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NOTE

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| From: | Commission services |
| To: | Working Party on Frontiers / Mixed Committee (EU-Iceland/Norway and Switzerland/Liechtenstein) |
| Subject: | Free movement of UK nationals (beneficiaries of the Withdrawal Agreement) |

Context

Withdrawal Agreement beneficiaries have their previously exercised free movement rights, which they enjoyed as EU citizens, grandfathered only in their host State. With regard to movement in Schengen States other than their host State, they are to be treated as third-country nationals legally resident in that host State.

Why do we bring this issue?

In 2022 there have been few cases of UK citizens (beneficiaries of WA) who have encountered problems when transiting Schengen States on their way to the MS where they reside. The Commission received reports, according to which persons who are WA beneficiaries in a Schengen Member State entered another Schengen Member State for a short stay and were detained by the police because they did not have a valid residence document to prove that they are legally resident as WA beneficiary in their host State.

These incidents have been followed by the Specialised Committee on Citizens' Rights gathering both UK and COM.

Messages

- We would like to remind Member States of the applicable rules with regard to UK nationals that are beneficiaries of the Withdrawal Agreement, to prevent that they are being wrongfully detained whilst transiting through the Schengen area.

- In a nutshell, beneficiaries of the Withdrawal Agreement can use **their residence documents** issued under the Withdrawal Agreement as well as **other means of evidence** at the border to prove their residence status and connected rights, such as not being subject to the maximum duration of stay of up to 90 days in a 180 days’ period in their host State.
- We would like to recall the **changes made last year in the Practical Handbook** to reflect the situation of the beneficiaries of the WA. Annexes 42 and 43 of this Handbook also provide detailed clarifications regarding the treatment at the external borders, as of 1 January 2021, of UK nationals and their family members who are beneficiaries of Part Two of the Withdrawal Agreement on citizens’ rights.
- MS, irrespectively of the declaratory or constitutive scheme they opted for with regard to this category of person, should make sure that the information provided for in **Annexes 22 and 43 are up to date**.
- We also recall about **the possibility to rebut the presumption of illegal stay** on the territory of the second Member State in accordance with Article 12(2) Schengen Borders Code (SBC) and the possibility to “regularise” the short-term stay in the second MS by means of obtaining an entry stamp/record.

Background

In the first case, the WA beneficiary was in possession of registration certificate for EU citizens issued by the host State and which is included in Annex 43 to the Practical Handbook for Border Guards (PHBG) as a document that the host State still considers valid for WA beneficiaries. However, the host State had not notified the title of the document for inclusion in Annex 22 PHBG.

In the second case, the WA beneficiaries entered the other Schengen Member State shortly after the previously issued free movement residence documents lost their validity for the purposes of Annex 43 PHBG. The host State had also not notified the title of the documents previously issued to UK nationals for inclusion in Annex 22 PHBG (but only the titles of the documents previously issued to non-EU family members).

Guidance – concrete steps proposed by DG JUST in 2022

Beneficiaries of the Withdrawal Agreement can use **their residence documents** issued under the Withdrawal Agreement **as well as other means of evidence** at the border to prove their residence status and connected rights, such as not being subject to the maximum duration of stay of up to 90 days in a 180 days’ period in their host State. The Commission *recommends* that all beneficiaries of the Withdrawal Agreement obtain the appropriate residence document under the Withdrawal Agreement in their Member State of residence and to proactively present it to border guards when crossing a Schengen external border.

- First, the best option to avoid similar situations would be for the WA beneficiary to request, and for the WA host State to issue, **a residence document under Article 18** of the Withdrawal Agreement before the WA beneficiary travels to another Schengen State as recommended by the European Commission in several occasions. The Withdrawal Agreement residence document will evidence that the holder is legally resident in the Schengen area in accordance with Article 21 of the Convention Implementing the Schengen Agreement.

- Second, Withdrawal Agreement beneficiaries who reside in host Member States with **constitutive schemes** can use their certificate of application issued under Article 18(1)(b) of the Withdrawal Agreement to prove their residence status and connected rights as long as they have not obtained a final decision on their application. Member States that operate a constitutive residence scheme under the Withdrawal Agreement should therefore ensure that they have notified the title of the certificate of application issued under Article 18(1)(b) WA for inclusion in Annex 22 PHBG. DG JUST launched another exercise for this purpose on 11 July 2022 (e-mail sent to the Member States' representatives of the expert group on free movement of persons, see attached).

Withdrawal Agreement beneficiaries who reside in host Member States with **declaratory schemes** can use residence documents issued under the EU Free Movement Directive before the end of the transition period as proof of their Withdrawal Agreement beneficiary status, provided that there is no indication that they no longer reside in the host Member State. For these cases, where the WA beneficiary will have to travel before being in possession of a Withdrawal Agreement residence document, therefore, the WA host State should check whether it has provided specimen of all previously issued free movement documents, which it still considers valid for Withdrawal Agreement beneficiaries, for inclusion in Annex 43 (PHBG) and has also notified the titles of all such documents for inclusion in Annex 22 PHBG.

In addition, it is important to note that Withdrawal Agreement beneficiaries who reside in host Member States with declaratory schemes can use **other documents** that credibly prove that their holders exercised the right to move and reside freely in the host Member State before the end of the transition period and continue to reside there. Documents indicating the address of the person can show continued residence after the end of the transition period. Border guards may ask questions about the domicile in order to establish the residence status and connected rights of the traveller. - Where a WA beneficiary is in possession of a document that is contained in both Annex 43 and 22 PHBG (and still considered valid by the issuing Member State according to the indication in Annex 43 PHBG), such document is to be considered as valid residence document for the purpose of Article 21 of the Convention Implementing the Schengen Agreement (based on Artikel 2(16)(b) in conjunction with 39 Schengen Borders Code).

- Third, as a fall-back solution to tackle comparable incidents is recommended to competent authorities (border guards) of second Member States to ensure that the individuals concerned are afforded the opportunity to rebut the presumption of their illegal stay on the territory of the second Member State in accordance with Article 12(2) Schengen Borders Code (SBC) and to “regularise” their short-term stay in the second MS by means of obtaining an entry stamp/record as provided for in that provision. In addition, the competent authorities could issue the standard form set out in Annex VIII SBC. Such regularisation can take place on the basis that the individuals concerned (WA beneficiaries in one Schengen Member State without Schengen-wide recognised documentation) are interrupting their long-term stay under the WA in their host State and starting a new “short-term stay” during their presence in a second Member State (even if this is just for transit purposes).

Alternatively, those Member States which dispose of other provisions under national law which allow them to consider the stay of UK nationals on their territory as legal even if not all conditions for a short-term stay are fulfilled (such as for instance Article 41 of the German Aufenthaltverordnung) are encouraged to use these provisions for tackling comparable situations.

ANNEX 42

1. GUIDELINES ON THE TREATMENT OF BENEFICIARIES OF THE WITHDRAWAL AGREEMENT

The objective of these Guidelines is to provide clarifications regarding the treatment at the external Schengen borders, as of 1 January 2021, of UK nationals and their family members who are beneficiaries of Part Two of the Withdrawal Agreement¹ on citizens' rights ("Withdrawal Agreement beneficiaries").

On 1 February 2020, the United Kingdom withdrew from the European Union. On the same day, the Withdrawal Agreement entered into force. It provides for a transition period, during which EU law on free movement of persons continues to apply to and in the United Kingdom, as if it were still an EU Member State, and to the benefit of UK nationals, as if they were still EU citizens. The transition period ends on 31 December 2020.

UK nationals who resided in an EU Member State in accordance with EU law on free movement of persons before the end of the transition period and who continue to reside there, will be protected by the Withdrawal Agreement as of 1 January 2021. The same is true for the family members of those UK nationals, regardless of their nationality.

The guidelines aim at helping border guards understand the main difference between the two implementation schemes that Member States use with regard to the citizens' rights part of the Withdrawal Agreement. Based on the main difference between the two implementation schemes, the guidelines give concrete guidance on how to identify who is a Withdrawal Agreement beneficiary, for the purpose of not stamping their passport when they cross an external Schengen border. The guidelines also deal with other border procedure aspects for Withdrawal Agreement beneficiaries, such as those related to refusal of entry alerts in the Schengen Information System.

The guidelines apply equally to UK nationals and their family members, as defined in Articles 9(a) and 10(2) – (4) of the Withdrawal Agreement, regardless of their nationality. For reasons of drafting simplification, reference is sometimes made only to UK nationals.

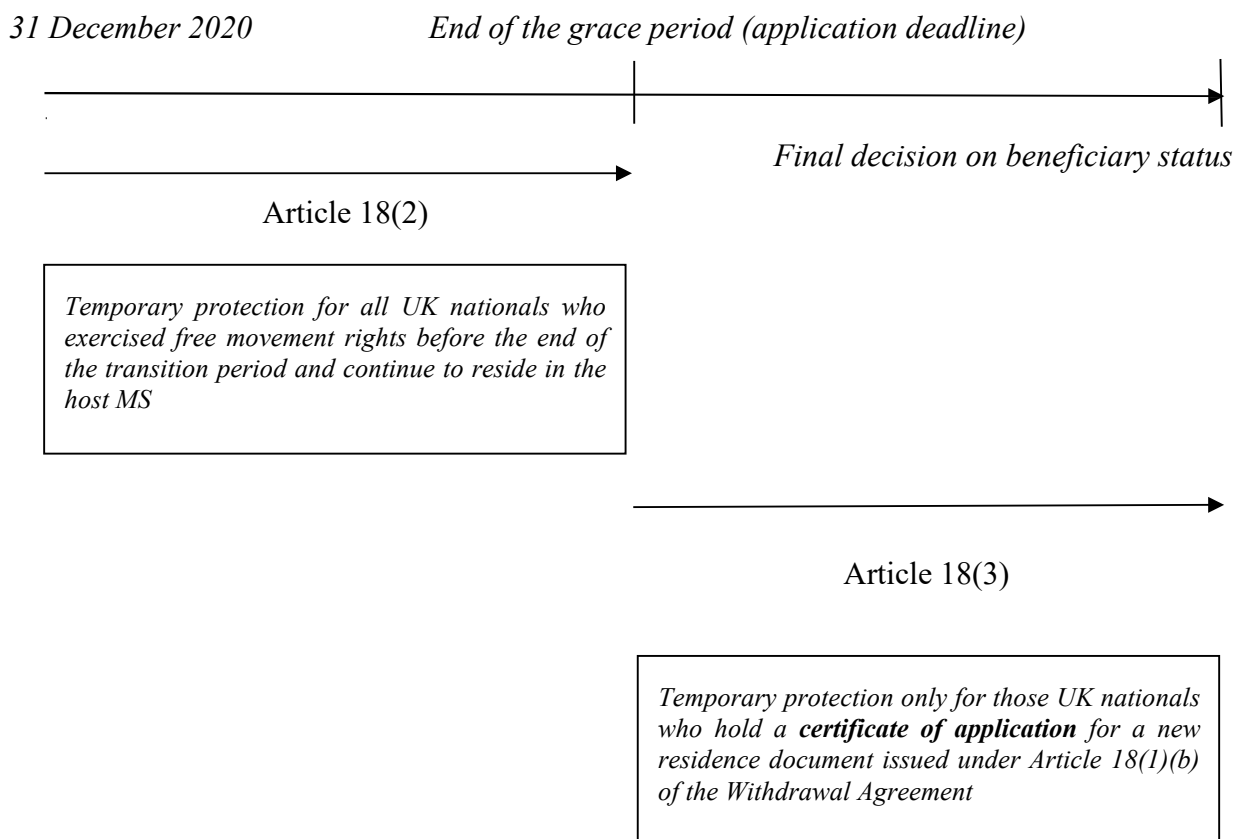
Background information on citizens' rights implementation schemes

Withdrawal Agreement beneficiaries are to be considered as third country nationals as defined in Article 2(6) Schengen Borders Code and not as persons enjoying the right of free movement under Union law as defined in Article 2(5) Schengen Borders Code. Withdrawal Agreement beneficiaries have, however, their exercised EU free movement residence rights grandfathered and protected in their host Member State. Each Member State had the choice to decide whether to implement the Withdrawal Agreement residence rights through either a constitutive scheme under Article 18(1) of the Withdrawal Agreement or a declaratory scheme under Article 18(4) of the Withdrawal Agreement.

¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 7–187.

Under the **constitutive scheme**, all UK nationals who exercised EU free movement rights in the host Member State before the end of the transition period and continue to reside there are *temporarily protected* until the end of a so-called “grace period”.² After the end of the grace period, they are protected only if they have applied to become, or have already been granted, the status of Withdrawal Agreement beneficiary. Everyone who becomes a Withdrawal Agreement beneficiary in a constitutive scheme receives a new residence document that evidences the status of Withdrawal Agreement beneficiary. While an application is being assessed, the applicant can prove with a certificate of application, issued under Article 18(1)(b) of the Withdrawal Agreement, that s/he continues to benefit from temporary protection until there is a final decision under Article 18(1) of the Withdrawal Agreement on whether s/he becomes a Withdrawal Agreement beneficiary.³

Timeline of temporary protection in constitutive schemes:



13 Member States operate constitutive schemes. Depending on the Member State, the grace period ends on 30 June, 30 September or 31 December 2021, as indicated in the below table.

² See Article 18(2) of the Withdrawal Agreement.

³ See Article 18(3) of the Withdrawal Agreement.

| EU Member State | End of the grace period (deadline to apply for the new residence status under the Withdrawal Agreement) |
|------------------------|--|
| Belgium | 31-12-2021 |
| Denmark | 31-12-2021 |
| France | 30-06-2021 |
| Latvia | 30-06-2021 |
| Luxembourg | 31-12-2021 |
| Hungary | 31-12-2021 |
| Malta | 30-06-2021 |
| The Netherlands | 30-09-2021 |
| Austria | 31-12-2021 |
| Romania | 31-12-2021 |
| Slovenia | 31-12-2021 |
| Finland | 30-09-2021 |
| Sweden | 31-12-2021 |

Under the **declaratory scheme**, UK nationals automatically become Withdrawal Agreement beneficiaries on 1 January 2021 if they exercised EU free movement rights in the host Member State before the end of the transition period and continue to reside there. It is not mandatory for them to hold a new residence document that evidences the status of Withdrawal Agreement beneficiary. However, they may, at any point in time, apply for a new residence document to be issued under Article 18(4) of the Withdrawal Agreement. If they do not hold a new residence document issued under the Withdrawal Agreement, they may prove their status of Withdrawal Agreement beneficiary by other means.

14 Member States operate declaratory schemes:

| | | |
|-----------------|----------------|------------------|
| Bulgaria | Greece | Lithuania |
| Czechia | Spain | Poland |
| Germany | Croatia | Portugal |
| Estonia | Italy | Slovakia |
| Ireland | Cyprus | |

The Commission has also published an overview of Member States' choice of scheme (constitutive vs declaratory) and the application deadlines in constitutive schemes [here](#).

Regardless of the implementation scheme, the following are the basic rules for the treatment of Withdrawal Agreement beneficiaries at the external Schengen borders:

- The passport of a UK national or a family member must not be stamped if s/he holds a new Withdrawal Agreement residence document issued under Article 18(1) or 18(4) of the Withdrawal Agreement or a certificate of application issued under Article 18(1)(b) of the Withdrawal Agreement.
- In case of doubt about whether a UK national or a family member is a Withdrawal Agreement beneficiary, the passport must be stamped.
- The Withdrawal Agreement provides that the new residence document has visa exempting effect only for entering and exiting the host Member State (Article 14(2) of the Withdrawal Agreement).
- In accordance with the Schengen acquis (Article 2 point 16 and Article 6 (1) b Schengen Borders Code), the new Withdrawal Agreement residence document has visa exempting effect in the Schengen area where it was issued by a Schengen State fully applying the Schengen acquis.
- The certificate of application issued under Article 18(1)(b) of the Withdrawal Agreement does not have visa exempting effect (but see page 9 on the visa exemption during and after the grace period, based on documents issued under Directive 2004/38/EC).

Evidence for Withdrawal Agreement beneficiary status

The following documents evidence the Withdrawal Agreement beneficiary status:

- new residence document issued under Article 18(1) or 18(4) of the Withdrawal Agreement
- certificate of application issued under Article 18(1)(b) of the Withdrawal Agreement

During the grace period in constitutive schemes and generally in declaratory schemes, residence documents issued under Directive 2004/38/EC before the end of the transition period should be accepted as proof of the Withdrawal Agreement beneficiary status, provided that there is also no indication that the holder no longer resides in the host Member State. Border guards can ask relevant questions about the domicile of the person and take the replies to constitute evidence.

Where documents other than residence documents issued under Directive 2004/38/EC are presented during the grace period in constitutive schemes and generally in declaratory schemes, border guards may accept them as proof that the person is a Withdrawal Agreement beneficiary, provided the documents credibly evidence that the person exercised free movement rights in the host Member State before the end of the transition period and continues to reside there. Regarding continued residence after the end of the transition period, documents indicating the address of the person within the host Member State could be accepted. Border guards can also ask relevant questions about the domicile of the person and take the replies to constitute evidence.

See Annex 43 for specimen of residence documents issued under Directive 2004/38/EC and of certificates of application issued under Article 18(1)(b) of the Withdrawal Agreement.

Annex 43 contains also specimen of acknowledgements of receipt/submission of an application for a new residence document under Article 18(4) of the Withdrawal Agreement. While such a document does not prove that the holder is a Withdrawal Agreement beneficiary, it may be considered as evidence when assessing the holder's continued residence in the host Member State.

Practical instructions regarding stamping of passports

Border guards should follow the process below to establish whether the passport of a UK national or a family member, who claims to be a Withdrawal Agreement beneficiary, must be stamped or not.

The general rule is that a UK national or family member will not have his/her passport stamped if the person can prove that s/he was resident in the host Member State before the end of the transition period and continues to reside there thereafter.

The process differs depending on whether the person resides in a host Member State with a constitutive or a declaratory scheme.

1. Holds a new residence document issued under Article 18(1) or 18(4) of the Withdrawal Agreement: no stamping
2. Does not hold a new residence document:
 - a. Resides in a MS with a *constitutive scheme* and
 - i Holds a certificate of application for the new residence status issued under Article 18(1)(b) of the Withdrawal Agreement: no stamping
 - i Is still within the grace period, holds a residence document issued under Directive 2004/38/EC and there is no indication that the person no longer resides in the host Member State: no stamping
 - i Is still within the grace period, does not hold a residence document issued under Directive 2004/38/EC before the end of the transition period but can credibly evidence, by other means, that the person exercised free movement rights in the host Member State before the end of the transition period and continues to reside there: no stamping

In the absence of a new residence document, there is no specific document to prove that the person continues to reside in the host Member State. However, documents indicating the address of the person within the host Member State could be accepted. Border guards can also ask relevant questions, such as where the person currently lives/works etc, and take the replies to constitute evidence.

- iv Is still within the grace period, does not hold a residence document issued under Directive 2004/38/EC before the end of the transition period and cannot credibly evidence, by other means, that the person exercised free movement rights in the host Member State before the end of the transition period and continues to reside there: stamping
 - v Is outside the grace period and does not hold a certificate of application: stamping
 - b. Resides in a MS with a *declaratory scheme* and
 - i Holds a residence document issued under Directive 2004/38/EC and there is no indication that the person no longer resides in the host Member State: no stamping.
 - i Does not hold a residence document issued under Directive 2004/38/EC but can credibly evidence, by other means, that the person exercised free movement rights in the host Member State before the end of the transition period and continues to reside there: no stamping

In the absence of a new residence document, there is no specific document to prove that the person continues to reside in the host Member State. However, documents indicating the address of the person within the host Member State could be accepted. Border guards can also ask relevant questions, such as where the person currently lives/works etc, and take the replies to constitute evidence.

 - i Does not hold a residence document issued under Directive 2004/38/EC and cannot credibly evidence, by other means, that the person exercised free movement rights in the host Member State before the end of the transition period and continues to reside there: stamping

For the cases where the person does not hold a new residence document issued under Article 18(1) or 18(4) of the Withdrawal Agreement or a certificate of application issued under Article 18(1)(b) of the Withdrawal Agreement, the border guard should invite the person to apply for a new residence document in accordance with Article 18 of the Withdrawal Agreement in order to facilitate future travels.

Verification of stamps upon entry or exit

When verifying the stamps upon entry and exit and if there is an alleged overstay of a UK national or a family member, who might be a beneficiary of the Withdrawal Agreement, the presumption of overstay may be rebutted by any means that show that the person exercised free movement rights in the host Member State before the end of the transition period and continues to reside there. For example, the UK national or family member may present a document that was issued to him/her since the stamping of the passport, such as a new residence document issued under Article 18 of the Withdrawal Agreement or a certificate of application issued under Article 18(1)(b) of the Withdrawal Agreement. Where the person rebuts the presumption of overstay by means of another document, such as a document issued under Directive 2004/38/EC in the absence of any indication that s/he no longer resides in the host Member State, the person should be invited to apply for a new residence document in accordance with Article 18 of the Withdrawal Agreement in order to avoid future difficulties.

Where the UK national or family member presents only a document indicating his/her address in a Schengen State, the border guard may accept the document as rebutting the presumption of overstay, without, however, drawing any inferences as to whether the person is a Withdrawal Agreement beneficiary.

Practical instructions regarding the visa exempting effect of documents issued under Directive 2004/38/EC before the end of the transition period

Residence documents issued under Directive 2004/38/EC to UK nationals and their family members lose their legal basis when EU free movement law ceases to apply to and in the UK on 31 December 2020. This means that the Directive can no longer serve as a basis for the issuing or renewal by Member States of documents for UK nationals and their family members after 31 December 2020.

This notwithstanding, such documents will generally prove [*or* “such documents may be used to prove”] that the holder exercised free movement rights in the host Member State before the end of the transition period. Where a Member State allows UK nationals and their family members to continue to hold such documents after the end of the transition period, the Member State may continue to accept such documents – which were issued with an individual date of validity beyond the end of the transition period – in a national context to evidence the Withdrawal Agreement beneficiary status of the holder, provided that the authorities have no indication that the person no longer resides in the host Member State (or would otherwise no longer fulfil the Withdrawal Agreement residence conditions). This applies generally both for Member States operating a declaratory scheme (Article 18(4) WA) as well as for Member States operating a constitutive scheme (Article 18(1)) during the grace period and/or the time it takes to issue a new residence document.⁶

Regarding the crossing of external Schengen borders, Member States may notify, under the Schengen Borders Code, the residence documents that it has issued to UK nationals and their family members under Directive 2004/38/EC and whose continued use under national law may be permitted after the end of the transition period. If they do so, the documents will form part of Annex 43 to the Practical Handbook for Border Guards that concerns Withdrawal Agreement beneficiaries. The documents will then continue to prove that the holder has a right of residence in the Schengen area without controls at internal borders and will also have visa exempting effect.

Where a third country family member subject to the visa obligation presents a residence document issued under Directive 2004/38/EC, which was issued by a Schengen State with a declaratory scheme and with an individual date of validity beyond the end of the transition period, border guards shall accept the document as having visa exempting effect. If a Member State invalidates such documents and requests holders of such documents to replace existing documents, it should notify the Commission accordingly. The Commission will then update the information for border guards.

⁶ N.B. Member States with a declaratory scheme should set a deadline for non-UK family members to apply for a new residence document in accordance with Article 18(4) of the Withdrawal Agreement in conjunction with Article 9 of Directive 2004/38/EC.

Where the issuing Schengen State has a *constitutive scheme*, border guards shall accept the residence document as having visa exempting effect only until the end of the grace period. After the grace period, such documents shall be accepted only where the holder provides also a certificate of application issued under Article 18(1)(b) of the Withdrawal Agreement.

Other border procedure matters with regard to Withdrawal Agreement beneficiaries

a) Entry Exit System (EES) and the European Travel Information and Authorisation System (ETIAS)

As a principle, persons legally resident within the Schengen area shall not be included in the Entry Exit System (EES) and the European Travel Information and Authorisation System (ETIAS). Therefore, Withdrawal Agreement beneficiaries shall not be included in these two systems. Further practical instructions will be issued closer to the entry into application of these two systems.

b) Passport control lanes

Withdrawal Agreement beneficiaries have to use the “all passports” or “visa not required” lanes.

c) Schengen Information System (SIS)

As of 1 January 2021, it is possible for Schengen States to introduce refusal of entry alerts for UK nationals in the SIS, as UK nationals are then third country nationals who no longer benefit from EU law on free movement of persons.⁷

Withdrawal Agreement beneficiaries should be checked against the SIS when crossing an external Schengen border.

If a refusal of entry alert comes up in the SIS for a UK national or a family member who is a Withdrawal Agreement beneficiary seeking to cross an external Schengen border, the following applies:

The UK national or family member has a right to enter the Schengen area to transit to the host Member State in which s/he has a right of residence as Withdrawal Agreement beneficiary.⁸

⁷ A Schengen State may introduce any third country national into the SIS for refusal of entry in accordance with Article 24 of Regulation 1987/2006.

⁸ Unless the person figures on the national list of alerts of the Member State whose external borders s/he is seeking to cross and the alert is accompanied by instructions to refuse entry or transit, see Article 6(5)(a) of the Schengen Borders Code and point 4.5.2 Sirene Manual.

However, the Member State of entry needs to inform the Member State that issued the alert. The alert issuing Member State needs to consult the Withdrawal Agreement beneficiary's host Member State.⁹ The host Member State then has to take a decision on whether to terminate the UK national's or the family member's right of residence under the Withdrawal Agreement. The host Member State can only terminate the right of residence if the conditions for restricting rights under the Withdrawal Agreement are fulfilled.¹⁰ If the host Member State does not terminate the residence right, the Member State that issued the SIS refusal of entry alert has to delete it¹¹.

Border Guards shall consider that someone is a Withdrawal Agreement beneficiary if the following applies:

- A UK national or a family member holds a new Withdrawal Agreement residence document issued under Article 18(1) or 18(4) of the Withdrawal Agreement or a certificate of application issued under Article 18(1)(b) of the Withdrawal Agreement.
- In declaratory schemes, a UK national or a family member holds a residence document issued under Directive 2004/38/EC and there is no indication that the person no longer resides in the host Member State.
- In declaratory schemes, a UK national or a family member does not hold a residence document issued under Directive 2004/38/EC before the end of the transition period but can credibly evidence, by other means, that the person exercised free movement rights in the host Member State before the end of the transition period and continues to reside there.
- In constitutive schemes *during the grace period*, the above two points apply as well.

⁹ Article 25(2) of the Schengen Convention.

¹⁰ See Article 20 of the Withdrawal Agreement.

¹¹ The issuing Member State may, however, enter the UK national or family member in question on its national list of alerts.

2. UK NATIONALS WHO ARE BENEFICIARIES OF THE WITHDRAWAL AGREEMENTS CONCLUDED BETWEEN ICELAND, LIECHTENSTEIN AND NORWAY AND THE UK ON THE ONE HAND AND SWITZERLAND AND THE UK ON THE OTHER HAND

The Schengen Associated Countries are not party to the Withdrawal Agreement concluded between the EU and the United Kingdom and are therefore not bound by it.

These countries have, however, made their own arrangements with the United Kingdom for UK nationals and their family members residing in their countries.

Constitutive system:

| | |
|---------------|-------------------------------------|
| Norway | End of the grace period: 31-12-2021 |
|---------------|-------------------------------------|

Declaratory system:

| |
|----------------------|
| Iceland |
| Liechtenstein |
| Switzerland |

The guidelines set out under point 1. above apply mutatis mutandis also to the Schengen Associated Countries.

Specimens of residence documents issued by the Schengen Associated Countries to UK nationals and their family members are included in Annex 43.
