'former EU citizen', for UK nationals residing in the EU-27 at the time of Brexit. This would be consistent with Union citizenship as a fundamental status and would fully guarantee UK citizens resident in the EU-27 even absent an agreement. For the sake of completeness the study highlights some of the main problems that UK citizens in the EU-27 would face should they be treated as third country nationals at the time of Brexit. This section then turns to consider the main problems that would be faced by EU citizens resident in the UK at the time of Brexit if existing British immigration rules were to be applied to them.

Section 5 – Citizens having resided in EU-27/UK for more than 5 years at the time of Brexit This section considers the right of UK/EU citizens who have already matured the right to permanent residence at the time of Brexit. It highlights the problems that might be encountered in evidencing such right by both UK and EU citizens. It considers that UK citizens in the EU should continue to be protected by the Citizenship Directive, and highlights the risk that would occur for EU citizens in the UK if their status were to be transitioned to that provided by the indefinite leave to remain regime.

¹ For an account of the debate see J Shaw *The Transformation of Citizenship in the European Union, Electoral Rights and the Restructuring of Political Space*, Cambridge Studies in European Law and Policy (2007), ch 7; for a detailed analysis of the legal situation in the EU Member States, see J T Arrighi, R Bauböck, M Collyer, D Hutcheson, M Moraru, L Khadar, J Shaw "Franchise and Electoral Participation of Third Country Nationals Residing in the European Union and of EU citizens Residing in Third Countries", (2013) study prepared at the request of the European Parliament Committee on Constitutional Affairs, PE 474.441, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474441/IPOL-AFCO_ET\(2013\)474441_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474441/IPOL-AFCO_ET(2013)474441_EN.pdf). Member States, remain free to confer electoral rights, even to the EP, to those who do not hold Union citizenship, Case C-145/04 *Spain v United Kingdom*, EU:C:2006:543.

Section 6 – The Irish peculiarities: maintaining a common travel area and special treatment for UK and Irish citizens This section briefly summarises the existing arrangements between Ireland and the UK. It finds that continuation of some of those arrangements might be problematic having regard to case law of the Court of Justice of the EU which imposes limits to the extent to which Member States might accord preferential treatment to non-EU countries without extending the same treatment to EU nationals.

Annex 1 – Outline of EU citizens' rights and Brexit - Changes and challenges is a table visualising the issues discussed in the study.

Annex 2 – Table of petitions received by the PETI Committee on Brexit

1. ELECTORAL RIGHTS AND RIGHT TO DIPLOMATIC REPRESENTATION

KEY FINDINGS

- UK citizens will lose the right to stand and vote for the EP elections, as well as for the local election in the EU-27, unless such a right is provided for in national law.
- EU citizens in the UK will maintain the right to vote for the EP, but whether they will be able to exercise this right from the UK will depend on the voting rules of the Member State of nationality. EU citizens in the UK (save for Irish, Cypriot and Maltese citizens who enjoy voting rights in the UK as a matter of British law) will lose the right to vote in local elections, including devolved administrations.
- EU-27 citizens will lose the right to be assisted by the UK diplomatic representations in other countries, and UK citizens will lose the right to be assisted by EU-27 representations.

The electoral franchise is usually the right most readily associated with citizenship. In the EU context the *additional* nature of Union citizenship means that the franchise is limited to:

(a) the right to vote and stand for the European Parliament,² pursuant to the modalities provided for in national law (for instance in relation to age);³

(b) the right to vote and stand for the European Parliament in the Member State of residence, if different from that of nationality;⁴

(c) the right to vote and stand for local elections when resident in another Member State.⁵

Migrant EU citizens are therefore represented at both EU and local level and, insofar as the local and the European political spheres are not entirely isolated from the national political arena, Union citizens may have some representation in the national political process.⁶

A number of petitioners expressed concern in relation to the fact that EU citizens in the UK had not been given the chance to vote in the Brexit referendum, that UK citizens resident in other parts of the EU were in certain instances excluded from the right to vote,⁷ and that all

² See Council Decision 2002/772 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, (2002) OJ L 283/1.

³ In Case C-300/04 *Eman and Sevinger*, EU:C:2006:545, the Court held that the electoral franchise for the EP falls within the scope of EU law even when there is no cross border issue, this was later confirmed in Case C-350/13 *Delvigne*, EU:C:2015:648. In *Matthews v UK* (Appl. No. 24833/94), the European Court of Human Rights held that the right to vote for the European Parliament elections is covered by Art 3 Protocol 1 (right to free elections); and in Case C-145/04 *Spain v United Kingdom*, EU:C:2006:543, the Court of Justice of the European Union has recognised that it is for the Member States to decide who holds the electoral franchise for the EP, which can also be conferred to non-EU citizens.

⁴ Article 20(2)(b) TFEU, implemented by Council Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, as subsequently amended, consolidated version (2013) OJ L 26/27.

⁵ Article 20(2)(b) TFEU.

⁶ In the UK, Irish, Cypriots and Maltese citizens have also the right to vote for the national elections; this right is conferred by British law, not by EU law. Similarly, British citizens have a right to vote for the national parliament in Ireland;

⁷ The UK provides a right to vote for British nationals resident abroad up to 15 years from when the citizen last resided in the UK; the time limit is due to be repealed so as to allow British citizens resident abroad an unconditional right to vote in the British political elections. For an analysis of the rules on voting from abroad in the EU see E M Poptcheva *Disenfranchisement of EU Citizens resident abroad – Situation in National and European Elections in EU Member States*, European Parliament in-depth analysis, PE 564.379, [http://www.europarl.europa.eu/ReqData/etudes/IDAN/2015/564379/EPRS_IDA\(2015\)564379_EN.pdf](http://www.europarl.europa.eu/ReqData/etudes/IDAN/2015/564379/EPRS_IDA(2015)564379_EN.pdf)

EU citizens should be consulted on the decision of a Member State to withdraw from the EU. However, it is in the very nature of Union citizenship, a supranational citizenship that does not *replace* national citizenship but is additional to it, that there is a separation between voting rights at national and European level. And, at the present stage of European integration, Member States have decided that the national electoral franchise is of exclusive national competence.⁸ Whilst there was a discussion in the UK about modifying the franchise for the referendum to include EU citizens resident in the UK, it was decided that the referendum franchise should be the same as that for the national parliamentary elections.⁹

1.1. Implications of Brexit for the electoral franchise of British citizens and EU citizens residing in the UK

As mentioned above, any EU citizen has the right to vote and stand for the European Parliament, and any EU citizen residing in a Member State other than that of her/his nationality has a right to stand and vote for local and European elections in the Member State of residence. Brexit then will determine the following changes:

(a) UK citizens residing in the UK will no longer be able to stand and vote for the European Parliament elections. The only way to change this would be to amend the Treaties to provide for a special 'associate' citizenship for those UK citizens willing to maintain a closer relationship to the EU.¹⁰ However, given that EU law would no longer apply to the UK, and hence to citizens therein resident, there is no compelling democratic argument to extend the European Parliament franchise to UK citizens resident in the UK.¹¹

(b) EU citizens resident in the UK will no longer have an EU derived right to vote from the UK, and will lose the right to vote in British local elections. However, EU citizens will maintain the right to vote for the European Parliament as EU citizens and might, depending on the rules of their state of nationality, be able to exercise that right from abroad, through post or consular representation as the case might be.¹² Depending on national rules they might be able to stand for the European Parliament even if not resident in the territory of the EU.

(c) UK citizens residing in the EU will no longer be entitled to vote for either the European Parliament or in local elections in the Member State of residence, unless such a right is conferred by national law. It should be noted that some Member States do confer the right to vote in local elections to lawfully resident third country

⁸ Subject to EU law scrutiny when deprivation of franchise deprives EU citizens of EP franchise; and subject to ECHR.

⁹ Irish, Cypriots and Maltese citizens were allowed to vote because they have voting rights in the national elections; supporters of the need to extend the referendum franchise to EU citizens resident in the UK relied also on the fact that EU citizens were allowed to vote for the Scottish independence referendum. However, it should be noted that EU citizens are also allowed to vote for the Scottish Parliamentary election, so that the franchise for the referendum was the same as that for the devolved administration.

¹⁰ The Commission has indicated that Article 50 confer an "exceptional horizontal competence to cover in [the withdrawal] agreement all matters necessary to arrange the withdrawal. This exceptional competence is of a one-off nature and **strictly** for the purposes of arranging the withdrawal from the Union." (Commissions draft negotiating guidelines, para 5); conferring an associate citizenship status could only be considered as "strictly" for the purposes of arranging withdrawal to the extent to which it referred *only* to existing UK migrants in the EU, and was reciprocal (which might be difficult for EP elections)

¹¹ For this very same reason it is unlikely that such an 'associate citizenship' for non-migrant UK nationals could be provided in the context of the withdrawal agreement.

¹² For a list of EU countries that allow voting from abroad see J T Arrighi, R Bauböck, M Collyer, D Hutcheson, M Moraru, L Khadar, J Shaw "Franchise and Electoral Participation of Third Country Nationals Residing in the European Union and of EU citizens Residing in Third Countries", (2013) study prepared at the request of the European Parliament Committee on Constitutional Affairs, PE 474.441, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474441/IPOL-AFCO_ET\(2013\)474441_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474441/IPOL-AFCO_ET(2013)474441_EN.pdf).

nationals.¹³ There are three ways in which UK citizens resident in the EU-27 could be included in the EU democratic process:

(i) Through acquisition of nationality of the Member State of residence; this would be entirely dependent on national law.

(ii) Through a decision of Member States to extend the franchise for the European Parliament elections to UK nationals living in their territory. In this respect the Court of Justice has clarified that Member States can confer such a right to third country nationals.¹⁴ It should be noted however that national constitutional provisions guaranteeing equal treatment might be a bar to conferring such a right only to British nationals lawfully resident in the host Member State, without including also third country nationals who are long term residents.

(iii) Through a Treaty amendment and the creation of a special status (associate citizenship or the like) for British nationals. Voting rights could be attached to this citizenship, provided the associate citizen is resident in one of the Member States.

1.2. Right to diplomatic representation

Union citizens have a right to be protected by any of the other Member States' consular and diplomatic representation in a third state, when their own state lacks consular/diplomatic presence.¹⁵ Following Brexit, UK citizens will no longer enjoy the right to be protected by other Member States' representations in the rest of the world, and Union citizens will lose the right to be represented by the British diplomatic and consular representations.¹⁶ Each of the Member States can, of course, decide to enter into a reciprocal agreement with the UK to ensure maximum protection of each other's citizens.

¹³ See generally J Shaw *The Transformation of Citizenship in the European Union, Electoral Rights and the Restructuring of Political Space*, Cambridge Studies in European Law and Policy (2007); F Fabbrini "Voting rights for non-citizens: the European multilevel and the US federal constitutional systems compared" (2011) ECL Rev 392.

¹⁴ Case C-145/04 *Spain v United Kingdom*, EU:C:2006:543.

¹⁵ Article 23(1) TFEU, implemented through Decision 95/553/EC regarding protection for citizens of the European Union by diplomatic and consular representations, (1995) OJ L14/73, this will be repealed as of the 1 May 2018 by Council Directive (EU) 2015/637/EU of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC (2015) OJ L 106/1. For an account of the complexities that emerge from this regime see A Vermeer-Kunzli "Where the law becomes irrelevant: consular assistance and the European Union" (2011) ICLQ 965; see also see J T Arrighi, R Bauböck, M Collyer, D Hutcheson, M Moraru, L Khadar, J Shaw "Franchise and Electoral Participation of Third Country Nationals Residing in the European Union and of EU citizens Residing in Third Countries", (2013) study prepared at the request of the European Parliament Committee on Constitutional Affairs, PE 474.441, [http://www.europarl.europa.eu/ReqData/etudes/etudes/join/2013/474441/IPOL-AFCO_ET\(2013\)474441_EN.pdf](http://www.europarl.europa.eu/ReqData/etudes/etudes/join/2013/474441/IPOL-AFCO_ET(2013)474441_EN.pdf), section 3.

¹⁶ For a list of countries where each of the Member States (including the UK) has diplomatic/consular presence see http://ec.europa.eu/consularprotection/representations_en The UK has a very extensive network of diplomatic representation.

2. THE RIGHT TO PETITION THE EP, THE EUROPEAN OMBUDSMAN AND THE EUROPEAN CITIZENS' INITIATIVE

KEY FINDINGS

- UK citizens residing in the EU-27 will continue to have a right to petition the EP and the European Ombudsman, but will no longer be able to participate in the European Citizens' Initiative.
- EU citizens in the UK will maintain the right to petition the EP and the European Ombudsman, and they will also maintain the right to participate in the European Citizens' Initiative.
- The effectiveness of those rights might be weakened if English is no longer a Treaty /official language.

Citizens of the Union and individuals and companies resident within the EU territory have a right to petition the European Parliament and to apply to the European Ombudsman.¹⁷ This means that following Brexit, UK citizens residing in the EU will continue to be able to petition the European Parliament, and EU citizens residing in the UK will also maintain such a right, although the effectiveness of petitions and Ombudsman applications will be grossly reduced given that the UK will no longer be subjected to EU law.¹⁸ Furthermore, and unless English is maintained as a Treaty language post-Brexit,¹⁹ it will no longer be possible for citizens to write and receive answers from the institutions in English. This might restrict not only the right to petition of UK nationals, but also the right to petition of lawfully resident third country nationals, given the prevalence of English as an international language.

The European Citizens' Initiative,²⁰ pursuant to which at least one million citizens who are nationals of a significant number of Member States might invite the Commission to submit legislative proposals,²¹ is limited to Union citizens. This means that British nationals will no longer be able to initiate or participate in a Citizens' Initiative and that, should it be decided to extend such a right to UK citizens resident in the EU-27, a Treaty amendment would be necessary.

An argument could be made for lowering the 1 million threshold for triggering a Citizens' Initiative, given the fact that the EU population will reduce by approximately 12%. However, the inclusion of the 1 million threshold in Article 11 TEU is an indication that it was intended to be maintained regardless of variations (usually upwards) in the overall EU population.²² Furthermore, at present, in order to be considered, a European Citizens' Initiative must include signatures from at least 7 Member States (i.e. 1/4). Whether this threshold should

¹⁷ Articles 20(2)(d); Arts 227 and 228 TFEU. It should be noted that whereas, as said above, the right to right to the other institutions of the EU is limited to Union citizens.

¹⁸ On these issues see Repo

¹⁹ Note that Article 20 TFEU provides that citizens have a right to address the institution in one of the Treaty languages, listed in Article 55(1) TEU, not in one of the official languages of the EU. Whether English will be maintained as a Treaty language, possibly losing its status as an official language is to be seen.

²⁰ Article 11(4) TEU, 24 TFEU and Regulation 211/2011 on the citizens' initiative (2011) OJ L 65/1, as amended.

²¹ See now the Rethinking European Citizenship Initiative, urging the Commission to submit proposals to safeguard the rights of those who have already moved before a Member State depart and for those citizens of the departing Member State who wish to retain their status as Union citizens, <http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000005>; and <https://www.eucitizen2017.org/>.

²² Indeed the Accession of Romania, Bulgaria and Croatia post-date the entry into force of the Lisbon Treaty, and, despite the increase in the EU population by roughly 20 million, the 1 million threshold for the Citizens' initiative remained the same.

be lowered to 6, given the fact that the UK is one of the biggest Member States in terms of population, might also have to be considered.²³

The biggest challenge to ensure the full effectiveness of the European Citizens' Initiative after Brexit might however be the language problem, as identified in relation to the right to petition. In particular, Article 4(1) of Regulation 211/2011 provides that a European Citizens' Initiative must be submitted in one of the official languages of the EU. It can then be translated, by the organisers, in other official languages of the EU. An analysis of the initiatives submitted shows that the large majority of initiatives were submitted in English,²⁴ no doubt since this is the first most understood language in the EU. Should English no longer be an official language of the Union,²⁵ then language diversity in the EU might become a de facto additional barrier to the ability to secure support (and to co-ordinate) a European Citizens' Initiative.

²³ Article 11 TEU simply refers to citizens from a 'significant number of Member States', and it is Regulation 211/2011 that identifies the threshold as being citizens from at least on 1/4 of the Member States. The latter therefore could be reduced by means of amendment to Regulation 211/2011.

²⁴ English is the first language of choice for 70.45% of submitted Citizens' initiatives.

²⁵ The Treaty languages of the EU are listed in Article 55(1) TEU, whereas the official languages of the EU are determined by Regulation 1/1958 determining the languages to be used in the European Economic Community (1958) OJ P 17/385, as amended. English is currently the second official language of Ireland and Malta, which could elect to maintain it (possibly having to renounce Irish/Maltese as the case might be); the Commission's President Juncker has stated that English is losing importance in Europe (Speech as the State of the Union conference, EUI, 5th May 2017, http://europa.eu/rapid/press-release_SPEECH-17-1238_fr.htm).

3. MAIN RIGHTS OF MIGRANT EU CITIZENS

KEY FINDINGS

- EU citizens have a right to move and reside in any of the Member States. The right to reside for more than three months is conditional upon either economic activity as an employed or self-employed person, or having comprehensive health insurance and sufficient resources. EU citizens who are lawfully resident in a host Member State have a right to equal treatment.
- The notion of 'worker' in EU law has been interpreted in a very generous way, including part-timers regardless of hours worked/income earned, as long as the activity is genuine and effective. Self-employed only have to demonstrate economic activity and no investment threshold can be imposed. Work-seekers are also protected although they do not have a right to social assistance.
- Economically inactive EU citizens have to possess comprehensive health insurance and sufficient resources so as not to become a burden on the host welfare system.
- After 5 years of lawful residence in a host member State Union citizens gain the right to permanent residence so that they are assimilated for almost all purposes to nationals of the host state. They no longer have to satisfy the requirements of economic activity/independence.
- Family members of Union citizens derive a right to reside from the EU citizen, as well as a right not to be discriminated against on grounds of nationality even if they are third country nationals. No minimum income requirement can be imposed in EU law.
- EU citizens who return to their home State after having exercised their right to free movement are protected by the Treaty provisions, including in relation to the right to bring their family members back to their home country.

As stated above, and unsurprisingly, a significant proportion of the petitions received by the PETI committee relate to the right of EU citizens in the UK, and UK citizens in the EU-27, as it is those citizens who are particularly vulnerable to the consequences of Brexit. We will start by recalling the rights granted by Union law to migrant EU citizens, and then assess how the situation will be affected by Brexit in the absence of an agreement. It should be noted that the UK government in its White Paper on Brexit indicated that it is willing to protect EU citizens under reciprocal arrangements.²⁶ The Commission's negotiating guidelines also propose reciprocal protection of citizens, for the lifetime of those affected. The Commission's agenda, fully received by the Council,²⁷ is ambitious in that it seeks a continuation of the rights of EU/UK citizens who have migrated before Brexit under the same conditions pre-Brexit.²⁸ The study will show that, whilst this might be relatively easy for

²⁶ See

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589189/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Print.pdf, section 6.

²⁷ See Council directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, XT 21016/17 ADD 1 REV 2 (22 May 2017).

²⁸ https://ec.europa.eu/info/sites/info/files/annex-recommendation-uk-eu-negotiations_3-may-2017_en.pdf, section III.1. All the EU institutions consider an agreement on the rights of EU and UK citizens paramount; see European Council (Art 50) guidelines for Brexit Negotiations, EU CO XT 20004.17; the European Parliament also considers the rights of citizens a priority, see European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP), P8_TA-PROV(2017)0102, paras 17 and 18.

some citizens (full time employed), it might be more contentious (at least politically) for others (low-wage, part-time, zero hours, etc).²⁹

3.1. The right to move and reside freely

All Union citizens have a right to move and reside in the territory of another Member State. This right is conferred directly by the Treaty and detailed in the so-called Citizenship Directive (2004/38/EC).³⁰ Migration rights include the right to move across borders without being subjected to visa requirements, the right to move within the territory of a Member State and the right to reside in any of the Member States.

For residence beyond the initial 3 months,³¹ the right to reside is conditional on exercising an economic activity as an employed or self-employed person, or having sufficient resources and comprehensive health insurance so as not to become an unreasonable burden on the welfare provision of the host Member State.³² Union citizens have also the right to be accompanied by their spouse/partner and children under the age of 21, or dependent, regardless of their nationality, i.e. even if they are not EU citizens.³³ Union citizens who are not students can also be accompanied by dependent relatives in the ascending lines (i.e. parents and grandparents).³⁴ Family members have a right to work and exercise an economic activity and benefit from the general right to equal treatment.³⁵

Union citizens are also protected when returning to their own Member State after having spent some time in another Member State. This right has been particularly relevant in two areas: to force public employers to recognise work experience and qualifications gained in another Member State,³⁶ and to ensure that cross-border workers and returning migrants would have a right to be accompanied by their family members in the same way as non-national Union citizens,³⁷ a right which is increasingly significant given that national family reunification policies are becoming more restrictive compared to the generous regime conferred by Directive 2004/38/EC.

Union citizens who exercise their free movement rights are protected from expulsion and are also protected, at least to a certain extent, by the fundamental rights contained in the Charter of Fundamental Rights of the EU. In particular, Union citizens and their protected family members can only be expelled on public policy or security grounds, narrowly construed, and enjoy significant procedural rights protection.³⁸ Union citizens enjoy

²⁹ It should also be noted that the Conservative Party has made reduction of migration one of the manifesto pledges <https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf>, p. 54; in relation to (future) EU migration the manifesto states "We will therefore establish an immigration policy that allows us to reduce and control the number of people who come to Britain from the European Union, while still allowing us to attract the skilled workers our economy needs" (p55).

³⁰ Article 21, 45 and 49 TFEU; Directive 2004/38/EC, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004) OJ L 158/77 (hereinafter Directive 2004/38/EC, or Citizenship Directive).

³¹ Article 6 Directive 2004/38/EC.

³² Article 7(1) Directive 2004/38/EC.

³³ Article 2 Directive 2004/38/EC; the situation is more difficult for partners moving to Member States where such partnerships are not recognised since Article 3(2)b Directive 2004/38/EC only imposes a duty for the host Member State to facilitate entry of said partners; see pending case C-673/16 *Coman*.

³⁴ Article 2(2)(d) read in conjunction with Article 7(4) Directive 2004/38/EC.

³⁵ Article 23 Directive 2004/38/EC.

³⁶ See e.g. Case C-340/89 *Vlassopoulou*, EU:C:1991:193; Case C-19/92 *Kraus*, EU:C:1993:125; Case C-15/96 *Schöningh-Kougebetopoulou*, EU:C:1998:3.

³⁷ Case C-370/90 *Singh*, EU:C:1992:296; Case C-64/00 *Carpenter*, EU:C:2003:397; 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.

³⁸ See Articles 27 and following of Directive 2004/38/EC.

enhanced protection after having lived in the host country for 5 or 10 years, so that it is more difficult for Member States to justify deportation.³⁹

As mentioned above, migrant Union citizens are also safeguarded, to a certain extent, by the Charter. The latter informs the Court's interpretation of primary and secondary legislation and applies whenever a Member State is limiting a free movement right. The Charter has become very important to enforce family reunification rights of citizens who manage to establish a cross-border link.⁴⁰

Finally, in exceptional circumstances, Union citizenship can be invoked against the Member State of nationality, even when the Union citizen has not moved. This is the case for children who hold the nationality of a Member State and whose third country national parents/carers face deportation outside of the EU.⁴¹ Here, the Court has recognised that minor Union citizens have no possibility of living independently and would therefore be forced to follow the parent/carer outside the EU, and hence lose the possibility of a meaningful enjoyment of their EU citizenship rights.

3.2. Categories of residence right-holders under EU law

As mentioned above, several of the petitions expressed concern about the effect that Brexit will have on EU citizens resident in the UK and UK citizens resident in the EU-27.⁴² In this section the legal issues arising from Brexit for individuals will be discussed. It should be recalled that rights under EU law are acquired incrementally so that length of time is material to the rights enjoyed by citizens.⁴³

Union citizens who reside in a host Member State for a period between 3 months and 5 years have a *conditional* right to reside, in that they must be either economically active (employed or self-employed) or economically independent, i.e. have sufficient resources and comprehensive health insurance so as not to become a burden on the host state's welfare system. Health insurance for pensioners is covered by the Member State from which they receive their pension.

A worker in EU law is defined as someone who for 'a certain period of time (...) performs services for and under the direction of another person in return for which he receives remuneration.'⁴⁴ As long as those conditions are satisfied, and the activity is 'effective and genuine' and not on such a small scale to be purely 'marginal and ancillary',⁴⁵ an individual is fully protected by EU law, even if she/he works only a few hours a week.

Work-seekers are also protected under EU law, and they can stay in the host state after the initial three months as long as they can show that they are looking for a job and have a

³⁹ The enhanced protection was given a somehow narrow interpretation in Case C-348/09, *PI*, EU:C:2012:300..

⁴⁰ Case C-64/00 *Carpenter*, EU:C:2003:397; 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.

⁴¹ Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124; Case C-304/14 *CS*, EU:C:2016:674; Case C-165/14 *Rendón Marín*, EU:C:2016:675; Case C-133/15 *H.C. Chavez-Vilchez*, EU:C:2017:354.

⁴² If the Common Travel Area between the UK and Ireland is maintained then the legal issues concerning post-Brexit treatment of UK nationals will arise in 26 of the Member States, and Irish citizens in the UK will also be fully safeguarded. For ease of reference, we will refer throughout to EU-27, and have a separate section about the Irish situation.

⁴³ For a more theoretical analysis, albeit rich in policy suggestions, of the impact of Brexit on Union citizenship see P Mindus "European Citizenship after Brexit" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842500; see also G Marrero Gonzales "Brexit: consequences for citizenship of the Union and residence rights" (2016) MJ 796; A Fernández Tomás and D López Garrido "The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and UK citizens living in the EU-27", study for the AFCO Committee of the European Parliament, 2017 [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583135/IPOL_STU\(2017\)583135_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583135/IPOL_STU(2017)583135_EN.pdf).

⁴⁴ Case 66/85 *Lawrie-Blum* [1986] ECR 2121.

⁴⁵ Case 53/81 *Levin* [1982] ECR 1035; case C-413/01 *Ninni-Orasche* [2003] ECR I-13187.

genuine chance of becoming employed.⁴⁶ Work-seekers do not have a right to social assistance.⁴⁷

Self-employed are those who exercise an economic activity in a self-employed capacity in the host Member State. A self-employed is established in the host Member State if she/he pursues her/his activities on a 'stable and continuous basis'.⁴⁸ Self-employed are protected under EU law regardless of minimum investment/income.

Economically active Union citizens have a full right to equal treatment with nationals of the host state (also in relation to welfare entitlement).

Economically independent citizens also have a right to equal treatment but (i) the criteria of sufficient resources and comprehensive health insurance guarantee that Union citizens are not a burden on the host welfare system since they are excluded from most, if not all, means-tested benefits (because they have sufficient resources) and their health expenditure is (in theory) covered by the insurer; and (ii) students do not have a right to maintenance aid for studying.⁴⁹

Once a Union citizen has resided lawfully in the host country for 5 years, she/he acquires a right to permanent residence.⁵⁰ This means that she/he is assimilated to own nationals and, as such, no longer has to satisfy the conditions of economic activity/independence and has full access to welfare provision. As mentioned above, permanent residents also benefit from enhanced protection in relation to expulsion on public policy and security grounds.⁵¹

In the context of a reflection on Brexit two issues should be borne in mind. First of all, permanent residence is a right conferred *directly* by Union law, which is evidenced, and not constituted, by the permanent residence card. Secondly, the Court has stated that in order to qualify for permanent residence, the citizen (and her/his family members) must have resided in the host Member State pursuant to the conditions set out in Directive 2004/38/EC, i.e. employment, self-employment or economic independence (sufficient resources and comprehensive health insurance).⁵² This might have potentially very detrimental effects, especially for more vulnerable citizens and for those who have not kept a record or documentation of their activities, resources and entitlements.⁵³

⁴⁶ Article 14(4)(b) Directive 2004/38/EC; Case C-344/95 *Commission v Belgium* [1997] ECR I-1035.

⁴⁷ Article 24(2) Directive 2004/38/EC; see Case C-67/14 *Alimanovic and Others*, EU:C:2015 597,

⁴⁸ Case C-55/94 *Gebhard* [1995] ECR I-4165.

⁴⁹ Article 24(2) Directive 2004/38/EC.

⁵⁰ Article 16 Directive 2004/38/EC.

⁵¹ Article 28(2) Directive 2004/38/EC; after 10 years residence in the host State the Union citizen can only be expelled for imperative reasons of public security (Art 28(3) Directive 2004/38/EC.

⁵² See e.g. Joined Case C-424 and 425/10 *Ziolkowski and others*, EU:C:2011:866.

⁵³ In a bizarre turn of events, EU citizens in the UK, a state where the Union national is only required to register for a social security number for employment purposes but who are otherwise exempt from any other bureaucratic requirement, might well be at a disadvantage compared with UK citizens living in more "bureaucratic" states, where registration after 3 months is a legal requirement.

4. MIGRANT UNION CITIZENS HAVING RESIDED IN THE EU-27 AND UK LESS THAN 5 YEARS AT THE TIME OF BREXIT

KEY FINDINGS

- UK citizens residing in the EU-27 should be considered 'former EU citizens' and be protected by analogy by the Citizenship Directive. This would mean preserving most of the rights currently enjoyed by those citizens and giving them the opportunity to mature the right to permanent residence.
- If UK citizens in the EU-27 were instead to be considered third country nationals at the point of Brexit, they would be subjected to 27 different legal regimes (UK nationals in Ireland might however continue to enjoy a special regime). Immigration regimes might restrict the number or types of work permits, impose minimum earning requirements for self-employed and economically inactive individuals (if visas are available at all for the latter two categories). UK citizens would be at risk of losing their residence rights.
- If an agreement is not reached, EU citizens residing in the UK are vulnerable to loss of residence. In particular, low earners, part-time workers, those in an atypical employment relationship, low-income self-employed and economically inactive citizens might be at risk. Fees and evidence required to prove status might also act as a bar to continued enjoyment of residence rights.
- Family members of EU citizens (and especially TCN family members) might be at risk of losing residence rights due to the income threshold currently applied in the UK for family reunification.

Whereas some of the citizens affected by Brexit might have already matured the right to permanent residence at the time of the UK withdrawal from the EU, others will have not. In this respect, both UK citizens in the EU-27, and EU citizens in the UK are vulnerable to the Brexit changes. We will examine both legal situations in turn. It should be noted that the 'time of Brexit', unless a different date is agreed, will be the default date of 29th March 2019.⁵⁴

4.1. The legal qualification of UK citizens in the EU-27: British citizens as third country nationals or as *former* EU citizens?

As mentioned above, upon Brexit, all UK nationals will no longer be EU citizens, since EU citizenship is conferred only on nationals of a Member State. Some 1.2 million UK citizens, however, currently reside in one of the EU-27 Member States, having moved as EU citizens exercising rights directly conferred by the Treaties and secondary legislation.⁵⁵ One of the issues is then whether UK citizens, absent an agreement, will be treated as third country nationals (TCNs) upon Brexit, or whether, having regard to the existing legal principles of

⁵⁴ It is to be seen whether a potential agreement will apply only to those who have resided at least 3 months at the time of Brexit, or also to those who have just moved, provided they fulfil the conditions of economic activity/independence required for lawful residence pursuant to Art 7 Directive 2004/38/EC.

⁵⁵ <https://fullfact.org/europe/how-many-uk-citizens-live-other-eu-countries/>, of those about 1/3 are in receipt of a DWP pension, and hence most likely to be retired (<http://frozenbritishpensions.org/wp-content/uploads/2015/07/SN01457-8.pdf>).

EU citizenship law, they will have a special status as 'former EU citizens' (regardless of an agreement). Needless to say, there is no express provision relating to the rights of citizens of a former EU state, nor is there any case law of the Court of Justice specifically on this issue.⁵⁶

The most simplistic answer to this question is to consider UK citizens who are resident in another Member State as transitioning overnight to the status of third country national. This *de facto* would deprive those citizens of any EU law protection until they qualify for long term residence, when they would be protected by the Long Term Residence Directive (2003/109/EC) in all Member States bar Ireland and Denmark.⁵⁷ As a result, UK citizens would be subjected to different immigration rules according to where they reside, and even when protected by the Long Term Residence Directive would face lesser protection than that enjoyed by EU migrants (see section 4.2 and table 3 for details). Furthermore, this approach would negate any significance to the concept of Union citizenship as a *fundamental status*.

The second possibility is that UK citizens are protected, at least to a certain extent, by their former EU citizenship status. This is entirely consistent with the Union citizenship discourse, and relies on an analogical interpretation of EU secondary legislation. In particular, it recognises that UK citizens exercised their right to move as Union citizens and that therefore their situation cannot be equated to that of a third country national who has never exercised Treaty/EU law rights.

In this respect we should look at the way EU law treats those whose circumstances have changed. In particular, as mentioned above family members of migrant Union citizens are protected by the Citizenship Directive (2004/38/EC), even if they are third country nationals. The Citizenship Directive goes beyond recognising a *derived* right to reside for the TCN spouse of a migrant Union citizen. It also recognises that the family member *must* be protected in her/his own right. Thus, pursuant to the Citizenship Directive, a third country national spouse is treated in the same way as a Union citizen even if her/his family situation changes because of divorce, annulment of the marriage or termination of the registered partnership.⁵⁸ The right to reside of the TCN spouse also continues in the event of the death of the migrant Union citizen or should the Union citizen leave the territory of the host state.⁵⁹ In those circumstances then, the right of the TCN is transformed from a right derived from their partner's right to move, to an individual right accruing to the TCN her/himself.

The rationale behind this regime is that a change in family circumstances, sometimes within the control of the parties and sometimes entirely outside their control, should not be material to the enjoyment of rights conferred by the Citizenship Directive. After all, if the TCN spouse has moved with a Union citizen, therefore exercising a derived right conferred directly by Union law, she/he should be protected also in the event of changes in her/his family circumstances.

The Citizenship Directive then recognises that changes in circumstances might not be determinative of enjoyment of rights, even for individuals who are not Union citizens. Furthermore, Union citizenship has been construed as imposing limits on Member States' discretion in areas that are, otherwise, of exclusive national competence.⁶⁰ This approach reflects the fact that Union citizenship is the *fundamental status* of Union citizens. Moreover,,

⁵⁶ In Case C-135/08 *Rottmann*, EU:C:2010:104 the Court held that since withdrawing national citizenship has the effect of also withdrawing EU citizenship, the Member State's discretion was curtailed by the constitutional principles of the EU, including proportionality and fundamental rights; in a different line of caselaw, the *Ruiz Zambrano* case law, the Court has held that Member State's discretion in relation to the treatment of own nationals was further curtailed by the need to ensure the 'genuine enjoyment of the *substance of the rights* attaching to the status of European Union citizen', Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124, operative part of the ruling and para 42.

⁵⁷ Directive 2003/109/EC concerning the status of third-country national who are long term residents (2004) OJ L 16/44 (hereinafter Directive 2003/109/EC).

⁵⁸ Article 13 Directive 2004/38/EC.

⁵⁹ Article 12 Directive 2004/38/EC.

⁶⁰ Case C-135/08 *Rottmann*, EU:C:2010:104; Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124.

the Court has clarified that Union citizens should not be penalised for having exercised their right to move.⁶¹ It would be inconsistent to treat Union citizens who have exercised their right to move pursuant to the Treaty as if they were third country nationals who never held rights under EU law, because of their change of status arising from their country withdrawal from the EU. Rather, the Citizenship Directive must be applied by analogy to the situation of a Union citizen who loses her/his status by virtue of her/his state's withdrawal from the European Union.⁶² In the same way as a change in personal circumstances is not determinative of TCN family members' rights, it cannot be determinative of the rights of British citizens in the EU. Furthermore, if Union citizenship means anything at all, it is unthinkable that a TCN with derived rights would be treated better than a Union citizen who has exercised Treaty conferred rights, which are then lost by virtue of withdrawal from the EU.

The implications of this interpretation, supported by case law as well as a teleological interpretation of the Treaty, are the following:

- Migrant UK citizens are protected by the combined application of the Treaty and the Citizenship Directive (2004/38/EC) following Brexit, hence being protected equally in all Member States.
- The EU Charter of Fundamental Rights applies to their situation.
- Migrant UK citizens continue to have a right to reside, subject to the same requirements of economic activity or economic independence.
- Migrant UK citizens continue to have a full right to equal treatment in respect of all matters covered by the Treaty.
- Migrant UK citizens can mature a right to permanent residence pursuant to Directive 2004/38/EC, even after Brexit.
- Migrant UK citizens enjoy protection against expulsion.
- Migrant UK citizens have a right to obtain a residence card and such residence card allows the UK citizen to move (but not work) across the EU without the need to obtain a visa (if such visas were to be applicable to non-migrant UK nationals).

4.2. UK citizens as third country nationals (mid-term residence)

Conversely, if UK citizens were to be treated as third country nationals before having accrued the 5 years of residence required for permanent residence/long term residence, they would be subjected, for most issues,⁶³ to 27 different immigration regimes (not analysed here). Some common problems that might arise for some groups of citizens are described below.

⁶¹ Case C-184/99 *Grzelczyk*, EU:C:2001:6193.

⁶² In Case C-456/12 *O and B*, EU:C:2014:135, and Case C-457/13 *S and G*, EU:C:136, the Court has held that even though the provisions of the Citizenship Directive do not apply to the nationals of a Member State against her Member State of nationality, the Treaty provisions allow for an analogical interpretation of those provisions beyond the personal scope of the Directive. In simpler terms, this means that Union citizenship extends the protection afforded by Directive 2004/38/EC beyond what has been foreseen by the legislature, so as to cover the situation of a returning migrant or of a frontier worker who is seeking to establish residency rights for her TCN spouse. For this reason, even though there is no provision in Directive 2004/38/EC for the treatment of former EU citizens, there is no bar to applying that legislation by analogy to the situation of UK citizens resident in EU-27.

⁶³ Some issues concerning third country nationals have been regulated at EU level; e.g. Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State,

4.2.1. Economically active

It should be noted that pursuant to the Treaty and the Citizenship Directive (2004/38/EC), as mentioned above, Union citizens are economically active as long as they carry out a genuine economic activity. No income or minimum hours threshold is required (and in theory, at least, such minimum threshold is incompatible with EU law), so that also part-time workers are covered by the protection of the Treaty. No minimum turnover is required in the case of self-employed, who also do not need to show a minimum capital/income in order to benefit from the protection afforded by the Treaty.

(i) Workers/employed UK citizens – might either be treated as automatically having a work permit (simpler from an administrative perspective and also simpler for employers), or they might have to apply for a work permit. Work permits might be sector specific or skill specific and/or they might be subject to a maximum number per annum. The application of normal immigration rules whereby UK citizens might have to apply for a work permit, might therefore have the effect of terminating the right to reside and work of UK citizens in the EU-27.

(ii) Self-employed – Generally speaking, immigration regimes for self-employed are much stricter and usually comprise minimum income/investment thresholds and might comprise additional requirements such as health insurance. Again, the transitioning of UK citizens to a TCN regime might have the effect of de facto terminating the right to reside as a self-employed.

It is clear that transitioning existing UK workers/self-employed to TCN status would put at particular risk low income workers, part-timers, those who move in and out of work, those in atypical working relationships, such as zero-hour contracts, bogus internships, etc, and self-employed.

4.2.2. Economically inactive

There are currently two categories of economically inactive individuals who have residence rights under EU citizenship law: (i) economically independent individuals (including pensioners) and (ii) students. Economically independent individuals need comprehensive health insurance and sufficient resources. Pensioners however continue to be insured by the Member State where they had worked prior to retirement and hence do not need to take up private health insurance. Students only need to assure authorities that they have sufficient resources and might be covered by the EHIC, at least to start with. It should be noticed that economically inactive citizens (whether UK or EU-27) are the most vulnerable to Brexit, not least as they might have been residing in the host state, in good faith, without fulfilling the conditions provided for in the Citizenship Directive (2004/38/EC).⁶⁴

(i) Economically independent – the situation might vary: some Member States might not provide visas for economically inactive individuals at all, whilst others might do so for those who satisfy a minimum (usually high) income threshold. After Brexit, lacking an agreement, pensioners might find that it is impossible for them to meet requirements even in those states that allow for residence of economically inactive

(2011) OJ L 343/1 (it does not apply to UK, Ireland and Denmark); Council Regulation (EC) No 1030/2002, of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (2002) OJ L 157/1. However, the conditions regulating entry (who, when and how) as well as the actual decision as to work permits remain at national level.

⁶⁴ Because of the ease of free movement, economically inactive citizens might realise that their residence is conditional only when and if they request assistance from the host State. However, often this does not happen, leaving the Union citizen who exercises free movement rights in good faith in a sort of legal limbo. The treatment of those citizens should be of particular concern, as indicated also in the Commission's draft negotiating guidelines.

individuals. It is in fact extremely costly, and sometimes impossible, for senior citizens to secure health insurance which, lacking social security co-ordination,⁶⁵ would have to be secured privately.

(ii) Students – students are also particularly vulnerable. In particular, there are two relevant issues in relation to students and Brexit. First of all, EU students are currently protected by the right to equal treatment in respect to fees, and therefore might see their fees hike even during the course of studies already started.⁶⁶ Secondly, de facto, many students might be unaware of the need to have comprehensive health insurance. This means that their residence is not 'lawful' for the purposes of Citizenship Directive. In practice this means that if a Brexit deal only covers 'lawfully resident' EU/UK citizens many students might be excluded. It should be also noted that students are not covered by the Long Term Residence Directive (2003/109/EC) unless they secure a job, in which case only half of the period of residence during studies/vocational training counts towards the 5 years period.

If UK nationals were to transition to TCN status, then they would see a significant decrease in protection and in some cases might see their residence rights discontinued.

4.3. Policy recommendations for UK citizens in the EU-27

As said above, it can be argued that UK citizens in the EU will continue to be protected after Brexit in the same way as third country national family members of Union citizens are protected by the Citizenship Directive (2004/38/EC). However, this is a matter of legal argument which might or might not be accepted by the Court. The best solution is to provide clear legal protection for UK nationals either by clarifying in the withdrawal agreement that the Citizenship Directive continues to apply to the situation of UK nationals resident in the EU-27 (this is the solution favoured by the Council and the Commission) or, lacking an agreement, via an amendment to the Citizenship Directive. In any event, the following issues should be considered:

- A clear indication that all UK nationals who have moved before Brexit will be protected, with no minimum residence requirement imposed.
- A clear indication on how to determine worker status, paying particular attention to atypical employment situation.
- It should be decided that, for the purposes of post-Brexit status, the failure to register with the relevant unemployment office in-between periods of employment does not affect the rights conferred therein.
- Similarly, periods taken off work because of caring responsibilities should not be determinative of post-Brexit status.
- Lack of comprehensive health insurance for periods preceding Brexit should not affect the possibility of gaining post-Brexit status.
- Family members must be fully protected, and the right of children to continue in education should also be guaranteed.
- The evidence required to prove status should be kept to an absolute minimum and be uniform across the EU; UK citizens must be allowed to prove entitlement to post-Brexit status with alternative means.

⁶⁵ It should be noted that the negotiations directives published by the Commission suggest that social security co-ordination should be maintained for those who at the time of Brexit are covered by it; see https://ec.europa.eu/info/departments/taskforce-article-50-negotiations-united-kingdom_en#negotiationdocuments.

⁶⁶ The UK Government has guaranteed equal fees status for the duration of their degree for students who have started their courses in 2016 and 2017. EU Member States have not made a similar commitment.

- Discretion should be left to the decision-maker to find that the principle of proportionality and the Charter of Fundamental Rights might require extending the post-Brexit status also to those UK citizens who have failed to establish lawful residence.
- The effective protection of pensioners will require an agreement on social security co-ordination.

Table 1: Rights of UK citizens in the EU-27 post-Brexit as 'former citizens' or as third country nationals

	UK citizens as former Union citizens	UK citizens as third country nationals
Right to reside	<p>Continues under the same conditions of Dir 2004/38/EC, i.e. subject to economic activity or economic independence.</p> <p>No need for work permits/visa.</p> <p>Need for residence card.</p> <p>NB pensioners might see their right de facto terminated if no social security co-ordination.</p>	<p>Different for each of the 27 countries.</p> <p>Workers might be subjected to work and visa arrangements; restrictions of numbers and activity might apply; low income, part-time and atypical workers at risk.</p> <p>Self-employed might be subjected to minimum turnover requirements; low earners at particular risk.</p> <p>Economically independent and pensioners especially at risk.</p>
Right to equal treatment	<p>Fully protected for economically active individuals (also low earners).</p> <p>Students no right to maintenance aid.</p> <p>Work-seekers no social assistance.</p> <p>Economically independent de facto excluded from health care and means tested benefits.</p>	<p>Depending on MS – might include restriction on health care entitlement or payment of insurance and reduced access to welfare benefits.</p> <p>Economically inactive less likely to have equal treatment.</p>
Right to travel in EU	<p>Residence card allows visa free travel within EU (but no right to work/reside in an EU country other than that of residence).</p>	<p>Schengen/visa requirements as agreed post Brexit (this might result in considerable barrier to cross-border service provision).</p>
Right to permanent residence	<p>After 5 years of lawful residence, full protection (see below table 3 for details).</p>	<p>After 5 years some protection, periods for study/vocational training count only partially towards 5 years residence (see below table 3).</p>

4.4. EU citizens who have resided less than 5 years in the UK

4.4.1. EU economically active migrants in the UK

At Brexit, EU legislation will no longer apply to the UK. The UK Government has made it clear that EU law will be converted into domestic law through a special instrument (the Great Repeal Bill).⁶⁷ It would be, of course, open to the UK to incorporate the Citizenship Directive in its domestic legislation and allow it to apply to Union citizens residing in the UK at the time of Brexit.⁶⁸ This study only considers what would be the legal situation absent an agreement. Each category will be considered separately.

(i) Workers/employees – would need a visa after Brexit. One solution would be for the UK government to decide that all those legally employed would automatically obtain a visa (5 years and 14 days for workers with a contract of employment of indefinite duration; period of contract plus a month for the others). This would be consistent with the aim of reducing uncertainty for business as well as reducing the administrative cost of processing visa applications on a case by case basis. Yet, even should the UK government choose to follow this approach, there would still be practical problems, especially for low earners and unskilled workers. For instance, EU nationals might be required to pay the existing fee for the visa,⁶⁹ and at present there is no possibility to obtain a working visa as an unskilled person (unless identified work shortages).

But, more fundamentally, the real uncertainty relates to whether the UK will accept the very generous definition of 'worker' under EU law when transitioning EU nationals to normal immigration status. Here, it should be noted that a worker in EU law is 'Someone who for a certain period of time performs services for and under the direction of someone else in return for remuneration'.⁷⁰ As mentioned above, this broad definition also covers part-time workers as long as their activity is genuine and effective. In theory, there is no minimum earning/minimum hours requirement, so that even someone working a few hours a week is qualified as a 'worker', entitled to both residence rights and welfare provision. This said, most Member States, including the UK, apply presumptions to determine who is a 'worker' for EU law purposes (minimum hours/minimum earnings).⁷¹ It is far from obvious that, post-Brexit, the UK will be willing to recognise a special post-Brexit status to part-time workers, especially those working only a few hours a week, those working in atypical contracts (e.g. zero-hours contracts), students who work, and so on.

Another issue concerns timing: the current UK regime provides that in order to be recognised as a worker under EU law, a worker must have worked for at least 3 months (it should be noted that there is no such requirement in EU law, the Court simply referring for a 'certain period of time'). This might de facto exclude EU workers who have arrived/have secured a job in the UK in the three months prior to Brexit.

⁶⁷ See UK Government Brexit White Paper (The United Kingdom's exit from and new partnership with the European Union),

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

⁶⁸ The UK Government suggested that they wished to impose the day of the Article 50 notification as a cut-off date for residence rights; the Commission, on the other hand, are adamant that up until the very moment of Brexit Union citizens would be exercising EU law rights, and therefore should be treated equally regardless of when they moved. See Draft Negotiating Guidelines [(COM 2017) 218 final], para 20.

⁶⁹ The price for work visas varies from just under £ 300 to close to £ 2000, see

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607212/Fees_table_April_2017.pdf

⁷⁰ Case 66/85 *Lawrie-Blum* [1986] ECR 2121.

⁷¹ For a detailed analysis see C O'Brien, E Spaventa and J De Coninck *The Concept of Worker under Article 45 TFEU and Certain Non-Standard Forms of Employment*, *FreSsco Comparative Report 2015* prepared at the request of the European Commission (DG Empl), <http://ec.europa.eu/social/main.jsp?langId=en&catId=1098>.

(ii) Work-seekers – would not be protected unless this is agreed in the withdrawal agreement.

(iii) Self-employed – the situation of EU nationals in the UK carrying out an economic activity as self-employed will also present its challenges. In this respect, and as noted above, Member States tend to have much stricter immigration regimes for self-employed, also to avoid the risk of bogus self-employment. The latter occurs when individuals and their employers seek to hide the subordinate nature of the working relationship, usually in order to avoid the application of social security and employment protection rules.⁷²

Migrant entrepreneurs in the UK must meet a minimum investment threshold (currently £50,000), whereas EU self-employed are subject to no conditions. EU nationals who are self-employed in the UK might struggle to meet the investment threshold, should this be applied to them. Furthermore, self-employed individuals also have to provide evidence that they can support themselves (at least £945 for 90 days in the applicant's bank account) and must show evidence of English language competence, as well as pay a fee for the visa. Whatever the regime that will be applied to EU self-employed post Brexit, it should be noted that the transition from a free movement to immigration control status might make assembling evidence and required paperwork particularly challenging for some EU self-employed, especially those with a low turnover and/or those with intermittent periods of economic activity.

4.4.2. EU economically inactive migrants in the UK

Economically inactive EU citizens – are those most at risk of suffering from Brexit. Thus, for instance, if they have been in the UK without comprehensive health insurance, they might be qualified as individuals whose right to reside did not derive from the Citizenship Directive. This, in turn, might impact on their eligibility to a special post-Brexit status. This might be particularly harsh, as those citizens (and especially students) might have been unaware of the need to have health insurance.

Pensioners – might also be required to satisfy a minimum income requirement (currently £25,000 for non-EU citizens), whilst students might see their fees hiked⁷³ and be subjected to visa requirement and the health surcharge (£150). There will also be issues relating to the evidence required in order to prove lawful residence (e.g. retroactive evidence of availability of sufficient resources and/or comprehensive health insurance).

4.5. Family members of EU citizens

Another considerable challenge arises in relation to the treatment of (TCN) family members of EU nationals since the family reunification regime in the UK is considerably harsher than that afforded to EU citizens by Citizenship Directive. In particular, family reunification is subjected to minimum income requirements (currently £18,600 per annum, which is considerably more than a full time salary at minimum wage level) a health surcharge, and an application fee (minimum £993). Applicants are also required not to access benefits and public funds, which might.

⁷² See e.g. in the UK the Uber case where the employment tribunal found that Uber drivers were not self-employed, <https://www.theguardian.com/technology/2016/oct/28/uber-uk-tribunal-self-employed-status>

⁷³ For the time being, the UK Government has committed to maintain fees, loan and eligibility for grants for students who have started their studies up to 2017/18. See UK Government White Paper on Brexit, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589189/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Print.pdf, paragraph 10.11.

Third country national family members of Union citizens might therefore be in a particularly vulnerable situation should they be transitioned to the family member status currently applicable to UK citizens. For instance, in EU law there is no minimum income requirement and a beneficiary of EU law rights might be working part-time or be in and out of employment. It should also be noted that the protection afforded by the Human Rights Act is at times weaker than that afforded by the Charter of Fundamental Rights of the EU. For instance, the Court of Justice has held that a spouse overstaying the entry permit or a spouse who is not lawfully present in the host country does not lose her/his right to reside based on family relationship with an EU national lawfully resident in the host country.⁷⁴ Also, EU family reunification rights can be invoked against the Member State of nationality by a citizen who returns to her/his home country after having exercised free movement rights. The same holds true for frontier workers.⁷⁵ UK nationals returning in the UK after Brexit (and possibly because of Brexit) might also be placed in a vulnerable position as the immigration rules would apply to their family members.

4.6. Policy recommendations EU citizens in the UK

Beside the policy recommendations identified above, which also apply to the protection of EU citizens in the UK, a potential agreement should take particular care in ensuring that:

- In determining workers status the UK authorities do not unduly restrict the definition of worker, and that minimum hours thresholds are not applied even as presumptions.
- In determining self-employed status no minimum income requirement is applied.
- The evidential burden is lightened and that authorities return identity cards and passports as soon as possible.
- The comprehensive health insurance requirement should not be applied, and for continuation of status Union citizens should be allowed to pay the health surcharge in lieu of comprehensive health insurance.

Furthermore, the EU should also aim to guarantee the rights of returning UK migrants, and especially their right to family reunification, since those migrants moved as EU citizens.

⁷⁴ Case C-60/00 *Carpenter*, EU:C:2002:434; Case C-127/08 *Metock*, EU:C:2008:6241.

⁷⁵ Case C-370/90 *Singh*, EU:C:1992:296; Case C-64/00 *Carpenter*, EU:C:2003:397; 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.

Table 2: Changes and risks for EU nationals in the UK absent an agreement

	Potential changes (absent ad hoc agreement)	Main risks
Workers	Potential automatic transition to work-visa or sector by sector approach (NB currently no visas for unskilled workers where no work shortages).	<p>Payment of fees</p> <p>Non-full time/open ended workers vulnerable esp. if minimum earning/hours and duration of work are used to determine post-Brexit status.</p> <p>Work-seekers would be excluded. Risk of differential protection of EU citizens based on UK preferences.</p>
Self-employed	<p>Minimum investment/turnover requirement (£50,000).</p> <p>Minimum resources (£954 savings in bank account for three months).</p>	<p>Excludes low earners.</p> <p>Evidence required might be very difficult to satisfy.</p>
Economically inactive	<p>Minimum savings/income threshold.</p> <p>Health Surcharge</p> <p>Fees + health surcharge for students.</p>	<p>No social security co-ordination.</p> <p>High thresholds.</p> <p>Residence rights very limited.</p>
Family members	<p>Minimum earnings requirement for family reunification.</p> <p>Fees.</p>	<p>Excludes workers on minimum wage.</p> <p>Protection from HRA 1998 weaker than existing EU law protection.</p> <p>Returning UK nationals families also at risk of not being included in potential ad hoc deal.</p>

5. CITIZENS HAVING RESIDED IN EU-27/UK FOR MORE THAN 5 YEARS AT THE TIME OF BREXIT

KEY FINDINGS

- The main risk, for both UK citizens in EU-27 and EU citizens in the UK, is proving lawful residence status. Both evidence and the citizens' lack of awareness of legal requirements might produce very unfair results.
- Workers in atypical, part-time, fragmented employment relationships, low-turnover self-employed, and economically inactive citizens are at particular risk.
- UK citizens in the EU-27 who have already matured the right to permanent residence at the time of Brexit should enjoy full protection under the Citizenship Directive (2004/38/EC).
- EU citizens in the UK might be transferred, absent and agreement, to the indefinite leave to remain regime. This transition would carry considerable risks, including high fees for application, earning thresholds for family reunification, minimum investment requirements and home office discretion.

Union citizens and their family members acquire the right to permanent residence after 5 years of lawful residence in the host Member State.⁷⁶ Permanent residence is acquired as a matter of course and documents attesting to it have only evidentiary value. The issue for consideration is then what is the legal situation in relation to UK citizens in the EU-27, and EU citizens in the UK who at the time of Brexit had already matured a right to permanent residence.

5.1. Proving the right to permanent residence

As mentioned above, length of time alone does not confer a right to permanent residence to Union citizens. Rather, the Court has clarified that citizens must have complied with the conditions provided for in the Citizenship Directive.⁷⁷ In this section the main challenges for each of the categories of claimants will be considered. It should be noted that these problems are common to UK citizens in EU-27 and EU citizens in the UK.

Workers will have to prove a period of five years of continuous employment. In the current economic climate, where traditional open-ended employment contracts are more difficult to secure this might leave many citizens vulnerable to a denial of permanent residence. In particular:

- (i) Workers in atypical employment relationships – These workers might have moved between employments and have gaps in their employment relationships (see also below). They might have had successive employment contracts, but those employment relationships might be counted separately. They might have worked variable hours within given periods and hence risk not being defined as 'genuine' workers or they might have worked part-time and struggle to persuade the relevant authorities that their employment has been continuously 'genuine and effective'.⁷⁸

⁷⁶ Article 16 Directive 2004/38/EC.

⁷⁷ See e.g. Joined Case C-424 and 425/10 *Ziolkowski and others*, EU:C:2011:866.

⁷⁸ For a comprehensive comparative review see C O'Brien, E Spaventa and J De Coninck *The Concept of Worker under Article 45 TFEU and Certain Non-Standard Forms of Employment*, FreSsco Comparative Report 2015

Union citizens who have been working in internships or who have been employed in the black economy will find it particularly difficult to prove lawful residence.

(ii) Workers with a fragmented/non continuous working history – In order to retain the status as a worker, the citizen not in work must have registered as a job seeker with the relevant unemployment office.⁷⁹ However, unless the worker had sought unemployment benefits, she/he might have been unaware of that requirement. Only involuntary unemployment allows for the worker's status to be maintained and this poses particular risks for low skilled, low paid employees, for those who are 'forced' to resign, for those in fake short term contracts, and for those who have employment gaps due to caring responsibilities.⁸⁰

Self-employed – Especially self-employed with a very low turnover might struggle to provide evidence of continuous economic activity.

Economically inactive citizens – This group of citizens might again struggle to provide evidence, especially in relation to the fact that they have had sufficient resources throughout the qualifying 5 years. Students might have difficulties in demonstrating that they have been covered by comprehensive health insurance, not least since they might have been unaware of such a requirement.⁸¹

5.2. Evidencing the right to permanent residence – policy recommendations

- Some very serious thought should be given to the possibility of allowing time alone to determine entitlement to post-Brexit permanent residence status. This would be cheaper and simpler from an administrative perspective, and fairer on citizens who might not have the required evidence.
- Lack to register with the unemployment office should not interrupt residence status for workers; periods of different employment should be added even when there is no continuity.
- Part-time workers, and those in atypical employment relationship should be fully protected.
- No minimum earning/investment threshold must be imposed on self-employed.
- Caring responsibilities should be taken into account and not interrupt lawful residence.
- No proof of comprehensive health insurance should be required.
- Family members should be fully protected; the rights of children should be paramount.
- Evidential burden should be kept to the absolute minimum, and identity documents required for the application should be kept by the authorities for the minimum possible time.
- Special consideration must be given as to whether absences from the host State / UK of more than 2 years should affect the post-Brexit status.

prepared at the request of the European Commission (DG Empl),
<http://ec.europa.eu/social/main.jsp?langId=en&catId=1098>.

⁷⁹ Article 7(3)(b) Directive 2004/38/EC.

⁸⁰ On this latter point and the potential detrimental effect of Brexit on EU women and children living in the UK, see C O'Brien forthcoming.

⁸¹ Note that there is some debate as to whether entitlement to NHS provision (free at the point of delivery) should be considered as comprehensive health insurance.

5.3. UK citizens in the EU-27 (permanent residents)

The right of permanent residence is acquired by virtue of Article 16 of Directive 2004/38/EC. British citizens who have resided lawfully for at least 5 years at the time of Brexit in one of the Member States will therefore automatically have acquired a right to permanent residence (subject to the problems in relation to evidence and status highlighted above), regardless of whether they have a document attesting to such a right.

5.3.1. UK citizens as TCNs or as former citizens?

As explained above there are two potential interpretations of UK citizens status – the simplistic approach being that UK citizens would become third country nationals (TCNs) at the point of Brexit. In this view, they would be protected by the Long Term Residence Directive (2003/109/EC). However, it should be noted that it is difficult to accept this view, not only for the reasons explained above in relation to medium term residence, but also because UK citizens who have resided in the EU-27 for at least 5 years at the point of Brexit would already have become permanent residents (regardless of whether they have applied for the documents evidencing such right), and should continue to be protected by the Citizenship Directive (2004/38/EC). However, for sake of completeness, the difference between the regime provided by the Long Term Residence Directive and permanent residence pursuant to the Citizenship Directive will be illustrated here

The Long Term Residence Directive confers some rights to third country nationals who have resided lawfully in the territory of one of the participating Member States for at least five years.⁸² In a nutshell, this directive confers on third country nationals extensive rights to equal treatment including in relation to access to employment, vocational training, welfare provision (which however can be limited to core benefits),⁸³ protection from expulsion (which must be justified on public policy/security grounds and take into account the personal circumstances of the individual subject to the order),⁸⁴ and facilitated rights to free movement in a second Member State.⁸⁵

However, there are considerable limits to the protection granted by the Long Term Residence Directive. First of all, the directive does not apply to Ireland and Denmark,⁸⁶ and Ireland has the second or third (depending on the figures) highest migration from the UK.⁸⁷ Secondly, the directive leaves a significant margin of discretion to the Member States. In practical terms this means the protection of UK citizens would vary considerably according to the country of residence.⁸⁸ Thirdly, the conditions provided in the directive are, quite naturally, much stricter than those provided for by the Citizenship Directive (see table 3 below).⁸⁹ In particular, the third country national must have 'stable and regular resources' without recourse to the social assistance of the Member State of residence and 'sickness insurance

⁸² Directive 2003/109/EC concerning the status of third-country national who are long term residents (2004) OJ L 16/44 (hereinafter Directive 2003/109).

⁸³ Article 11 Directive 2003/109/EC ; on the interpretation of what constitutes a core benefit see e.g. Case C-571/10 *Kamberaj*, EU:C:2012:233.

⁸⁴ Article 12 Directive 2003/109/EC.

⁸⁵ Article 14 and ff Directive 2003/109/EC.

⁸⁶ See whereas 25 and 26 Directive 2003/109/EC.

⁸⁷ See for references, <https://fullfact.org/europe/how-many-uk-citizens-live-other-eu-countries/>; it should be noted that the situation in relation to Ireland is particularly complex, given the need to avoid a hard border between Northern Ireland and the Republic of Ireland, so as not to jeopardise the peace process. The Commission has indicated that the Common Travel Area between the UK and Ireland should continue after Brexit (see https://ec.europa.eu/info/departments/taskforce-article-50-negotiations-united-kingdom_en#negotiationdocuments). We shall look at the Irish situation in section 6.

⁸⁸ See e.g. Article 5 Directive 2003/109/EC on stable and regular resources and sickness insurance; and on the power to impose integration conditions; on the latter see e.g. Case C-579/13 *P and S*, EU:C:2015:369.

⁸⁹ Directive 2004/38/EC, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004) OJ ,L 158/77 (hereinafter Directive 2004/38/EC).

⁸⁹

in respect of all risks normally covered' for their nationals in the Member State of residence.⁹⁰ These criteria are much more restrictive than those provided for the acquisition of the right to permanent residence for EU citizens and their family members. Thus, Union citizens have to satisfy the criteria of sufficient resources and health insurance only if they are not economically active, and only in relation to the preceding 5 years.⁹¹ Economically active citizens, even if working part-time and relying to a certain extent on welfare provision, are entitled to permanent residence without ever having to prove sufficient resources or health insurance. Furthermore, and differently from the Long Term Residence Directive,⁹² under the Citizenship Directive periods spent in vocational training and studying are counted towards the 5 years (provided, for students, that the conditions of comprehensive health insurance and sufficient resources were satisfied during the time of studies).

All UK citizens who had acquired the right to permanent residence in the EU-27 before Brexit would then be entitled to equal treatment in respect of all matters (including health and welfare provision). They would be protected from expulsion and should be entitled to a residence card, which would allow them to travel throughout the territory of the EU, regardless of any visa arrangement between UK and EU. However, lacking agreement, UK nationals will have a right to reside and work only in the host Member State where they reside, since the right to permanent residence only applies to the state where a citizen has resided for the previous 5 years. Pensioners might still be impacted insofar as the UK might decide to no longer index pensions paid to British citizens resident in one of the EU countries.

⁹⁰ Article 5(1) and 15(2) Directive 2003/109/EC.

⁹¹ Article 16 Directive 2004/38/EC (read together with Article 7).

⁹² Pursuant to Article 3(2)(a) the long term directive does not apply to those residing in the host State to pursue studies or education; pursuant to article 4(2) Directive 2003/109/EC only half of the periods spent in education or vocational training can be counted towards the fulfilment of the 5 years residency period.

Table 3: Main differences in treatment between UK citizens being transitioned to TCN status and UK citizens being treated as having acquired and maintained rights under the Citizenship Directive

TCN Long Term Residence Directive (2003/109/EC)	Right to permanent residence - Citizenship Directive (2004/38/EC)
<p>Prospective conditions → need to demonstrate stable and regular resources + sickness insurance (Art. 5).</p> <p>Prior lawful residence → assessed having regard to national law.</p>	<p>Retrospective conditions → EU citizen must have been either economically active (employed or self-employed) or economically independent (sufficient resources and comprehensive health insurance) for the prior 5 years.</p> <p>Part-time workers also covered even if they have relied on welfare provisions.</p> <p>Conditions of lawful residence assessed having regard to Directive 2004/38/EC (i.e. uniform throughout the EU).</p>
<p>Can be refused on public policy/security grounds (Art. 6).</p>	<p>Cannot be refused on public policy/security grounds.</p>
<p>Can be withdrawn or lost (Art. 9).</p>	<p>Cannot be withdrawn, although Union citizens might be expelled on 'serious' grounds of public policy and security; after 10 years a citizen can only be expelled on imperative grounds of public security.</p>
<p>Limited right to equal treatment for welfare provision (MSs can limit to core benefits).</p>	<p>Full right to equal treatment, including for welfare provision.</p>
<p>Very limited right to move to another Member State (Chapter III).</p>	<p>Full right to move (but not work post Brexit) in all Member States, also for TCNs' family members (Art. 5 together with Art. 10).</p>
<p>Wide margin of discretion for Member States.</p>	<p>Very little discretion for MSs.</p>
<p>No Treaty status.</p>	<p>Indirectly derives from the Treaty → semi-constitutional status.</p>
<p>Does not apply to Ireland and Denmark.</p>	<p>Applies to all of the EU.</p>

5.4. EU citizens in the UK (permanent residents)

The legal situation is different for EU citizens who have resided lawfully in the UK for the past 5 years. As long as the UK is part of the EU, those citizens have an automatic right to permanent residence regardless of whether they have applied for a permanent residence card.⁹³ However, it is not clear whether this status will be recognised once the UK, not being part of the EU, is no longer obliged to apply the Citizenship Directive (2004/38/EC). In particular, if the UK decides not to recognise a special status for EU permanent residents, EU citizens who have lawfully resided in the UK for at least five years prior to Brexit might see their status change and transitioned to that provided for by the indefinite leave to remain regime.

It should be noted (see table 4 below) that the main obstacles to converting the EU permanent residence in indefinite leave to remain are:

- very high fees required for the indefinite leave to remain application (currently £ 2,297 per applicant);
- minimum income requirement in order to enjoy the right to family reunification;
- minimum investment requirement for self-employed;
- a high savings threshold for economically inactive individuals;
- broader discretion of the home office.

Furthermore, it should be noted that EU students will have difficulties establishing permanent residence even with the more favourable EU regime. This is the case since, in order for their residence to count towards the five years residence requirement, students must either have had comprehensive health insurance,⁹⁴ or must have been covered by the European Health Insurance Card (EHIC). Whilst the latter might be held by some undergraduate students who maintain their main residence in the Member State where they come from, it is unlikely to be held by post-graduate students, whose residence has most likely shifted to the UK. Furthermore, private comprehensive health insurance would be more expensive than the health surcharge currently paid by non EU students, thus creating a more disadvantageous system for EU students.

⁹³ There are two issues, at present, in relation to permanent resident cards applications: first of all, the form is very long and the evidence required is very substantial (and there are question marks as to whether such a heavy evidentiary burden complies with Directive 2004/38/EC); secondly, the sheer number of applications from EU citizens is creating a huge challenge for the UK administrative authorities.

⁹⁴ Note however that the Commission has argued that since the NHS is a system free at the point of delivery it should count as comprehensive health insurance for migrant EU citizens. The case however has not been pursued, and a withdrawal agreement should be clear on whether this interpretation would apply or whether private health insurance would be required.

Table 4: Main differences between indefinite leave to remain (UK) and EU permanent residence

UK indefinite leave to remain	EU Law permanent residence
5 years continuous lawful residence as per UK law	5 years lawful residence as per Dir. 2004/38/EC
Life in the UK and English language tests	No tests
More discretion for refusal	No discretion for refusal
Family member can acquire a derived right only if sufficient funds and no use of public resources	Family member derives rights
Subject to payment of a high fee (£2,297 pp) + biometric data fee	Subject to payment of an administrative fee (currently £65 pp).

6. THE IRISH PECULIARITIES: MAINTAINING A COMMON TRAVEL AREA AND SPECIAL TREATMENT FOR UK AND IRISH CITIZENS

Ireland and the UK have long had special arrangements for the treatment of each other's citizens. These pre-date accession to the (then) EEC and have never been questioned, not least since both countries were part of the EU. These arrangements, together with the need to avoid a hard border between the Republic of Ireland and Northern Ireland, are deemed crucial, not only because of their historic legacy but also because instrumental to the peace process.

The current arrangements provide for a Common Travel Area between the two countries and the treatment of each other's nationals as almost 'nationals' in regard to the right to reside, equal treatment and the right to vote in each other's political elections (excluding for Ireland referenda and presidential elections).⁹⁵ Some of these arrangements are not problematic from an EU law viewpoint. However, other arrangements might be vulnerable to a challenge because the Court of Justice of the EU has imposed some limits to the extent to which Member States might enter into agreements with third countries without extending the same benefits as afforded to third countries to EU nationals and companies.

The right to vote in each other's elections would not be affected by Brexit, since the national franchise is a matter for national law. Moreover, UK citizens in Ireland would be able to continue voting for the European Parliament, since the Court of Justice has held that Member States can confer the right to vote for the EP to third country nationals.⁹⁶

The Common Travel Area does not provide for immigration control between the UK and Ireland. Protocol 20 safeguards the integrity of the Common Travel Area, authorising Ireland and the UK to make arrangements between themselves relating to the movement of persons between their territories, without such arrangements being affected by the Treaties.⁹⁷ The Protocol can be modified to continue to apply also post-Brexit. However, the difficulties might arise because of the risk of the current arrangement (no border checks in the UK from Ireland and almost vice versa) allowing a back door entry to the UK/EU.

More complex is the situation in relation to the extensive rights to equal treatment, and in particular the preferential treatment accorded by Ireland to British citizens. British citizens are not treated as foreigners in Ireland, and this means they have access to welfare provision without having to satisfy the conditions provided by EU law for other EU nationals. It is this disparity of treatment that is problematic in relation to the current Treaty framework. In particular, in *Gottardo* the European Court of Justice held that Member States are under a duty to extend preferential treatment afforded to third country nationals by virtue of an international agreement with a third country to all EU nationals.⁹⁸ Whilst the Court recognised that the disparity in treatment might be justified by the need to preserve the balance and reciprocity of an international convention, it also found that budgetary considerations, i.e. the cost inherent in extending the benefits of the agreement to a wider section of the population, could not be used as a justification to avoid extending preferential treatment to EU citizens.

⁹⁵ For a detailed and informative summary of the legal arrangements between Ireland and UK see B Ryan "Brexit Briefing Impact on Common Travel Area and the Irish", https://www.freemovement.org.uk/brexit-briefing-impact-on-common-travel-area-and-the-irish/#_ednref3

⁹⁶ Case C-145/04 *Spain v United Kingdom*, EU:C:2006:543.

⁹⁷ Protocol (no 20) on the application of certain aspects of article 26 on the functioning of the European Union to the United Kingdom and Ireland (2010) OJ C 83/293, Art. 2.

⁹⁸ Case C-55/00 *Gottardo*, EU:C:2002:543.

Following the ruling in *Gottardo*,⁹⁹ then some aspects, but by no means all, of the preferential treatment of British citizens in Ireland could be open to a challenge. In particular:

- The possibility for UK citizens to work and exercise an economic activity in Ireland without having to satisfy a visa requirement is compatible with EU law because the same right is afforded to EU nationals. The same can be said in relation to welfare entitlement of economically active citizens.
- More complex is the situation in relation to access to welfare benefits for economically inactive citizens. Here, two interpretations are possible. Following the case of *Dano*,¹⁰⁰ the situation of an economically inactive citizen who does not satisfy the conditions of sufficient resources and comprehensive health insurance (which de facto limit access to welfare resources) fall outside the scope of Union law and hence Ireland is not obliged to extend preferential treatment to all EU nationals. Or, because of the overarching framework of citizenship, the situation still falls within the scope of the Treaty, and preferential treatment would need to be extended to all EU nationals.
- A problem will arise in relation to preferential treatment of students and work-seekers. At present the possibility to limit the right to equal treatment in relation to maintenance grants and social assistance respectively is authorised by Article 24(2) of Directive 2004/38/EC. However, both students and work-seekers are lawfully resident for the purposes of the directive, and hence fall within the scope of both the directive and Article 21 and 45 TFEU respectively. The application of the ruling in *Gottardo* might then render the application of preferential rules to British citizens incompatible with the Treaty, and might therefore better be addressed through an amendment to Protocol 20 authorising such preferential treatment to be maintained.

⁹⁹ See also in the context of taxation agreements, Case C-307/97 *Saint-Gobain*, EU:C:1999:438.

¹⁰⁰ Case C-333/13 *Dano*, EU:C:2014:2358.

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ANNEX I - OUTLINE OF EU CITIZENS' RIGHTS AND BREXIT - CHANGES AND CHALLENGES

Rights conferred to EU nationals	Current situation	Impact of Brexit
Right to vote for EP	<p>Conferred on all EU citizens, modalities decided by MSs.</p> <p>Migrant EU citizens can vote in Member State of residence.</p>	<p>UK nationals no longer entitled to vote in EP elections.</p> <p>EU nationals residing in UK remain entitled if allowed to vote from abroad or through consular representations.</p>
Right to stand for EP	<p>Conferred on all citizens, subject to national rules.</p> <p>Migrant EU citizens can stand in Member State of residence.</p>	<p>UK nationals no longer entitled to stand for EP.</p> <p>EU nationals residing in the UK can no longer stand for European Parliament unless MS of nationality allows it.</p>
Right to vote and stand in local elections	<p>Conferred on migrant EU citizens residing in a Member State other than that of nationality.</p> <p>In the UK it also includes right to vote for the devolved administration in Scotland, Wales and Northern Ireland.</p>	<p>UK nationals in EU no longer entitled to vote/stand in local elections, unless national rules allow residents to do so.</p> <p>EU nationals in UK no longer entitled to vote with the exception of Irish, Maltese and Cypriot nationals.</p>
Right to diplomatic representation	<p>Right to receive diplomatic and consular protection by authorities of any Member State when no representation of Member State of nationality.</p>	<p>EU-27 citizens no longer protected by UK diplomatic and consular representations.</p> <p>UK citizens no longer protected by EU-27 diplomatic and consular representations.</p>
Right to petition the EP and right to access European Ombudsman	<p>Conferred on all EU citizens/companies and all those resident in EU territory.</p> <p>Citizen can write in any of the Treaty languages and can</p>	<p>UK citizens resident in EU-27 continue to enjoy both rights.</p> <p>EU citizens residing in UK continue to enjoy right. UK citizens residing in UK lose both rights.</p> <p>*Unless English is maintained as Treaty language, petitions</p>

Rights conferred to EU nationals	Current situation	Impact of Brexit
	<p>receive a reply in same language.</p> <p>NB Right to write to the other EU institutions limited to EU citizens.</p>	<p>and communications with EU institution can no longer be in English.</p>
<p>European Citizens' Initiative</p>	<p>EU citizens can invite the Commission to submit legislative proposals, subject to thresholds: 1 million citizens, from at least 1/4 of the Member States.</p> <p>Any official language can be used to register an initiative.</p>	<p>UK citizens in EU 27 or in UK can no longer participate in Citizens' Initiative.</p> <p>1 million threshold becomes higher proportion of EU population (needs Treaty amendment).</p> <p>English can be used only insofar as it is maintained as an official language of the EU.</p>
<p>Right to move to any of the Member States and right to short stay (up to 3 months)</p>	<p>Right to enter and exit for Union citizens and their spouses and children.</p> <p>Right for TCN spouses and children to travel within the territory of the EU only on production of residence card.</p>	<p>UK citizens traveling to EU-25 +2 (Ireland and Denmark) might have to comply with visas arrangements.</p> <p>EU-27 citizens traveling to the UK might have to comply with visa arrangements.</p> <p>Republic of Ireland might allow visa free entry regardless of EU-25 regime.</p>
<p>Right to reside</p>	<p>Union citizens can reside in any MS, subject to one of these conditions:</p> <p>(i) They are employed (or seeking employment) in the host MS; or</p> <p>(ii) They are self-employed; or</p> <p>(iii) They have sufficient resources so as not to become a burden on the host Member State and they have</p>	<p>UK citizens in EU-27 treated either as a special category ('former Union Citizens') maintain same rights; or as TCNs and lose all rights to reside.</p> <p>EU citizens in UK lose right to reside.</p>

Rights conferred to EU nationals	Current situation	Impact of Brexit
	<p>comprehensive health insurance.</p> <p>Family members of Union citizens who satisfy conditions above also have a right to reside.</p>	<p>Family members subject to national immigration rules on family reunification (or family reunification directive where applicable)</p>
<p>Right to work</p>	<p>Union Citizens have a right to seek and take up employment in any Member State, without need for a visa.</p> <p>They have a right not to be discriminated against on grounds of nationality (e.g. access to employment; all social and tax advantages (including welfare provision).</p> <p>EU workers have a right to be accompanied by their families; TCN spouse has right to work and equal treatment</p> <p>EU Workers continue to be protected after illness/accident/involuntary unemployment .</p>	<p>UK citizens in EU-26 maintain right as former EU citizens or are treated as TCNs subject to 26 different regimes (unskilled, part time workers and unemployed particularly vulnerable).</p> <p>British citizens in Ireland would be treated as Irish citizens if special arrangements maintained.</p> <p>EU citizens in UK:</p> <ul style="list-style-type: none"> - potential visa requirement (and fee); - visa currently distinguish different workers + at times minimum earning threshold; - access to benefits might be limited or excluded; - family reunification conditional upon minimum earnings; - Irish citizens in UK are treated as British citizens if special arrangements are maintained.
<p>Right to pursue an economic activity as self-employed</p>	<p>Right to set up a business + right to equal treatment (also in relation to welfare)</p> <p>No minimum earnings required</p> <p>Right to family reunification</p> <p>Continued protection after involuntarily ceasing activity</p>	<p>UK citizens in EU-26 as former citizens, maintain same rights; otherwise 26 different rules (including investment requirements, no self-employed visas, etc.).</p> <p>UK citizens in Ireland benefit from full equal treatment if special arrangements maintained.</p>

Rights conferred to EU nationals	Current situation	Impact of Brexit
		<p>EU-26 citizens in the UK → visa requirements + fees (minimum investment threshold). Minimum earning for family reunification. Limited or no access to welfare benefits.</p> <p>Irish citizens in UK benefit of full equal treatment if special arrangements are maintained.</p>
<p>Non economically active citizens</p>	<p>Pensioners can reside anywhere in the EU subject to having sufficient resources; their health expenses and insurance is provided by the Member State of affiliation.</p> <p>Students have a right to reside subject to demonstrating availability to sufficient resources and comprehensive health insurance.</p> <p>Others have a right to reside subject to having sufficient resources and comprehensive health insurance.</p> <p>All have a right to equal treatment (although de facto access to means-tested benefits limited) bar for study aid for students.</p> <p>All have a right to family reunification.</p>	<p>UK citizens in EU-26 if UK citizens treated as former EU citizens: Pensioners vulnerable for lack of health insurance (and indexation of pension); students vulnerable because often they do not have comprehensive health insurance.</p> <p>If UK citizens in EU-26 treated as TCNs they would be subject to very restrictive EU 26 immigration regimes.</p> <p>EU-26 citizens in UK would be subjected to UK immigration rules including threshold for pensioners.</p> <p>UK citizens in Ireland and Irish citizens in the EU might be able to maintain some of the benefits of special arrangements.</p>

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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