

Summary of UK document on EU citizens arriving in the UK during the post-Brexit transition period

European Union: MW 443

1. A UK policy statement, issued on 28 February 2018, states that EU nationals and their family members who arrive during a post-Brexit transition period would be eligible, after five years of continuous and lawful residence in the UK, to apply for indefinite leave to remain. We have previously stated that this could have a significant immigration implication (for more details see paragraph 9 below).
2. The statement adds, however, that the rights of those arriving during the transition period to have family join them after the transition period ended would be restricted (in contrast to the greater family joining rights of those EU nationals who arrive prior to the UK's formal withdrawal from the EU in March 2019). It also notes that the rights of those arriving in the UK during this period will be 'interpreted solely through UK courts' with no jurisdiction for the European Court of Justice (ECJ). Again, this is in contrast to those arriving prior to 29 March 2019, for whom a mechanism is to be created for UK courts which decide to ask the ECJ questions of interpretation for a period of eight years (until 2027).
3. Article 121 of the EU's Draft Withdrawal Agreement stipulates that the end date of transition period should be 31st December 2020. However, the press has reported that 'many on the EU side expect Britain to extend transition until 2022'. The parties are yet to come to an agreement on the length of the period.
4. The joint report on the UK and EU 'breakthrough' agreement on citizens' rights, published on 8 December 2017, affirmed a previous UK government pledge, made in late June 2017, that 'those EU citizens who arrived and became resident before the specified date but who [had] not accrued five years' continuous residence at the time of the UK's exit [would] be able to apply for temporary status in order to remain resident in the UK until they [had] accumulated five years, after which they [would] be eligible to apply for settled status'.
5. However, despite the December 'breakthrough', there remained differences over when the 'specified date' should be (either the date of the UK's formal withdrawal from the EU in March 2019 or the end of the transitional period). The joint report reflected the UK position that this should be the time of the UK's formal withdrawal. However, the European Commission has stated a preference that the specified date 'should... be defined... as that of the end of the transitional period'. This latter position was

reaffirmed when the EU set out its negotiating directives for the transition period in late January 2018.¹

6. The Prime Minister had indicated in late January that she would she would fight the proposal to give residency rights to EU citizens during the transition period after Brexit. Mrs May said: *"I'm clear there is a difference between those people who came prior to us leaving and those who will come when they know the UK is no longer a member"*.²

Government policy statement – The details

7. The February 2018 policy statement reflects this sentiment in noting that 'the expectations of EU citizens arriving in the UK after our exit will not be the same as those who moved here before our withdrawal'. It adds that the new immigration framework, which will be prepared 'in readiness for the end of the period', will *'deliver on our commitment to strengthen control of our borders and address the public's concerns about the impacts of unrestricted immigration from the EU on jobs, wage and public services'*.

8. However, in paragraph 10, the statement notes that those EU citizens and their family members who arrive during the transition period will be offered 'eligibility after the accumulation of five years' continuous and lawful residence to apply for indefinite leave to remain'. Those arriving will be accorded a 'temporary status in UK law that will enable them to stay after the implementation period has concluded – this means that they will be able to remain lawfully in the UK working, studying or being self-sufficient for the five years needed to obtain settlement'. This concession on the UK's part largely accords with the EU position as stated in their December 2017 communication.

9. We have previously estimated that between 280,000 and up to a million EU nationals could arrive in the UK during what could amount to a two-year transition period. The lower estimate is based on annual average net migration from the EU over the past five years. The upper limit is based upon the average annual number of National Insurance Numbers that have been registered by the EU nationals over five years. Between 2012/13 and 2016/17, this was over 535,000 per annum (while in the year 2017, there were nearly 500,000 NINo registrations by adult EU nationals)³. This means that over a two year period, the total number arriving could be up to a million. In the past many of the NINo registrations are likely to have been the result of short-term or circular migration. We do not suggest that all will decide to stay on, but if the EU's demand were conceded, it would likely encourage many to do so. Our estimates also do not take into account family members who would accompany those arriving or join them later, nor does it factor in the possibility of a last minute rush. For instance, the Home Affairs Select Committee has suggested that an imminent tightening of immigration rules could prompt a surge of new arrivals.⁴

10. According to the joint report issued in December 2017, those arriving prior to the 'specified date' would be subject to the same rules that pertain for EU nationals arriving prior to Brexit day – they

1 Council negotiating directives on the transition period, 29 January 2018, URL: <http://www.consilium.europa.eu//media/32504/xt21004-ad01re02en18.pdf>

2 BBC News, 1 February 2018. URL: <http://www.bbc.co.uk/news/uk-politics-42896996>

3 Migration Watch UK, 'Implications for immigration of a post-Brexit transition period', January 2018, URL: <https://www.migrationwatchuk.org/briefing-paper/440>

4 Commons Home Affairs Committee, July 2017, URL: <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/151/151.pdf>

would be able to bring in direct family members, provided the relationship existed prior to the end of the period and they would also be able to bring in any children who are yet to be born. In contrast, such arrangements would not be replicated for those arriving during the transition period who wished to bring in non-British relatives after the transition period ended. As a Home Office factsheet accompanying the statement puts it: *“Once the implementation period ends, this cohort will be able to bring family members to the UK – but these rights will be on a par with the rights of British citizens who wish to be joined by non-British family members. Those covered by the December 2017 agreement [in contrast] will be able to bring family members and children to the UK under EU law.”* This means that EU nationals who arrive during the transition period and who want to bring in their non-British relatives will have to pass a “minimum income threshold test”, which is currently set at £18,600.

11. However, it is worth reiterating that, while those covered by the December 2017 joint report would have the right to bring in family members in the future, as well as children who are yet to be born, they would not be able, after Brexit day, to be joined by grandchildren or great-grandchildren born after the date of the end of UK’s withdrawal. It is arguable that there is possibly some ambiguity on this in the Joint Report, but the position is clear in the Technical Note. In addition, rights in relation to extended family members such as aunts, uncles, nieces and nephews, will fall away, while rights in relation to future spouses or any other family members regardless of degree of connection will also fall away (ie where no relationship exists at the time of the UK’s departure from the EU). Future family members (ie where the relationship did not exist at the time of Brexit day) excluding future children, will also be subject to the family visa requirements contained in UK law

12. The UK February 2018 statement notes that the rights of those arriving during the transition period ‘will be enforceable in the UK legal system’. In contrast, the December 2017 joint report stated that, for those arriving prior to date of the UK’s withdrawal from the EU, there will be a mechanism for UK courts to decide to ask the ECJ questions of interpretation of citizens’ rights for a period of eight years after Brexit. The Home Office factsheet makes the distinction clear. In contrast to those arriving prior to Brexit day, *‘the rights of the implementation period cohort will be defined in UK law and interpreted solely through the UK courts. British judges will not be able to refer questions of interpretation to the European Court of Justice’.*

13. However, the UK policy statement makes it clear that unfortunately there is, as yet, no indication that EU member states will enact reciprocal arrangements for British nationals arriving during the transition period. The UK government policy statement only notes: *“The arrangements that will apply to UK citizens who move to EU member states during the implementation period will be for determination by Member States and we encourage member states to mirror the UK’s offer in their own arrangements”* (paragraph 14).

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