

## **Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU: a Joint Response to the UK's Proposal**

### **Executive Summary**

This paper sets out the position taken by the British in Europe Coalition and the 3million in response to the UK proposal on citizens' rights. Briefly:

- The UK proposal does not respond to the comprehensive offer made by the EU on 23 May to guarantee the vast majority of our rights, but instead represents an entirely different form of offer founded in UK law.
- Given this, when comparing the two proposals, it is not possible to compare like with like and thus the application of the principle of reciprocity is complicated.
- The proposal lacks detail on safeguarding the rights of UK citizens in the EU. The EU offer set out in the EU negotiating directives, on the other hand, would guarantee the vast majority of the rights that UK citizens in the EU currently have and this should be the starting point for the UK government in its negotiations with the EU to protect the rights of UK citizens in the EU, subject to certain clarifications.
- The offer set out in the UK proposal for EU citizens in the UK represents the substitution of acquired rights of EU citizenship under EU law, with a lesser status of "settled status", for which EU citizens would be required to apply.
- In particular, EU citizens would no longer benefit from the same family reunification rights, or the overarching principle of equal treatment.
- In addition, the position on other rights such as pensions, healthcare, rights to work, rights of establishment and mutual recognition of qualifications as regards both groups require clarification.
- Any definitive agreement on citizens' rights needs to be ring-fenced from the rest of the Article 50 negotiations if our current anxiety and uncertainty are to be brought to an end, regardless of the outcome of the negotiations.

### **Introduction**

On 26 June the UK unveiled its proposal on safeguarding the position of EU citizens living in the UK and UK Nationals living in the EU and this proposal was presented to Parliament.<sup>1</sup> We note and appreciate some of the core principles set out in the summary proposals, in particular in paragraph 3 that:

"EU citizens who came to the UK before the EU Referendum and before the formal Article 50 process for exiting the EU was triggered came on the basis that they would be able to settle permanently, if they were able to build a life here. We recognise the need to honour that expectation. The choice made in the Referendum was about our arrangements going forward, not about unravelling previous commitments."

It is therefore surprising that, instead of taking the framework that exists under EU law as regards the rights of EU citizens in the UK and proposing to incorporate it

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<sup>1</sup> [UK offer on citizens' rights](#)

into UK law as part of the Great Repeal Bill, the UK proposal in fact sets out to do just that – to unravel previous commitments and replace them with a UK law based immigration status.

In contrast, the statement made in paragraph 4 as regards around 1.2 million UK citizens who moved to other countries in the EU is far less reassuring:

“Over one million UK nationals have moved to other countries in the EU, and many have built their lives there. Their ability to stay, and for life to **continue much as it does now**, depends on the agreement that is reached between the UK and the EU”

The standard appears to be lower than that to be applied to EU citizens, and, despite the confirmation that their position depends on the agreement reached between the UK and EU, there is very little discussion of how the position of UK citizens in the EU is to be achieved in the Proposal.

## **Analysis**

### **General points**

We have the following overarching general remarks as regards the proposal:

- **UK law solution versus EU law proposal.** The EU proposal made in the EU’s negotiating directives of 22 May<sup>2</sup> (the “EU negotiating directives”) and the Essential Principles on Citizens’ Rights<sup>3</sup> (the “Essential Principles”) set out a comprehensive proposal to guarantee almost all the rights that UK citizens in the EU and EU citizens in the UK currently have through their EU citizenship. The proposal is founded in the current framework under EU law and sets out what could be likened to a heads of agreement from which the provisions of the Article 50 withdrawal agreement would then be prepared.

The UK proposal does not respond to that offer, but instead represents an entirely different form of offer. Apart from some broad principles as regards the position of UK citizens at the outset, it is a proposal rooted in UK law, dealing with the future immigration status of EU citizens in the UK.

As such, the two proposals do not correspond, as rooted in different legal systems and as even the framework of rights covered is different.

Since the UK did not respond to the EU offer but in effect made a counter offer that does not correspond to the framework of the EU offer, it is very difficult to understand how the UK envisages the application of the principle of reciprocity in this case.

- **Lack of detailed proposals as regards the rights of UK citizens in the EU.** The most noticeable omission in this proposal is that as regards how the UK will seek to protect the rights of UK citizens in the EU. Moreover, on contrast to the EU negotiating directives, UK citizens who lived and worked in the EU in the past are not mentioned. The detail of the proposal focuses on the immigration status post-Brexit of EU citizens in the UK and sets out only broad lines as regards the

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<sup>2</sup> [EU negotiating directives](#)

<sup>3</sup> [EU essential principles](#)

rights of UK citizens in the EU. There is thus no clear explanation in the proposal of what the UK is seeking to negotiate to protect the rights of UK citizens in the EU and, given the mismatch between an EU law proposal to guarantee almost all the rights of both groups and a UK proposal primarily addressing the immigration status post-Brexit of EU citizens in the UK, simply referring to reciprocity does not remedy this omission.

We consider that the UK should be accepting the offer made to UK citizens in the EU's negotiating directives subject to the clarification of the position on rights of establishment (as regards setting up and managing undertakings) as well as similar issues relating to students set out below under point 8 Students, and subject to the agreement on citizens' rights being ring-fenced from all other aspects of the Article 50 negotiations. The UK should then guarantee all of the same rights to EU citizens in the UK as set out in the EU proposal and offered to UK citizens in the EU.

- **Ring fencing.** Any definitive agreement on citizens' rights needs to be ring-fenced from the rest of the Article 50 negotiations if our current anxiety and uncertainty are to be brought to an end, regardless of the outcome of the negotiations. Objections that this is legally impossible are without foundation and the parties should take that into account as they commence the negotiations.

Ultimately, the purpose of ring-fencing is that if the parties are able to reach an early agreement on citizens' rights during the Article 50 negotiations, this will be based on the consensus that such agreement is final, it is not to be re-opened no matter what happens in the remainder of the negotiation, and that, most significantly, it will come into force even if other aspects of the negotiations fail. The EU could ensure this by requiring the signature of a citizens' rights agreement as a precondition of entering the next stage of the withdrawal negotiation under Article 50, before discussion of the principles for future relations between the EU and the UK.

- **Cut-off date.** At the moment, a date between 29 March 2017, the date on which Article 50 was triggered, and the date the UK is due to leave the EU, is being discussed. However, EU law applies in full in the UK until Brexit date and thus any date earlier than that would be difficult for the UK government to justify legally.
- **Jurisdiction of the CJEU.** The UK proposal states that the CJEU will not have jurisdiction in the UK. In practice, even if the CJEU were to be accepted, this would simply mean that, as regards EU citizens' rights in the UK, the UK courts would make decisions but would have the option of making a reference the CJEU as they do now. Given the cumulated experience and case law of the CJEU on the matters covered by the rights of both groups, the CJEU would clearly represent the easiest and most practical option. If political constraints on the UK government ultimately prevent this happening, there will, however, clearly need to be some form of dispute resolution body with jurisdiction as regards the enforcement of citizens' rights going forward, and a way for

individuals to enforce their rights as regards the final guarantee set out in the Article 50 withdrawal agreement. This should be for negotiation. In this regard, we support the proposals laid out on governance transmitted to the EU27 on 28 June.

- **Confirmation of the UK proposal in the Article 50 withdrawal agreement.** The UK government has stated in the proposal that it is “ready to make commitments in the Withdrawal Agreement which will have the status of international law”. This is to be welcomed and goes some way to providing assurance that the status of EU citizens already in the UK will remain unchanged in the future. However, that presupposes a high level of detail set out in the Withdrawal Agreement as to the arrangements in relation to that status of EU citizens, which would then simply be copied and implemented in to national law. Those rights set out in the Withdrawal Agreement must be implemented in national law, and be justiciable as individual, directly effective rights in national courts.
- **Protection of rights for life.** In contrast to the EU proposal in the negotiating directives, the UK proposal does not appear to offer that the rights set out therein will be for life.
- **Ability of UK nationals to move from Member State to Member State:** The EU offer appears to continue to provide UK nationals in the EU27 with the option of moving from Member State to Member State after Brexit to live/work and/or change status so as to avoid UK nationals from being “locked into one country” at the date of withdrawal. The UK offer does not address this point because it seeks to end free movement and because EU nationals will continue to benefit from free movement in the EU27. Thousands of UK nationals will, however, find their ability to make a living and live with their families threatened unless this right is continued in the withdrawal agreement.
- **EEA/EFTA States.** Citizens of these countries resident in the UK are not covered, and nor are UK citizens living in those countries – they are simply left for “discussion” in paragraph 11.

### ***Specific points***

#### **1. Equal Treatment.**

At no point in the document, is there any mention of an overarching right of equal treatment for EU citizens in the UK vis-à-vis British citizens in the UK. Currently, EU citizens in the UK do have a right to equal treatment and the application of this principle to EU citizens in an EU country other than their own is a fundamental aspect of the current EU citizenship rights that EU citizens enjoy across the EU to ensure that EU citizens are not discriminated against in comparison to nationals of the country in which they reside. The proposal does state that “these rights will apply to all EU citizens equally” but even that statement must be without prejudice

to the principle set out on page 3 of the proposal as regards arrangements between the UK and Ireland. This is a significant change to the rights of EU citizens.

## **2. Family reunification: bringing spouses/dependents after Brexit.**

The proposal as it stands would mean a reduction of the rights of EU citizens in the UK to bring spouses and dependent family members, including elderly parents, into the UK. This is because there are two alternative possibilities. Either the same rules as apply currently for non-EU nationals would apply in future. This includes income thresholds, as regards the ability to bring in a spouse as a British citizen, and the very restrictive criteria of the adult dependent relative scheme (with which it is virtually impossible to comply), which would apply in the case of elderly parents. Alternatively, the proposal states, the specific post-Brexit immigration arrangement for EU citizens who arrive after the cut-off date would apply – and it is noteworthy that no details of what this might be are provided. It is not clear whether, but very likely that the same rules would apply to British citizens returning from the EU post-Brexit e.g. with EU spouses, who would then be faced with no choice but to remain permanently in an EU country and not return to the UK, for example, to take care of elderly parents in the UK.

In any event, since the UK has some of the most stringent rules globally as regards family reunification, this constitutes a severe reduction of the current rights of EU citizens in the UK (and potentially of UK citizens in the EU as well).

There will of course be many more detailed questions to consider, e.g. the position of an EU citizen whose non-EU spouse joins him/her in the UK in the event that they separate/divorce within less than five years, and how this would impact children of such a couple.

Children and future children would not seem to be subject to similar restrictions, whether or not they were born or arrived in the UK before or after the final cut-off date applied to the arrangements.

## **3. “Settled status”**

The permanent residence rights of EU citizens in the UK under EU law would be exchanged for the new UK immigration status under the Byzantine UK immigration rules of 'settled status', akin to indefinite leave to remain in the UK. This offers a significantly reduced level of protection than their current status as EU citizens in the UK under EU law. And the acquired rights in question are rooted in EU/international law and as such should be protected in international law. Moreover, EU citizens will be required to apply for UK settled status, whereas they are in fact resident in the UK on the basis of existing, acquired rights under EU law. The UK should in fact be simply confirming rights that have already been acquired, which is the approach taken in the EU negotiating directives.

Moreover English common law, not to mention the Human Rights Act, has always opposed retrospective legislation. The Directive, which confers rights of residence *forms part of UK law* at present. Art. 16.4 of Directive 2004/38/EC provides, “Once acquired, the right of permanent residence shall be lost *only* through absence from the host Member State for a period exceeding two consecutive years.” The UK is proposing a substantive unilateral amendment to that provision, which will operate with retrospective effect because it changes for all time the terms upon which all those EU citizens have come to live in the UK. That is not only unacceptable but also illegal.

As regards the practicalities, those EU citizens in the UK who have already acquired rights of permanent residence (PR) will be obliged to make a new application for settled status, despite having already spent a great deal of time and money applying for their permanent residence status. Settled status gives a lower level of protection and yet those who have already acquired permanent residence status would not simply acquire settled status automatically. Frankly this is perhaps the point at which the UK position is the opposite of “generous” - to force people who have already battled with the much-criticised UK application process for permanent residence to go through a whole new process to secure their right to remain post Brexit.

Those who can prove five years’ continuous residence would be required to apply for UK settled status. However, there is no definition of what “continuous residence” means in this context or whether periods of residence could be aggregated. Moreover, details of what the proof of continuous residence should consist of have not been provided and would need to be spelt out in detail.

Similarly, an assessment of conduct and criminality will be required but details of what this would consist of have also not been provided. This would need to be spelt out clearly: would it simply be matters such as suspicions as regards for example terrorism, which fall short of crimes, or would the scope be wider? The proposal to exclude EU nationals who are “persistent criminals” as opposed to those convicted of serious offences carrying a sentence of imprisonment of more than 12 months would also suggest a departure from EU norms. It may conflict with Prime Minister May’s stated intention that families will not be separated.

Moreover, the need for the provision of biometric information to protect against fraud is highly questionable, unnecessary, and this is not standard in other European countries.

The ‘conduct’ and ‘proof of residence’ requirements are particularly alarming in light of the fact that more and more local authorities are using legislation such as the 1824 Vagrancy Act to criminalize homelessness in England and Wales, and the UK

Government published updated guidance on the administrative removal of homeless EEA citizens in 2016 (European Economic Area: administrative removal guidance) thus enabling the UK to deport homeless EU nationals even if they were otherwise exercising treaty rights as jobseekers or workers, or if they had arrived less than 3 months previously<sup>4</sup>.

It is also not clear whether there may be other conditions imposed, such as a 'Life in the UK' and English language test, NHS surcharge and visa fees.

There is also an anomaly, in that each family member would have to apply separately for UK settled status. It thus appears that the child of parents with UK settled status would not acquire UK settled status in its own right but would have to apply for such status separately. This would introduce another burden (and stress) on parents and their children.

The proposal states that settled status would generally be lost if a person was absent from the UK for more than two years "unless they have strong ties here" (paragraph 20). The two years' absence condition is in line with current EU law provisions on permanent residence but – and this is critical – that is a condition applied in an entirely different context, that of free movement and the acquisition of permanent residence. Post Brexit, a EU citizen who leaves the UK for two years will no longer benefit from such rights and will not automatically have the right to return to the UK and start to build up rights of permanent residence again but will have to apply to return under UK immigration rules. This will, for example, severely restrict the ability of mobile EU citizens to take up job postings outside the UK, which are generally for a period of at least two years, and this cannot be good for the UK economy. The concept of "strong ties" is presumably added to mitigate this but is extremely vague.

It is positive that the UK proposal states that there will be no CSI requirement but the issue as to whether any minimum income requirement will be set is not addressed: under these proposed new UK immigration rules, will there be an income threshold to acquire 'settled status'? The UK proposal does not mention one, nor does it exclude one (compared to CSI, which it does explicitly exclude).

The proposal is thus vague as regards potential income thresholds for retirees, for those who set up their own businesses and those who are posted around the world for work. Minimum income thresholds, if introduced, would certainly penalise people on low wages, people in part-time employment, people on zero hours contracts and those with disabilities, for example, who work sporadically.

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<sup>4</sup> [Homelessness and criminalisation in the UK](#)

In addition, special exemptions should be applied in the UK where, due to non-registration of citizens, EU citizens have acquired 'de facto' rights of living legally in the UK despite being unable to prove 'self sufficiency' (e.g. carers) in some cases, or to obtain PR for a variety of reasons. This would also avoid a multitude of lengthy tribunal cases, as the current PR refusal rate of over 30% indicates could result.

In conclusion, we do not consider that EU citizens should be required to seek a new UK status of settled status, which is inferior to the current acquired rights of permanent residence that EU citizens who have lived in the UK for five years have.

#### **4. Grace period.**

The UK proposal states that there will be no cliff edge and that EU citizens will have a grace period within which to regularise their status.

The grace period has yet to be defined, both its length, and its commencement date, and is thus uncertain.

The period of blanket residence permission proposed would apply to all existing lawful EU residents and their families, rather than to all EU citizens in the UK at that point (paragraph 24). There is no detail in the proposal as regards how this concept of "existing lawful EU residents" will be applied, and it could give rise to many issues in practice, in respect of work, benefits, housing, banking and all aspects of life e.g. the need to prove to employers or potential employers that one is actually a lawful EU resident during the grace period. Given that it appears that there will be no need to apply for documentation proving that an EU citizen benefits from the blanket residence permission (see also paragraph 24), how would anyone be able to prove their entitlement and will UK employers, landlords etc. not be inclined to refuse EU citizens for fear of breaking the law by offering a job or home to an illegal immigrant?

Also, on a purely practical note, two years seems to be an optimistic timeframe in which to deal with the numbers of people concerned. This is not least since the UK proposes to set up a digital streamlined process to deal with the applications involved, and this system needs to be planned, put out to tender, subject to procurement procedures, and then implemented, and checked for problems, before that process can commence. In other words, there could be gaps as regards the immigration status of EU citizens, and resulting problems in respect of work, benefits, housing, banking and all aspects of life. Citizens would be left without documentation and court cases would result.

Therefore, whilst we welcome the general intention to keep fees reasonable and to minimise the burden of documentary evidence, this proposal for a grace period and temporary leave status prior to UK settled status is not fit for purpose.



We are also aware of the challenges faced by the Home Office in dealing with current applications of EU citizens and 3rd country nationals.

We therefore suggest that a simple system of certification of the existing permanent residence status under EU law be introduced for all citizens living in the UK at the point of exit.

## **5. Benefits.**

As regards benefits, a first general point concerns entitlement to benefits before EU citizens have “regularised” their status. This is a question of proof, and no details as to how that entitlement could be proved without a document evidencing settled status or temporary leave to remain are set out in the proposal. We also wish to raise the following specific points (although there will be many other points of detail):

- a. *Aggregated Pension system.* The aggregation of contributions proposed in the UK paper seems only to apply to contributions accrued pre-Brexit. This raises the issue of what happens to post-Brexit contributions for those who are already aggregating where there are minimum amounts/periods of contributions in order to be entitled to *any* pension or other benefit. There is also no detail on how the UK will seek to protect the overarching aggregated pension system entitlements that exist currently under EU law for both UK citizens in the EU and EU citizens in the UK, as this will be subject to negotiation.
- b. *Pensions uprating.* We welcome the confirmation that the UK “intends to continue to export and uprate the UK State Pension within the EU, subject to reciprocity”. However, we would welcome clarification on what “subject to reciprocity” means in this context in concrete terms.
- c. *Healthcare.* The proposal states that the UK “will seek to protect” the current healthcare arrangements under EU and UK law for UK nationals in the EU and EU nationals in the UK “who benefit from these arrangements before the specified date”. This statement begs a number of questions. In the first case, the wording is vague “seek to protect” rather than guarantee, and there is no detail about what the UK will seek to protect (the entire system, parts of the system?). The EU negotiating directives, on the other hand, are very clear about maintaining the framework of Regulation 883/2004 and the implementing Regulation, 987/2009. Second, the final phrase “who benefit from these arrangements before the specified date” could potentially rule out large numbers of e.g. UK citizens from the application of the deal negotiated on healthcare, in particular, those who have not yet retired before the cut-off date, or those who currently depend on a retired spouse’s S1 card and will only receive their own on retirement. Third, it is not clear in general how future healthcare arrangements will impact family members of UK and EU citizens who

do not have access to healthcare in their own right in the country where they are resident.

- d. *EHIC system.* One of the aspects of the healthcare system that the UK seeks to protect is outside the scope of these Article 50 negotiations, as it relates to the future rights of tourists to benefit from the EHIC scheme, who are not UK citizens already resident in the EU 27. There is also no justification for detailed proposals on this aspect, while leaving out the details of what type of reciprocal healthcare system is to be protected as regards UK citizens currently resident in the EU.
- e. *Exporting benefits.* It is not clear why EU citizens who are already in the UK or UK citizens who are already in the EU but not yet exporting benefits should not have the right to do so in future.
- f. *Future changes.* Future changes to the social security arrangements are not covered in the UK proposal, while they are in the EU proposal.
- g. It is also not clear whether the UK wishes to continue to participate in the coordinating mechanism for social security benefits or to negotiate 27 bilateral agreements with the EU27 (see paragraph 43).

## 6. Work

There is very little detail in the UK proposal dealing with the concerns of working people. This includes rights to work, rights of establishment and mutual recognition of qualifications.

The latter rights are included briefly in a section entitled “economic and other relevant rights”. However, it is important to recognise that the freedom of establishment and mutual recognition of qualifications we are referring to here are rights of the individual citizen, and thus not purely economic rights or rights of a company.

Thus it is the individual who is guaranteed the right of establishment by Art. 49 (“nationals of a Member State” in the wording of the Article). Art. 49 creates both a prohibition and a right. The prohibition is against Member States adopting restrictions that discriminate against individuals who are not nationals of that State in relation to the setting up and running of undertakings, such as companies. The right conferred on these individuals is to run such undertakings on equal terms with nationals of the host State. It is these EU rights of individuals who have already moved cross-Channel that we seek to protect.

Similarly, mutual recognition of qualifications is a right from which individuals in these two groups benefit, and this is expressly recognised in the EU negotiating directives, which would protect qualifications that citizens have “in personam”.

It is also unclear how the UK would consider EU citizens who lived and worked in the UK in the past, or what they would seek to achieve for UK citizens who lived and worked in the EU in the past, or how vested rights would be directly enforceable.

In addition, we have the following specific comments:

- a. *Mutual recognition of qualifications.* The wording is vague and sets out general aims without any detail. The aim is to “seek to ensure”, rather than guarantee. Moreover, the UK “will also give due regard to these professionals’ ability to practise without unfair detriment or discrimination” rather than guarantee this, and, as we noted above, there is no general principle of equal treatment proposed to provide a general remedy in the case of unfair discrimination.
- b. *Right of establishment/Self-employment.* Issues as regards self-employment and rights of establishment generally are to be negotiated and the UK proposal simply states, without further detail, that the UK will seek to protect them for “EU citizens in the UK before the specified date and vice versa”. There is no real detail on how the UK government will deal with self-employment for EU citizens in the UK in terms of their rights or status in the UK e.g. specific rules such as regards minimum income, etc. To those people who have moved countries in order to pursue a career through self-employment, or the medium of establishing a company or other legal entity, it is essential that they should be able to continue to do so. Their right under EU law to follow this course is guaranteed by Art. 49 TFEU. Many of course will be providing employment to citizens of their host country through this means. Again, the wording is not clear, as the UK government simply states that it will “seek to protect” the right of establishment for EU citizens in the UK and vice versa, rather than to guarantee this.
- c. *Cross-border working.* There is also reference to seeking to protect the right to provide cross-border services although it is unclear whether this means cross-border working in general. The right of EU citizens’ to continue to provide cross-border services in the UK, e.g. the various directives on the rights of professions to practise in other EU countries is not even mentioned and thus does not appear to be covered, and note the points made above on mutual recognition of qualifications.

## **7. Voting rights.**

There is no mention of voting rights in this proposal at all, and it appears that this is another area in which settled status for EU citizens in the UK will differ from citizenship. Likewise, there is no mention of seeking to guarantee continuing voting rights, at least at local and European level, for UK citizens in the EU. This is also an area that is not addressed by the EU negotiating directives.

## **8. Students:**

The position of students is unclear. This affects both UK citizens resident in the EU and EU citizens in the UK. UK citizens who go to the UK from their EU residence to study pre- and post-Brexit face issues as regards their permanent residence status, while the same would be true regarding EU citizens in the UK who leave to study in the EU. There are also issues concerning fees and the recognition of qualifications, particularly for students who are UK citizens from EU countries. In general, there is very little consideration of the position of young UK citizens resident in EU countries now embarking on their studies in the UK or EU 27 countries.

There also seems to be no right to stay on to seek work after degree, in contrast to the position set out in the EU's Essential Principles on Citizens' Rights document. Not does there appear to be any right to stay on to do further studies, for example, a Masters or a PhD.

British in Europe

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