

# Brexit and Migration

CIVIL LIBERTIES, JUSTICE AND HOME  
AFFAIRS



Policy Department for Citizens' Rights and Constitutional Affairs  
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## **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at the request of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), focuses on the future relationship between the UK and the EU following the UK's withdrawal from the EU in the field of migration (excluding asylum), including future movement of EU citizens and UK nationals between the EU and UK. Moreover, it investigates the role of the Court of Justice of the EU.

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## LIST OF ABBREVIATIONS

<b>ACP</b>	<b>Partnership Agreement with African, Caribbean and Pacific Group of States</b> (also referred to as Cotonou Agreement)
<b>AFSJ</b>	<b>Area of Freedom, Security and Justice</b>
<b>CEEC</b>	<b>Central and Eastern European Countries</b>
<b>CETA</b>	<b>Comprehensive Economic and Trade Agreement</b> (between EU and Canada)
<b>CMR</b>	<b>Centre for Migration Law, Radboud University Nijmegen</b> (NL)
<b>CTA</b>	<b>Common Travel Area</b>
<b>EAM</b>	<b>European Agenda on Migration</b>
<b>EAW</b>	<b>European Arrest Warrant</b>
<b>EC</b>	<b>European Community</b>
<b>EC-Swiss</b>	<b>Agreement between EC and Swiss Confederation on Free Movement</b>
<b>EEA</b>	<b>European Economic Area</b> (EU plus EFTA minus Switzerland)
<b>EEC</b>	<b>European Economic Community</b>
<b>EES</b>	<b>Entry and Exit System</b>
<b>EFTA</b>	<b>European Free Trade Association</b> (Norway, Iceland, Liechtenstein, Switzerland)
<b>EFTA-EEA-States</b>	<b>EFTA member states</b> (Norway, Iceland, Liechtenstein) <b>participating in EEA</b>
<b>ESA</b>	<b>EFTA Surveillance Authority</b>
<b>EP</b>	<b>European Parliament</b>
<b>EU</b>	<b>European Union</b>
<b>EU-27</b>	<b>All Member States of the European Union except UK</b> (EU after Brexit)
<b>EUROSUR</b>	<b>European Border Surveillance System</b>
<b>FR</b>	<b>Family Reunification</b>
<b>FRD</b>	<b>Family Reunification Directive</b>
<b>Frontex</b>	<b>European Border and Coast Guard Agency (Frontières extérieures)</b>
<b>GAMM</b>	<b>Global Approach to Migration and Mobility</b>
<b>GATS</b>	<b>General Agreement on Trade in Services</b>
<b>LIBE</b>	<b>Committee on Civil Liberties, Justice and Home Affairs</b> (of the European Parliament)
<b>LTR</b>	<b>Long-Term Resident</b>
<b>LTRD</b>	<b>Long-Term Residents Directive</b>
<b>TCN</b>	<b>Third Country National</b> (any person who is not a citizen of the EU)
<b>TEU</b>	<b>Treaty on European Union</b> (Maastricht 1992)
<b>TFEU</b>	<b>Treaty on the Functioning of the European Union</b> (Rome 1957)
<b>WDA</b>	<b>Withdrawal Agreement</b> (the draft version of 19 March 2018)

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## EXECUTIVE SUMMARY

The UK will leave the EU on **29 March 2019**, either with or without an agreement. If the current **Withdrawal Agreement (WDA)**<sup>1</sup> is signed and ratified, a transition period extending free movement until the end of 2020 would apply. Thereafter, the **future relationship** of the UK with the EU as regards mobility and migration is unknown. This study examines four substantive issues relating to the UK's departure from the EU and mobility and migration. These issues are:

- the UK's **existing participation** in EU measures on migration and mobility (**chapter 1**),
- the **rights of EU citizens** and UK nationals to move between the EU and the UK including family reunification (**chapter 2**),
- models for **future cooperation** between the EU and the UK in the field of migration and mobility (from the EU's perspective) (**chapter 3**), and
- the role of the **Court of Justice of the European Union** and its jurisprudence in migration and mobility (**chapter 4**).

### Existing participation

The UK's existing participation in EU law on migration and mobility can be divided into **two periods**: before and after the Maastricht Treaty (1993). Free movement of EU citizens, already part of EU law when the UK joined the EU in 1973, applies fully to the UK. EU law has never countenanced the separation of the single market's four freedoms – free movement of goods, persons, services and capital – allowing access to some and not to others. Delays to the free movement of workers have been applied to acceding Member States (for up to seven years) but not to other forms of migration and mobility. So, when the UK joined the EU it embraced the **single market** and its **four freedoms**.

However, from 1993, and the Maastricht Treaty calling for the **abolition of border controls** on the movement of persons within the EU, the UK became increasingly concerned about border and migration control. By the time of the Amsterdam Treaty in 1999, the UK had negotiated with the other Member States an **opt out** so that it would not be engaged by EU migration and mobility measures in respect of third country nationals<sup>2</sup> nor would it be obliged to join what had become the Schengen area without internal border controls on the movement of persons (which also became part of EU law in 1999). Thus, the UK was a full member of the single market but only an **occasional visitor** to the EU's area of freedom, security and justice.

In **chapter 1** of the study we set out in detail every measure and the status of the UK in respect of it. Suffice it to note here that from 1999, the UK's immigration policy has become ever **more divergent** from that of the EU. While EU citizens continue to have full free movement rights, including with their family members to move to and live in the UK after 1999, the UK became increasingly concerned about the arrival of third country nationals, even when these were family members of EU citizens (or UK nationals returning to the UK). The UK continues to participate in EU agreements with third countries on **readmission** but not on **visa waiver**. However, the UK is bound by other third country agreements to which the EU had acceded and which include reciprocal migration and mobility rights.

1 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (colored version) in the negotiation round with the UK of 16-19 March 2018; TF50 (2018) 35 - Commission to EU-27, 19 March 2018.

2 The concept third country national (TCN) refers to any person who is not a citizen of the EU.

## Migration and mobility rights

The biggest difference which the UK's departure from the EU will cause in this field is disruption to EU citizens' and UK nationals' **migration and mobility rights** on the territory of the other. After the departure, UK nationals will become third country nationals on the territory of the EU-27. This will mean that unless agreement is reached to the contrary, they will be subject to EU measures on third country nationals such as the Long-Term Residents Directive, or the Blue Card directive.<sup>3</sup> In effect, UK nationals will be covered by a **patchwork** of **EU measures** and **national law**. EU citizens in the UK will be covered by UK immigration law. In order to protect the position of all people who have exercised free movement rights between the UK and the EU, very extensive provisions have been included in the **Withdrawal Agreement** (WDA), a proposed agreement between the EU and the UK to regulate an orderly departure, covering the continuity of rights of those who have used their free movement rights.

The objective of the Withdrawal Agreement is to limit to a minimum the disruption to people's lives which the UK's departure is likely to cause. It guarantees work and residence rights and the entitlement to non-discrimination on grounds of nationality. All categories of EU citizens and UK nationals are covered in the Withdrawal Agreement from visitors to pensioners and the economically inactive. Assuming the successful conclusion of the Withdrawal Agreement, the issue going forward will be ensuring consistent and faithful implementation of the Withdrawal Agreement. To this end the Withdrawal Agreement has extensive provisions on supervision, oversight and the continuing jurisdiction of the Court of Justice of the European Union (**CJEU**) regarding the situation of those EU citizens and UK nationals who have already exercised their free movement rights. A **transition period** is included in the Withdrawal Agreement to end on 31 December 2020 during which period people would still be entitled to move and start acquiring migration and mobility rights under the EU rules. **Chapter 2** explains in depth these provisions.

## Models for future cooperation

One of the open questions for both the EU and the UK is what kind of **future cooperation** in the fields of migration and mobility is desirable. The EU has **extensive experience** in negotiating agreements with third countries (and groups of third countries) in this field. One of the guiding principles of the EU's approach has been to offer closer cooperation to those states which participate in the **Schengen area of no border controls** than to others. This is because the **reciprocal** security assured by the Schengen rules on visas and border controls means there is greater confidence both parties can have in extending free movement and mobility rights within the area. Thus, the EFTA-EEA states (Iceland, Liechtenstein and Norway) and Switzerland all enjoy full free movement rights with a few minor modifications to adjust to the fact that there is no common citizenship project at work with these states. Thereafter, the EU has negotiated agreements which include parts of mobility and migration. **Visa waiver agreements** which abolish visa requirements for visitors have been self-standing agreements dealing only with the one issue. **Workers' rights**, primarily non-discrimination on grounds of nationality but not general access to the labour market have been included in trade agreements covering a wide range of issues. The right of **establishment** (including self-employment) has included access to the territory for self-employed activities as well as non-discrimination and is generally included in trade agreements. **Service provision** is the most commonly included provision in trade agreements and includes a dimension of mobility for service providers (now usually based on the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO)). Students, pensioners and the economically inactive are rarely granted mobility rights in EU agreements with third

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3 Directive 2003/109 (Long-Term Residents Directive) concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44); Directive 2009/50 (Blue Card Directive) on conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ 2009 L 155/17).

countries. **Coordination of social security** on the traditional EU terms of non-discrimination, aggregation of contributions and export accompany all agreements with provisions on workers. The detail of these models is found in **chapter 3**. What kind of agreement might be acceptable to the EU and the UK after the latter's departure, will depend on the degree of **reciprocity** which the parties will countenance. All agreements have reciprocal obligations so the treatment of EU citizens and UK nationals would have to follow this pattern.

### The Court of Justice of the European Union

The role of the **Court of Justice of the European Union** has been of great importance to the realisation of free movement rights in the EU. It is worth remembering that **UK legislation** implementing free movement rights has been at the core of 21 judgments of the Court in the ten-year period 2008–2018. This is not insignificant as it indicates a degree of uncertainty on the part of judges in the UK about the correct interpretation of EU free movement rights. The Court's role in providing one definitive interpretation of EU rights has been central to the development of **EU law**. The confidence that all Member States have that EU law is applied in the same manner across the EU and that in the event of disagreement there is a Court charged with providing a solution for all, has been central to making free movement of persons work. Divergent interpretations of EU law undermine its authority and effectiveness. **Harmonisation** is key to the smooth operation of EU law generally. Thus, the continuing jurisdiction of the Court to matters of free movement of persons arising in the UK after Brexit is a matter of much concern. The Withdrawal Agreement, if signed and ratified, provides a **continuing role** for the Court until the end of the **transition period** (31 December 2020). Thereafter a Joint Committee will be established to settle disputes. This issue is dealt with in depth in **chapter 4**.

### Recommendations

Conclusions and recommendations are subject of **chapter 5**. The first **priority** of the EU as regards migration in the Brexit context is to secure, in a durable manner, the **rights of EU citizens and UK nationals** who have exercised free movement rights and invested their lives in the territory of the other party. The Withdrawal Agreement provides a good basis to achieve this objective. The Commission has indicated that its objectives in the negotiations of the Withdrawal Agreement did not extend to UK nationals resident in the UK or returning there. This means that **some rights** which these people currently have will fall away and **are not protected** by the Withdrawal Agreement. The **future relationship** of the EU and the UK regarding mobility and migration after the end of the transition period (assuming that the Withdrawal Agreement is signed and ratified) can take one of a number of forms. Depending on the willingness of the parties, a very close relationship could be negotiated such as that of the EEA states or if there is no desire for such a privileged relationship, something very distant with virtually no rights of mobility or migration such as the EU Canada Agreement.

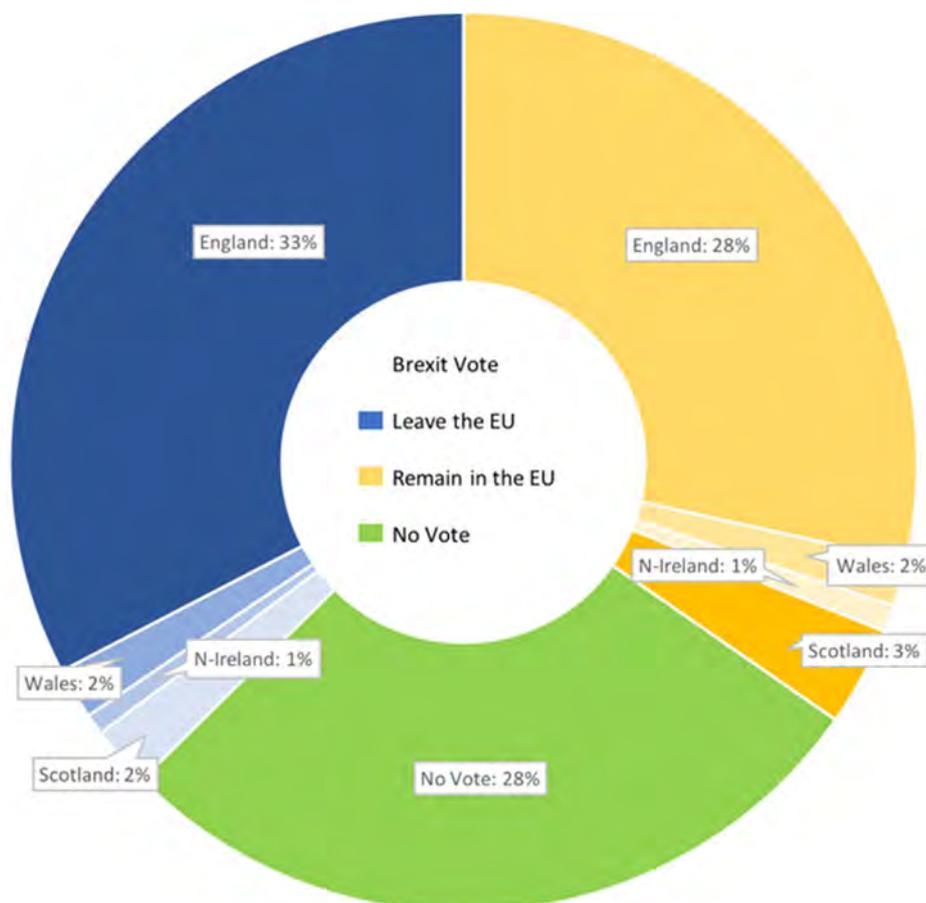
Visit the European Parliament's homepage on [migration in Europe](#).

## INTRODUCTION

This study<sup>4</sup> is about the **future relationship** between the **UK** and the **EU** following the UK's **withdrawal** from the EU in the field of **migration**, including future movement of EU citizens and UK nationals between the EU and UK, i.e. the **consequences of Brexit** in the field of mobility and migration excluding asylum.

### Brexit Vote

On 23 June 2016 in a UK **referendum** which had no legally binding force, 72% of the registered voters cast their vote. The voters were almost equally divided into 52% (leave) and 48% (remain). With reference to the total electorate this meant **35% voted to remain**, **37% voted to leave**, with a remaining part of **28% non-voters**. The turnout varied between 63% in Northern Ireland, 67% in Scotland, 72% in Wales and 73% in England. Voters in Scotland (62%) and Northern Ireland (56%) voted in majority to stay in the EU, whereas in England (53%) and Wales (53%) the majority voted to leave the EU.



**Chart 1 Brexit Vote**

Source: BBC <[www.bbc.com/news/politics/eu\\_referendum/results](http://www.bbc.com/news/politics/eu_referendum/results)>; Centre for Migration Law, Radboud University

4 Following the invitation of 28 March 2018 to submit an offer for a study within the framework contract IP/C/LIBE/FWC/ 2013-006/LOT 4 (Brexit and Migration), the Odysseus Network submitted an offer on 10 April 2018, which was accepted by the European Parliament on 7 May 2018. The subject Brexit and asylum is developed in another study: contract IP/C/LIBE/FWC/2013-006/LOT 3.

The decision to hold a referendum had been a campaign promise of the (then) prime minister as a result of very substantial discord in the prime minister's own party over the UK's membership of the EU. When the prime minister's party won a majority in parliament on 7 May 2015 the die was cast leading to the UK's departure from the EU. After a series of negotiations with EU leaders about possible modifications to EU law which the (then) prime minister demanded in return for his support to the "remain" campaign in the national referendum (which mainly revolved around the treatment of EU citizens coming to the UK or working and living there already) the referendum date was set. The referendum campaign was highly divisive in the UK political class with the two main parties divided about their positions.

Following the announcement of the result, the UK prime minister resigned and was replaced. After some constitutional dispute in the UK on 29 March 2017 the next prime minister **triggered article 50 TEU** which permits a Member State to leave the EU with a two-year negotiation period. This was formally done by handing over a letter to Donald Tusk, the President of the European Council. After authorizing the opening of negotiations with the United Kingdom, the Directives were set for the negotiation of an agreement with the UK setting out the arrangements for its withdrawal from the European Union. During the remainder of 2017, position papers were published on matters needed for an orderly withdrawal of the UK from the Union. In December 2017, the Commission communicated to the European Council on the state of progress of the negotiations. It took, however, until March 2018 before a couple of drafts of the Withdrawal Agreement (WDA) were published, the latest on 19 March 2018. In this **Withdrawal Agreement**, i.e. the **draft of 19 March 2018**, three issues emerged as central:

- the divorce **bill** – what was the UK's contribution to the EU budget on the basis of existing commitments;
- the position of **EU citizens** in the UK and **UK nationals** in the EU Member States; and
- the **Irish border**.

## Study

This study focuses on the second issue: the position of **EU citizens and UK nationals** regarding the territory of the other. It also takes into account the issue of the **Irish border**.

We will examine this from **three perspectives**. After we have mapped the instruments of the EU on migration and mobility in which the UK participates (**chapter 1**), we will investigate the contents and consequences of the Withdrawal Agreement for migration and mobility issues. The draft Withdrawal Agreement provides for a complex and intricate set of rights for EU citizens living in the UK (including those who move to the UK during the proposed transitional period, which would end on 31 December 2020). We set out the terms of this agreement in **chapter 2** and explain its consequences for: (1) the **position of UK nationals** exercising their free movement rights in the EU, and (2) of **EU citizens** exercising their free movement rights in the UK. In **chapter 3** we will examine the possible models for a **future relationship** between the UK and EU regarding movement of persons.

The EU has designed a variety of agreements with neighbours about mobility and movement of persons which reflect the degree of integration of the third country into the EU's project of **border control free movement**. Agreements with other states which do not share that objective also include some degree of mobility or migration provisions. These are examined by class of agreement. One of the constant concerns of the EU is ensuring that any agreement with the UK – both the Withdrawal Agreement and any future agreement – will be subject to a consistent and coherent application, implementation and interpretation. The importance of this for people's lives is self-evident. Thus, a substantial section is devoted to this issue. We therefore examine in **chapter 4** the applicability of the case law of the **Court of Justice of the EU** during and after the transition period and give an overview of the most important judgments, especially those with an impact on the UK legislation. The chapter furthermore explains the consequences of the Withdrawal Agreement for the **jurisdiction** of the Court

of Justice of the EU, especially with regard to the situation of EU citizens and UK nationals after the UK's departure. In the last section of this chapter, we give an overview of the rules on judicial review and dispute resolution in a number of cooperation models between the EU and third countries, with a special focus on the role of the Court of Justice. This information can serve as a source of inspiration for further elaborations on future models and possible consequences for the position of the CJEU.

In **chapter 5** we set out the **conclusions** and **recommendations** to the European Parliament regarding the position of EU citizens and UK nationals.

### Terminology

In this report we have used - as far as possible - the terminology set out in article 2 of the Withdrawal Agreement (WDA), i.e. the draft version of the Withdrawal Agreement of 19 March 2018.<sup>5</sup>

- *Member State* means Member State of the (European) Union (or EU);
- *Member States (excluding the UK)* means the (collective of all) current Member States of the EU excluding the UK; (also referred to as EU-27);
- *(European) Union citizen* (or EU citizen) means any person holding the nationality of a Member State;
- *United Kingdom national* (or UK national) means a national of the United Kingdom;<sup>6</sup>
- *third country* means a non-EU Member State;
- *third country national* means a non-EU citizen.

This terminology, however, is not in complete conformity with some sources we have used, particularly regarding statistics. The available UK statistics (as used in Table 3 and 4) mention *British citizen* which has a slightly different, i.e. broader meaning, than the term *UK national*. According to Macdonald's, the meaning of *British citizen* for the purpose of the right of abode and freedom from immigration control in the UK domestic context is different from the meaning of *British national* (under international human rights law) or *UK national* (for the purpose of free movement and residence under EU law).<sup>7</sup> However, this slight difference in meaning has no bearing on the analysis in this report.

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5 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (colored version) in the negotiation round with the UK of 16-19 March 2018; TF50 (2018) 35 - Commission to EU-27, 19 March 2018.

6 As defined in the New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland of 31 December 1982 on the definition of the term 'nationals' (*OJ* 1983 C 23/1), together with Declaration No 63 annexed to the Final Act of the intergovernmental conference which adopted the Treaty of Lisbon (*OJ* 2007 C 306/270).

7 Macdonald, I.A. & R. Toal (2014), *Macdonald's Immigration Law & Practice*, 9<sup>th</sup> ed., London: LexisNexis.

## 1. UK's Participation in EU measures on Migration and Mobility

### KEY FINDINGS

- The **UK** with accession to the EU in 1973, accepted its **four freedoms**. Subsequently, all measures on Free Movement apply to the UK (section 1.1).
- The UK **opted-out** on most of the measures on **Regular Migration** (section 1.2), **Borders & Visas** (section 1.3), and **Irregular Migration** (section 1.4).
- The measures to which the UK did **opt-in** are a clear indication of the issues where the UK might be willing to conclude an **agreement** with the EU-27 - either in the Withdrawal Agreement or in a separate agreement after Brexit.
- From the point of **harmonisation of law** and effectivity of the implementation, the EU would have preferred the UK to opt-in to all measures listed on Regular Migration (section 1.2), Borders & Visas (section 1.3), and Irregular Migration (section 1.4).
- The measures on Regular Migration (section 1.2), Borders & Visas (section 1.3), together with Irregular Migration (section 1.4) form the **basic set** of EU rules determining the **legal status of UK nationals** and their family members in the **EU-27** in case of a no-deal Brexit.
- The **UK**, being a **third country after Brexit**, cannot participate directly in the measures listed in this chapter. Future cooperation in these fields could take the form of additional EU-UK agreements, or unilateral alignment of UK national law with some of those instruments.

The existing EU measures regarding migration and mobility can be divided into several categories:

- (1) Free movement (section 1.1),
- (2) Regular migration (section 1.2),
- (3) Borders and Visas (section 1.3),
- (4) Irregular Migration (section 1.4), and
- (5) Agreements with third countries (section 1.5).<sup>8</sup>

Each of these **categories** include measures that involve: EU citizens, third country nationals (i.e. non-EU citizens), or both. In the following sections these existing European Union measures are listed and a qualification of **UK's current participation** in each of these (**applicable, opted in, or opted out**).<sup>9</sup> Repealed, replaced or not yet adopted measures are not listed. The UK, in a Protocol to the Amsterdam Treaty of 1997, acquired the right to opt-in or opt-out from EU measures on migration of third-country nationals, borders and visa. The lists below (in sections 1.2-1.5.3) show that the UK opted out most of them. The UK never had that option with regard to measures on free movement of Union citizens and all measures in section 1.1 apply to the UK. The UK chose to become a party to all Association Agreements the EU concluded with third countries (listed in section 1.5.4).

Deciding on which of the measures listed under sections 1.2-1.5 would be more or less beneficial or urgent in a future EU-UK cooperation is basically a political question, academic research cannot answer in a 'neutral' way. Since the UK is and will remain outside the Schengen visa cooperation, future UK participation in the Visa Facilitation, Visa Waiver and Association Agreements (sections 1.5.2-1.5.4) would make no sense. The pros and cons of future participation of the UK in the EU Readmission Agreements could be considered (section 1.5.1).

<sup>8</sup> The category of asylum is dealt with in another study (Lot 3).

<sup>9</sup> The measures are listed in alphabetical order.

### 1.1. EU measures on Free Movement

Name	Description	Applicable to UK
Citizenship of the Union	Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Citizenship or Citizens Directive)	X
EEA	Agreement on the European Economic Area (OJ 1994 L 1/3)	X
EC-Swiss	Agreement between the European Community and the Swiss Confederation on the free movement of persons (OJ 2002 L 114/6)	X
Movement of Workers	Regulation 492/2011 on the freedom of movement for workers within the Union	X

### 1.2. EU measures on Regular Migration

Name	Description	UK opted	
		out	in
Blue Card	Directive 2009/50 on conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ 2009 L 155/17)	X	
Family Reunification	Directive 2003/86 on the right to family reunification (OJ 2003 L 251/12)	X	
Intra-Corporate Transferees	Directive 2014/66 on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (OJ 2014 L 157/1)	X	
Long-Term Residents	Directive 2003/109 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44)	X	
Long-Term Residents extended	Directive 2011/51 long-term resident status for refugees and persons with subsidiary protection (OJ 2011 L 132/1)	X	
Mutual Information	Council Decision 2006/688 on the establishment of a mutual information mechanism in the areas of asylum and immigration (OJ 2006 L 283/40)		X
Researchers and Students	Directive 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes, educational projects and au pairing (OJ 2016 L 132/21)	X	
Residence Permit Format I	Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals (OJ 2002 L 157/1)		X
Residence Permit Format II	Regulation 2017/1954 on a uniform format for residence permits for third-country nationals (OJ 2017 L 286/9)	X	
Seasonal Workers	Directive 2014/36 on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment (OJ 2014 L 94/375)	X	
Single Permit	Directive 2011/98 on 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 (OJ 2011 L 343/1)	X	
Social Security TCN I	Regulation 859/2003 on third-country nationals' social security extending reg. 1408/71 and reg. 574/72 (OJ 2003 L 124/1)		X
Social Security TCN II	Regulation 1231/2010 on social security for EU citizens and third-country nationals who move within the EU (OJ 2010 L 344/1)		X

### 1.3. EU measures on Borders and Visas

Name	Description	UK opted	
		out	in
Border and Coast Guard Agency	Regulation 2016/1624 creating a borders and coast guard agency (OJ 2016 L 251/1)	X	
Borders Fund II	Regulation 515/2014 borders and visa fund (OJ 2014 L 150/143)	X	
EES	Regulation 2017/2226 establishing an entry/exit system to register entry and exit data and refusal of entry data of third country nationals crossing the external borders (OJ 2017 L 327/20)	X	
EUROSUR	Regulation 1052/2013 establishing the European border surveillance system (EUROSUR) (OJ 2013 L 295/11)	X	
Local Border traffic	Regulation 1931/2006 local border traffic within enlarged EU at external borders of EU (OJ 2006 L 405/1)	X	
Maritime Surveillance	Regulation 656/2014 rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (OJ 2014 L 189/93)	X	
Passenger Data	Directive 2004/82 on the obligation of carriers to communicate passenger data (OJ 2004 L 261/24)		X
Passports	Regulation 2252/2004 on standards for security features and biometrics in passports and travel documents (OJ 2004 L 385/1)	X	
Researchers	Recommendation 761/2005 on uniform short-stay visas for researchers from third countries (OJ 2005 L 289/23)	X	
Schengen Implementing Agreement	Convention implementing the Schengen agreement of 14 June 1985 (OJ 2000 L 239)	X	
Schengen Borders Code	Regulation 562/2006 establishing a community code on the rules governing the movement of persons across borders (OJ 2006 L 105/1)	X	
Schengen Borders Code (codified)	Regulation 2016/399 on the rules governing the movement of persons across borders. Codification of all previous amendments of the (Schengen) borders code (OJ 2016 L 77/1)	X	
Schengen Evaluation	Regulation 1053/2013 Schengen evaluation (OJ 2013 L 295/27)	X	
SIS II	Regulation 1987/2006 establishing 2nd generation Schengen information system (OJ 2006 L 381/4)	X	
SIS II Access	Council Decision 2016/268 list of competent authorities which are authorised to search directly the data contained in the 2nd generation SIS (OJ 2016 C 268/1)	X	
SIS II Manual	Council Decision 2016/1209 on the Sirene manual and other implementing measures for SIS II (OJ 2016 L 203/35)	X	
Temporary Internal Border Control	Council Decision 2017/818 setting out a recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk (OJ 2017 L 122/73)	X	
Transit Bulgaria a.o.	Decision 565/2014 on transit through Bulgaria, Croatia, Cyprus and Romania (OJ 2014 L 157/23)	X	
Transit Documents	Regulation 693/2003 establishing a specific Facilitated Transit Document (FTD) and a Facilitated Rail Transit Document (FRTD) (OJ 2003 L 99/8)	X	
Transit Documents Format	Regulation 694/2003 format for Facilitated Transit Documents (FTD) and Facilitated Rail Transit Documents (FRTD) (OJ 2003 L 99/15)	X	

Name	Description	UK opted	
		out	in
Transit Switzerland	Decision 586/2008 on transit through Switzerland and Liechtenstein (OJ 2008 L 162/27)	X	
Travel Documents	Decision 1105/2011 on the list of travel documents which entitle the holder to cross the external borders (OJ 2011 L 287/9)	X	
VIS	Decision 512/2004 establishing visa information system (OJ 2004 L 213/5)	X	
VIS	Regulation 767/2008 establishing visa information system and the exchange of data between Member States (OJ 2008 L 218/60)	X	
VIS Access	Council Decision 2008/633 access for consultation of the visa information system by designated authorities of Member States and Europol (OJ 2008 L 218/129)	X	
VIS Management Agency	Regulation 1077/2011 establishing an agency to manage VIS, SIS & Eurodac (OJ 2011 L 286/1)	X	
Visa Code	Regulation 810/2009 establishing a community code on visas (OJ 2009 L 243/1)	X	
Visa Format	Regulation 1683/95 on a uniform format for visas (OJ 1995 L 164/1)		X
Visa List	Regulation 539/2001 listing the third countries whose nationals must be in possession of visas (OJ 2001 L 81/1)	X	
Visa Stickers	Regulation 333/2002 uniform format for forms for affixing the visa (OJ 2002 L 53/4)		X

#### 1.4. EU measures on Irregular Migration

Name	Description	UK opted	
		out	in
Carrier sanctions	Directive 2001/51 on obligation of carriers to return third-country nationals when entry is refused (OJ 2001 L 187/45)		X
Early Warning System	Decision 267/2005 establishing a secure web-based Information and Coordination Network for Member States' Migration Management Services (OJ 2005 L 83/48)		X
Employers Sanctions	Directive 2009/52 on minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ 2009 L 168/24)	X	
Expulsion by Air	Directive 2003/110 on assistance with transit for expulsion by air (OJ 2003 L 321/26)	X	
Expulsion Costs	Decision 191/2004 on the compensation of the financial imbalances resulting from the mutual recognition of decisions on the expulsion of third-country nationals (OJ 2004 L 60/55)		X
Expulsion Decisions	Directive 2001/40 on mutual recognition of expulsion decisions of third-country nationals (OJ 2001 L 149/34)		X
Expulsion Joint Flights	Decision 573/2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals (OJ 2004 L 261/28)		X
Expulsion via Land	Council Conclusion on Expulsion via Land (adopted 22 Dec. 2003 by Council)		X
Immigration Liaison Officers	Regulation 377/2004 on the creation of an immigration liaison officers network (OJ 2004 L 64/1)		X

Name	Description	UK opted	
		out	in
Return Directive	Directive 2008/115 on common standards and procedures in MSs for returning illegally staying third-country nationals ( <i>OJ</i> 2008 L 348/98)	X	
Return Directive Implementing	Recommendation 2017/432 on making returns more effective when implementing the Returns Directive ( <i>OJ</i> 2017 L 66/15)	X	
Return Programme	Decision 575/2007 establishing the European Return Fund as part of the General Programme Solidarity and Management of Migration Flows ( <i>OJ</i> 2007 L 144)		X
Trafficking Persons	Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims ( <i>OJ</i> 2011 L 101/1)		X
Trafficking Victims	Directive 2004/81 residence permits for third-country nationals who are victims of trafficking ( <i>OJ</i> 2004 L 261/19)	X	
Unauthorised Entry	Directive 2002/90 facilitation of unauthorised entry, transit and residence ( <i>OJ</i> 2002 L 328)		X

## 1.5. EU Agreements with Third Countries

### 1.5.1. Readmission Agreements

Name	Description	UK opted	
		out	in
Albania	Readmission agreement with Albania ( <i>OJ</i> 2005 L 124/21)		X
Armenia	Readmission agreement with Armenia ( <i>OJ</i> 2013 L 289/13)	X	
Azerbaijan	Readmission agreement with Azerbaijan ( <i>OJ</i> 2014 L 128/17)	X	
Bosnia and Herzegovina	Readmission agreement with Bosnia and Herzegovina ( <i>OJ</i> 2007 L 334/66)		X
Cape Verde	Readmission agreement with Cape Verde ( <i>OJ</i> 2013 L 282/15)	X	
Georgia	Readmission agreement with Georgia ( <i>OJ</i> 2011 L 52/47)		X
Hong Kong	Readmission agreement with Hong Kong ( <i>OJ</i> 2004 L 17/23)		X
Macao	Readmission agreement with Macao ( <i>OJ</i> 2004 L 143/97)		X
Macedonia (fYRoM)	Readmission agreement with Macedonia ( <i>OJ</i> 2007 L 334/7)		X
Moldova	Readmission agreement with Moldova ( <i>OJ</i> 2007 L 334/149)		X
Montenegro	Readmission agreement with Montenegro ( <i>OJ</i> 2007 L 334/26)		X
Pakistan	Readmission agreement with Pakistan ( <i>OJ</i> 2010 L 287/50)	X	
Russia	Readmission agreement with Russia ( <i>OJ</i> 2007 L 129)		X
Serbia	Readmission agreement with Serbia ( <i>OJ</i> 2007 L 334/46)		X
Sri Lanka	Readmission agreement with Sri Lanka ( <i>OJ</i> 2005 L 124/43)		X
Turkey	Readmission agreement with Turkey ( <i>OJ</i> 2014 L 134/3)	X	
Ukraine	Readmission agreement with Ukraine ( <i>OJ</i> 2007 L 332/48)		X

### 1.5.2. Visa Facilitation Agreements

Name	Description	UK opted	
		out	in
Albania	Visa facilitation agreement with Albania ( <i>OJ</i> 2007 L 334/85)	X	
Armenia	Visa facilitation agreement with Armenia ( <i>OJ</i> 2013 L 289/2)	X	
Azerbaijan	Visa facilitation agreement with Azerbaijan ( <i>OJ</i> 2014 L 128/49)	X	

Name	Description	UK opted	
		out	in
Bosnia and Herzegovina	Visa facilitation agreement with Bosnia and Herzegovina (OJ 2007 L 334/97)	X	
Cape Verde	Visa facilitation agreement with Cape Verde (OJ 2013 L 282/3)	X	
Georgia	Visa facilitation agreement with Georgia (OJ 2011 L 52/34)	X	
Macedonia (fYroM)	Visa facilitation agreement with Macedonia (OJ 2017 L 334/125)	X	
Moldova	Visa facilitation agreement with Moldova (OJ 2013 L 168/3)	X	
Montenegro	Visa facilitation agreement with Montenegro (OJ 2007 L 334/109)	X	
Russia	Visa facilitation agreement with: Russia (OJ 2007 L 129/27)	X	
Serbia	Visa facilitation agreement with Serbia (OJ 2007 L 334/137)	X	
Ukraine	Visa facilitation agreement with Ukraine (OJ 2013 L 168/11)	X	

### 1.5.3. Visa Waiver Agreements

Name	Description	UK opted	
		out	in
Antigua and Barbuda	Visa waiver agreement with Antigua and Barbuda (OJ 2009 L 169/3)	X	
Bahamas	Visa waiver agreement with Bahamas (OJ 2009 L 169/24)	X	
Barbados	Visa waiver agreement with Barbados (OJ 2009 L 169/10)	X	
Brazil	Visa waiver agreement with Brazil (OJ 2012 L 255/3)	X	
Brazil (dipl.)	Visa waiver (diplomatic passports) agreement with Brazil (OJ 2011 L 66/2)	X	
China (dipl.)	Visa waiver (diplomatic passports) agreement with China (OJ 2016 L 76/19)	X	
Colombia	Visa waiver agreement with Colombia (OJ 2015 L 333/3)	X	
Dominica	Visa waiver agreement with Dominica (OJ 2015 L 173/21)	X	
Grenada	Visa waiver agreement with Grenada (OJ 2015 L 173/30)	X	
Kiribati	Visa waiver agreement with Kiribati (OJ 2016 L 198/3)	X	
Marshall Islands	Visa waiver agreement with Marshall Islands (OJ 2016 L 216/3)	X	
Mauritius	Visa waiver agreement with Mauritius (OJ 2009 L 169/17)	X	
Micronesia	Visa waiver agreement with Micronesia (OJ 2016 L 289/4)	X	
Palau	Visa waiver agreement with Palau (OJ 2015 L 332/13)	X	
Peru	Visa waiver agreement with Peru (OJ 2016 L 78/4)	X	
Saint Lucia	Visa waiver agreement with Saint Lucia (OJ 2015 L 173/12)	X	
Saint Kitts and Nevis	Visa waiver agreement with Saint Kitts and Nevis (OJ 2009 L 169/38)	X	
Saint Vincent and the Grenadines	Visa waiver agreement with Saint Vincent and the Grenadines (OJ 2015 L 173/39)	X	
Samoa	Visa waiver agreement with Samoa (OJ 2015 L 173/57)	X	
Seychelles	Visa waiver agreement with Seychelles (OJ 2009 L 169/31)	X	
Solomon Islands	Visa waiver agreement with Solomon Islands (OJ 2016 L 292/3)	X	
Timor-Leste	Visa waiver agreement with Timor-Leste (OJ 2015 L 173/3)	X	
Tonga	Visa waiver agreement with Tonga (OJ 2015 L 317/3)	X	
Trinidad and Tobago	Visa waiver agreement with Trinidad and Tobago (OJ 2015 L 173/66)	X	
Tuvalu	Visa waiver agreement with Tuvalu (OJ 2016 L 213/3)	X	
United Arab Emirates	Visa waiver agreement with United Arab Emirates (OJ 2015 L 125/3)	X	
Vanuatu	Visa waiver agreement with Vanuatu (OJ 2015 L 173/48)	X	

## 1.5.4. Association Agreements

<b>Name</b>	<b>Description</b>	<b>Applicable to UK</b>
ACP (or Cotonou)	Partnership Agreement (also referred to as Cotonou Agreement) with African, Caribbean and Pacific Group of States (23 June 2000; <i>OJ</i> 2000 L 317/3)	X
Albania	Stabilisation and Association Agreement with Albania (12 June 2006; <i>OJ</i> 2009 L 107/166)	X
Algeria	Euro-Mediterranean Association Agreement with Algeria (22 April 2002; <i>OJ</i> 2005 L 265/2)	X
Bosnia and Herzegovina	Stabilisation and Association Agreement with Bosnia and Herzegovina (16 June 2008; <i>OJ</i> 2015 L 164)	X
Chile	Association Agreement with Chile (18 November 2002; <i>OJ</i> 2002 L 352)	X
Egypt	Euro-Mediterranean Association Agreement with Egypt (25 June 2001; <i>OJ</i> 2004 L 304)	X
Georgia	Association Agreement with Georgia (27 June 2014; <i>OJ</i> 2014 L 261/4)	X
Israel	Euro-Mediterranean Association Agreement with Israel (20 November 1995; <i>OJ</i> 2000 L 147)	X
Jordan	Euro-Mediterranean Association Agreement with Jordan (24 November 1997; <i>OJ</i> 2002 L 129)	X
Kosovo	Stabilisation and Association Agreement with Kosovo (27 October 2015; <i>OJ</i> 2016 L 78)	X
Lebanon	Euro-Mediterranean Association Agreement with Lebanon (17 June 2002; <i>OJ</i> 2006 L 143/2)	X
Macedonia (fYroM)	Stabilisation and Association Agreement with Macedonia (9 April 2001; <i>OJ</i> 2004 L 84/13)	X
Moldova	Association Agreement with Moldova (27 June 2014; <i>OJ</i> 2014 L 260/4)	X
Montenegro	Stabilisation and Association Agreement with Montenegro (15 October 2007; <i>OJ</i> 2010 L 108)	X
Morocco	Euro-Mediterranean Association Agreement with Morocco (26 February 1996; <i>OJ</i> 2000 L 70/2)	X
South Africa	Association Agreement with South Africa (11 October 1999; <i>OJ</i> 2004 C 116)	X
Russia	Agreement on partnership and cooperation establishing a partnership with Russia (24 June 1994; <i>OJ</i> 1997 L 327/3)	X
Tunisia	Euro-Mediterranean Association Agreement with Tunisia (17 July 1995; <i>OJ</i> 1998 L 97/2)	X
Turkey	EEC-Turkey Association Agreement (12 September 1963; <i>OJ</i> 1964 P 217)	X
* Turkey Add. Prot.	* EEC-Turkey Association Agreement Additional Protocol (1 January 1973)	X
* Turkey Dec. 2/76	* Decision 2/76 (20 December 1976) on the implementation of Article 12 of the Ankara Agreement	X
* Turkey Dec. 1/80	* Decision 1/80 (19 September 1980) on the Development of the Association	X
* Turkey Dec. 3/80	* Decision 3/80 (19 September 1980) on Social Security	X
Ukraine	Association Agreement with Ukraine (21 March 2014; <i>OJ</i> 2014 L 161/3)	X

## 2. The rights of EU citizens and UK nationals to move between the EU and the UK, including family reunification

### KEY FINDINGS

- The TFEU provides that all Union citizens have the **right to move and reside freely** on the territories of the Member States.
- **Family members** of EU citizens derive a **right to enter into and reside** in any EU Member State from the right of the EU citizen to free movement, regardless of their nationality.
- The Withdrawal Agreement (WDA) is designed to **protect residence and work rights** of EU citizens or UK nationals, and their family members of any nationality, after Brexit during the transition period (until 31 December 2020).
- Part 2 of the WDA **secures** the rights of EU citizens and UK nationals who have exercised their free movement rights in accordance with EU law. They will be **covered for life** as long as they continue to meet certain conditions.
- Under the WDA, EU citizens in the UK will continue to reside in the UK under **domestic law** which mirrors the rights they would have had under EU law but for the departure of the UK from the EU.
- **UK nationals** living in **EU** Member States will be able to continue to reside, work and study in the Member State where they are resident, as long as they started exercising their **free movement** rights **before** 1 January 2021. After Brexit, they will, however, **not enjoy free movement** to another Member State.
- All EU citizens must **apply** for residence documents for settled status or pre-settled (temporary) status within six months of the end of the transition period, i.e. by 30 June 2021. The WDA sets out in great detail the obligation of the UK authorities to issue **residence documents** to EU citizens in the UK (**'settled status'**).
- The main requirement for settled status to be granted will be residence in the UK, and the absence of a **serious criminal record** and other public policy reasons. Contrary to the Citizens Directive, the WDA allows for systematic checks of criminal records.
- After Brexit, **UK nationals** in the EU will become **third country nationals** deriving their rights from national law and the EU directives on legal migration.

This chapter will provide an overview of the rights of EU-27 citizens and UK nationals to move between the UK and the other Member States of the EU, including the right to family reunification of families with different nationalities moving together, before the exit date, during the transition period, and after the expiry of the transition period, based on the WDA as it stands at the time of finalising this research,<sup>10</sup> and including a critical assessment of the movement rights granted during the transition period against the current rules under the Citizens Directive (Dir. 2004/38) and the Regulation on Free movement of workers (Regulation 492/2011).<sup>11</sup>

<sup>10</sup> The version of the Withdrawal Agreement of 19 March 2018: see footnote 5.

<sup>11</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance). Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (Text with EEA relevance).

It is notoriously difficult to estimate the size of EU migrant populations throughout Europe, as EU citizens are not always required to register with the municipalities in which they reside and many move back and forth between countries on a temporary or seasonal basis.<sup>12</sup> As a result, they often do not show up in official **statistics**. According to numbers published by Eurostat, approximately 1.3 million UK nationals reside outside the UK in the EU and approximately 3.8 million EU citizens reside in the UK.<sup>13</sup>

#### *UK nationals in the EU (outside the UK)*

In 2015, the UK was the third most important **sending country**, after Romania and Poland. Each country had about between 100,000 and 160,000 nationals leaving the country.<sup>14</sup> Data on UK residents in EU Member States suggest that **largest numbers** of UK nationals live in **Spain** (293,000), France (153,000), Ireland (107,000) and Germany (96,000).<sup>15</sup> Furthermore, UK nationals make up a notable share (around 2%) of the populations of Malta and Cyprus.

From high-skilled workers employed by multinational corporations in the Randstad megaregion in the Netherlands to small business owners in Cyprus and retirees on the Costa Brava in Spain, UK nationals living in the EU (outside the UK) constitute a **diverse group**, not only in terms of economic status, also in terms of age groups and income levels.<sup>16</sup> The characteristics of UK nationals living in Europe vary by country. In Ireland, Germany and the Netherlands, most UK nationals appear to have moved for work and are in relatively high-skilled jobs. In Germany, more than half of all UK nationals have a University degree and a further 20% have some kind of postsecondary qualification.<sup>17</sup> By contrast, most UK nationals in Spain are so-called life-style migrants which is reflected in the number of retirees and people living in coastal holiday regions such as Alicante and Malaga and in the high proportion of economically inactive residents.<sup>18</sup>

A large number of UK nationals living in other EU countries are **students**.<sup>19</sup> For UK nationals looking to complete part of their studies abroad, European Universities are a common choice. Across the academic years 2013/2014, 2014/2015 and 2015/2016, 52.7% of all UK student mobilities took place in a country from the European Union. France was the most popular destination country, having 14.5% of all mobilities, followed by Spain (12.4%).<sup>20</sup> The most popular non-EU destination country was the

12 Benton, M. (2017), *Safe or Sorry? Prospects for Britons in the European Union after Brexit*, Brussels: Migration Policy Institute Europe, p. 1.

13 See Annex Table 3 and Table 4.

14 European Commission, *2017 Annual report on Intra-EU Labour Mobility*, Brussels 2018, p. 41.

15 See Annex Table 3.

16 Benton, M. (2017), *Safe or Sorry? Prospects for Britons in the European Union after Brexit*, Brussels: Migration Policy Institute Europe, p. 1-11.

17 In Germany, 58% of UK immigrants had an academic or professional qualification as of 2016. In the Netherlands, more than half of UK workers earn more than €3,000 a month (and 40% earn more than €4,000). Benton, M. (2017), *Safe or Sorry? Prospects for Britons in the European Union after Brexit*, Brussels: Migration Policy Institute Europe, p. 14.

18 In Spain, UK nationals constitute the largest group of EU citizens after Romanians, and one third are pensioners. Approximately 18% of the UK residents in Spain reported being in work in the 2011 census. Benton, M. (2017), *Safe or Sorry? Prospects for Britons in the European Union after Brexit*, Brussels: Migration Policy Institute Europe, p. 2, 12, 15.

19 Benton, M. (2017), *Safe or Sorry? Prospects for Britons in the European Union after Brexit*, Brussels: Migration Policy Institute Europe, p. 14.

20 In the 2015/2016 academic year, France received 3,980 UK students, followed by Spain (3,805), and Germany (2,405). Benton, M. (2017), *Safe or Sorry? Prospects for Britons in the European Union after Brexit*, Brussels: Migration Policy Institute Europe, p. 14.

United States (12.1% of all instances).<sup>21</sup> In absolute numbers, in the 2015/2016 academic year, France received 3,980 UK students, followed by Spain (3,805), and Germany (2,405).<sup>22</sup>

It is difficult to say something about the degree of settlement of UK nationals in the other EU Member States, as most countries lack data on UK nationals' length of residence. However, data from Spain suggest that a large portion of its UK residents have lived there for more than five years, which means that they have a right to **permanent residence** based on the Citizens Directive (see below).<sup>23</sup> Similarly, in Germany, data suggest that 74% of UK nationals have been residing there for five years or more.<sup>24</sup>

### EU-27 citizens in the UK

With almost 4 million EU citizens residing in the UK, the UK is, together with Germany, the **main country of residence** for EU citizens (residing outside their own Member State). In 2016, the UK, together with Germany, hosted almost 50% of all EU movers of working age (20-64). Net intra-EU mobility to Germany and the UK is around four times higher than to any other EU Member State or EFTA country.<sup>25</sup> Furthermore, the UK hosts the largest number of EU movers who arrived during the past ten years (1.8 million).<sup>26</sup> 69% of EU citizens residing in the UK arrived in the past five years.<sup>27</sup> Most of the EU citizens residing in the UK are Polish (1,021,000), Romanian (411,000), Irish (350,000) or Italian (297,000).<sup>28</sup>

## 2.1. Present

This section will describe the **residence** and **work rights** provided to **EU citizens** (including UK nationals) and their family members under the TFEU,<sup>29</sup> Directive 2004/38 and Regulation 492/2011. It will analyse relevant CJEU case law on this matter, in addition to the overview of the case law provided in section 4.1.

Article 20 of the TFEU establishes the criteria and content of **citizenship of the Union**. Paragraph 2(a) provides that all Union citizens shall have the **right to move and reside** freely on the territories of the Member States. Similarly, article 21 of the TFEU confers the right of free movement to all citizens of the EU by providing that 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. The right to free movement and the limitations and conditions regarding this right for all Union citizens and their family members have been specified in Directive 2004/38, commonly referred to as the **Citizens Directive**.<sup>30</sup> This directive contains the free

21 Wake, D. & K. Allison (2018), *Gone International: Expanding Opportunities. Report on the 2015-16 graduating cohort*, London: Universities UK International, p. 24  
<universitiesuk.ac.uk/International/Documents/Gone/International\_expanding/opportunities\_digital.pdf> [30 June 2018].

22 Benton, M. (2017), *Safe or Sorry? Prospects for Britons in the European Union after Brexit*, Brussels: Migration Policy Institute Europe, p. 14.

23 Five years is also the period of residence required under the Long-term residents directive for TCNs to acquire the EU long-term residence status.

24 Benton, M. (2017), *Safe or Sorry? Prospects for Britons in the European Union after Brexit*, Brussels: Migration Policy Institute Europe, p. 16-17.

25 European Commission (2018), *2017 Annual report on Intra-EU Labour Mobility*, Brussels: EC, p. 31.

26 European Commission (2018), *2017 Annual report on Intra-EU Labour Mobility*, Brussels: EC, p. 23

27 European Commission (2018), *2017 Annual report on Intra-EU Labour Mobility*, Brussels: EC, p. 50

28 See Annex Table 4

29 Treaty on the Functioning of the European Union, OJ 2012 C 326.

30 OJ 2004 L 158/77, and corrigenda OJ 2004 L 229/35, OJ 2005 L 197/34, and OJ 2007 L 204/28. An in-depth examination of the provisions of the Directive and the relevant CJEU case law can be found in: Guild, E., S. Peers & J. Tomkin (2014), *The EU Citizenship Directive, A Commentary*, Oxford: Oxford University Press.

movement rules that were previously contained in separate instruments.<sup>31</sup> Article 45 of the TFEU establishes the right to free movement of workers. Specific rules concerning the free movement of workers have been laid down in Regulation 492/2011, which aims to facilitate access to the employment market for Union citizens making use of their right to free movement. Lastly, article 49 TFEU contains the right to establishment (self-employment) of EU citizens on the territory of another Member State.

### 2.1.1. Family members

The goal of the Citizens Directive is to protect the right to free movement of EU citizens to the territory of other EU Member States. In order to guarantee that the EU citizen is not deterred from exercising their free movement rights, the directive equally confers the **right to entry** and **residence of family members** of any nationality of EU citizens. Paragraph 2 of article 6 thus provides that the provisions of paragraph 1 shall also apply to family members of Union citizens. According to article 2(2) of the directive, family member refers to spouses, registered partners in case the legislation of the host state treats registered partnerships as equivalent to marriage, children, including those of the spouse or the registered partner under the age of 21 or in case they are dependants, and dependent direct relatives in the ascending line, including those of the spouse or registered partner. In order to derive rights from the Citizens Directive, it does not matter whether the family relationship was established before or after the EU citizen moved to the territory of the host Member State.<sup>32</sup> Article 3(2) of the Citizens Directive provides that Member States shall ‘facilitate’ entry and residence of any other family members, not covered by article 2(2) and who are either (a) dependants or members of the household of the Union citizen, or where serious health grounds strictly require the personal care of the family member by the Union citizen, or (b) partners with whom the Union citizen has a durable relationship.

As **family members** of the EU citizens **derive** their right to reside on the territory of a host Member State from the right of the EU citizen to free movement, it does not matter whether the family members themselves are EU citizens or third-country nationals (TCNs). The directive in some cases however gives a preferential treatment to family members who are EU citizens as opposed to those who are TCNs. Article 9 of the Citizens Directive for instance provides that TCN family members need a residence card when their stay on the territory of the host state exceeds three months, whereas EU family members of EU citizens do not require such a document (article 8). Also, family members of EU citizens who are EU citizens themselves will have to fulfil less demanding conditions in case they want to stay on the territory of the host state in cases of death or departure of the EU citizen (article 12(1)) or divorce, annulment or marriage or termination of registered partnership (article 13(1)). TCN family members of EU citizens can retain their right of residence in such cases, provided they fulfil the conditions specified in articles 12(2) and 13(2) Citizens Directive.

Article 12(3) of the directive provides that children of a Union citizen, irrespective of their nationality, will retain their right of residence in the host Member State after the Union citizen's death or departure from the host Member State, if these children reside in the host Member State and follow education there. The **right of residence** stretches out to the **parent** who has actual custody of the children. The right of residence ends when the **child** has completed their studies. As this provision applies to children (and their parents) of all EU citizens who have made use of their free movement

31 Dir. 64/221/EEC, and Dir. 68/360/EEC on the rights of entry and residence; Dir. 72/194/EEC, and Dir. 75/34/EEC on establishment and services; Dir. 73/148/EEC, Dir. 75/35/EEC, and Dir. 90/364/EEC on the right of residence for persons of sufficient means; Dir. 90/365/EEC on the rights of residence for employees and self-employed who have ceased their occupational activity and Dir. 93/96/EEC on the rights of residence for students.

32 CJEU 25 July 2008, C-127/08 *Metock*, ECLI:EU:C:2008:449; CJEU 19 December 2008, C-551/07 *Deniz Sahin*, ECLI:EU:C:2009:755.

rights under directive 2004/38, it is broader than the *Baumbast* judgment of the CJEU (discussed below) which only confers a right of residence to children (and their parents) of workers who have left the host state.<sup>33</sup>

For both EU citizens and their family members goes that they will only be able to profit from the rights conferred to them under directive 2004/38 if the EU citizen is **exercising** their **right to free movement**. The CJEU has however formulated three exceptions to this principle. These are:

- EU citizens who return to their home country after having exercised their free movement rights in the EU and who seek to bring or be joined by their third-country national family members;<sup>34</sup>
- EU citizens who are frontier workers, i.e. who, from their home state, carry out economic activities in another Member State and whose TCN family member resides in the home Member State;<sup>35</sup>
- EU citizens living in their home state who depend on a TCN parent or other family member.<sup>36</sup>

As regards the first situation (the so-called *Surinder Singh*-situation), the CJEU has ruled that a national of a Member State might be deterred from leaving his or her country of origin to exercise their EU-free movement rights if, upon returning to the Member State of which he or she is a national, 'the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State'.<sup>37</sup> According to the Court, the free movement rights cannot be fully effective if EU citizens may be deterred from exercising them by obstacles raised in their country of origin to the entry and residence of their spouse. The Court concluded that, accordingly, when an EU citizen who returns to their country of origin after having exercised free movement rights, their spouse 'must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State'.<sup>38</sup> Based on CJEU case law, in '**return situations**', TCNs benefit from EU law residence rights derived from an EU citizen.<sup>39</sup>

As regards the second situation, the CJEU in the *S&G* judgment ruled that the right of an EU citizen under article 45 TFEU to take up employment as a **frontier worker** in another Member State could be infringed in case a TCN family member, taking care of the children of the frontier worker, would not be awarded a residence status.<sup>40</sup>

The third situation (the so-called *Zambrano*-situation), concerns CJEU case law on EU citizenship, according to which there are very specific situations in which, despite the fact that the EU citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a TCN who is a family member of that EU-citizen. That holds true where, as a consequence of refusal of such a right, that citizen would be obliged in practice to **leave the territory of the EU** as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by the

33 CJEU 17 September 2002, C-413/99, *Baumbast*, ECLI:EU:C:2002:493. Hart, B. de & H. Oosterom-Staples (2018), 'Gezinshereniging en gezinsvorming', in: Zwaan, K., A. Terlouw, T. Strik, H. Oosterom-Staples, T. de Lange, B. de Hart, C. Grütters, R. Fernhout, *Nederlands Migratierecht*, The Hague: Boom, p. 179-268.

34 CJEU 7 July 1992, C-370/90, *Surinder Singh*, ECLI:EU:C:1992:296.

35 CJEU 11 July 2002, C-60/00, *Carpenter*, ECLI:EU:C:2002:434.

36 CJEU 8 March 2011, C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124; CJEU 10 May 2017, C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354.

37 CJEU 7 July 1992, C-370/90, *Surinder Singh*, ECLI:EU:C:1992:296, para. 19.

38 CJEU 7 July 1992, C-370/90, *Surinder Singh*, ECLI:EU:C:1992:296, para. 23.

39 This legal principle was confirmed by the Court in *Eind* (CJEU 11 December 2007, C-291/05, *Eind*, ECLI:EU:C:2007:771). In *O.&B.* the Court ruled that, in order to derive residence rights in return situations, the residence in the host state must have been 'sufficiently genuine' so as to enable that citizen to create or strengthen family life in that Member State. The residence is considered genuine in case it is based on article 7 or 12 of the Citizens Directive, meaning that the EU citizen must have been economically active in the host Member State, have studied there or have been self-sufficient and in possession of a sickness insurance. Furthermore, the EU citizen and the family member must have resided in the host Member State together (CJEU 12 March 2014, C-456/12, *O&B*, ECLI:EU:C:2014:135).

40 CJEU 12 March 2014, C-457/12, *S.&G.*, ECLI:EU:C:2014:136.

status of EU citizen.<sup>41</sup> The **residence right** of the TCN in such cases is based on article 20 TFEU, which establishes EU citizenship.

### 2.1.2. Workers

As has been stated above, **free movement of workers** has been secured in article 45 TFEU and by regulation 492/2011. The right of free movement of workers includes the right not be discriminated on grounds of nationality as regards access to employment, pay and other working conditions. Regulation 492/2011 falls into two parts: (1) the right of **access** to a post on **non-discriminatory** grounds and (2) the right of **equal treatment** while doing that job.<sup>42</sup> It defines specific areas where discrimination on grounds of nationality is prohibited, in particular as regards:

- access to employment,
- working conditions,
- access to social and tax advantages,
- access to training,
- membership of trade unions and eligibility for workers' representative bodies,
- access to housing,
- access to education apprenticeship and vocational training for the children of Union workers,
- assistance given by employment officers.<sup>43</sup>

Article 10 of regulation 492/2011 provides that the **children of an EU citizen** who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. In order to protect the 'effet utile' of this provision on 'the right to education', the CJEU has ruled that these children have a right to reside on the territory of the host Member State, also in cases where the EU citizen parent who was exercising his or her rights to work on the territory of another Member State under the regulation has left the host state.<sup>44</sup> The **CJEU has extended this right** to the parent who is the primary carer of the child, irrespective of that parent's nationality. According to the CJEU, the right of the child to pursue his or her education would be infringed in case the parent who is their primary carer would be refused permission to remain.<sup>45</sup> Later, the CJEU ruled that the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a **right of residence** in the latter Member State on the basis of Article 10 of Regulation 492/2011, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that Member State.<sup>46</sup> Lastly, it ruled that the right of a parent who is the primary carer of a child who is exercising their right to education may extend beyond the age of **majority**, if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education.<sup>47</sup>

### 2.1.3. Temporary residence for up to three months for EU citizens and family members

Article 6(1) of the Citizens Directive provides that:

41 CJEU 8 March 2011, C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124. In the judgment *K.A.* (CJEU 8 May 2018, C-82/16, *K.A.*, ECLI:EU:C:2018:308), the CJEU held that also an EU citizen who is of age in exceptional cases cannot be separated of a TCN on whom he or she depends (para. 76).

42 Barnard, C. (2016), *The substantive law of the EU; the four Freedoms*, Oxford: Oxford University Press, p. 244.

43 Minderhoud, P. (2017), 'Free movement of workers', in: Grütters, C., S. Mantu and P. Minderhoud (eds.), *Migration on the Move*, 54-75. The Hague: Brill.

44 CJEU 17 September 2002, C-413/99, *Baumbast*, ECLI:EU:C:2002:493, para. 52.

45 CJEU 17 September 2002, C-413/99, *Baumbast*, ECLI:EU:C:2002:493, para. 73.

46 CJEU 23 February 2010, C-310/08, *Ibrahim*, ECLI:EU:C:2010:80, para. 59.

47 CJEU 23 February 2010, C-480/08, *Teixeira*, ECLI:EU:C:2010:83, para. 86.

*Union citizens shall have the right of residence on the territory of another Member State for a period of **up to three months** without any conditions or any formalities other than the requirement to hold a valid identity card or passport.*

Union citizens derive their right to reside on the territory of another Member State **directly** from EU law. Their residence rights hence do not depend on (a formal decision of the authorities of another Member State to issue) a residence permit. The fact that a Union citizen has not been issued with a residence document hence does not mean that their stay is illegal.<sup>48</sup> The right of residence is subject to the condition that the migrants do not become 'an unreasonable burden on the social assistance system of the host state'.<sup>49</sup> The right of residence is hence not unlimited.<sup>50</sup>

#### 2.1.4. Temporary residence for more than three months

Article 7(1) of the Citizens Directive awards the right of residence for **more than three months** to: (a) Workers and the self-employed; (b) Economically inactive (yet self-supportive); (c) Students, and (d) Family members of (a), (b) or (c), provided they meet the required conditions. Article 7(1)(b) provides that for economically inactive EU citizens and students who are EU citizens to be able to profit from the right to reside for a period longer than three months on the territory of another Member State, they must have:

- **sufficient resources** for themselves and their family members not to become a burden on the social assistance system of the host Member State, and
- comprehensive **sickness insurance** cover.

The right to reside for longer than three months for family members who are not EU citizens has been laid down in article 7(2). EU citizens who reside on the territory of a host Member State do not need a residence permit. As has been stated above, family members of EU citizens who are TCNs do need a residence card (article 9 and 10 Citizens Directive).

Even though they do not need a residence permit in order to lawfully reside on the territory of a host Member State, the authorities of that State can require EU citizens to **register** with the relevant authorities in case their stay exceeds the three-month period (article 8(1) Citizens Directive). The competent authorities may require proof that the Union citizen fulfils the conditions of article 7(1). It has been noted that the UK has applied a 'harsh interpretation of the comprehensive sickness insurance requirement which excluded the National Health Service and required the individual to have private insurance (or continue to be affiliated with the health insurance system of their home state)'.<sup>51</sup>

#### 2.1.5. Permanent residence

The third 'tier' of residence rights is the right to **permanent residence**. EU citizens awarded the right to permanent residence are considered to be so assimilated into the host state that they are regarded and **treated as nationals** in all but name.<sup>52</sup> Paragraphs (1) and (2) of article 16 of the Citizens Directive

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48 CJEU 12 May 1998, C-85/96, *Martínez Sala* ECLI:EU:C:1998:217; CJEU 16 December 2008, C-524/06, *Huber*, ECLI:EU:C:2008:724.

49 Article 14(3) Citizens Directive.

50 Barnard, C. (2016), *The substantive law of the EU; the four Freedoms*, Oxford: Oxford University Press, p. 342.

51 Guild, E. & K. Vowden (2018), 'BREXIT and the Fate of EU Citizens', *A&MR* 2018/6-7, p.301-306. For an analysis of this debate see: Gareth Davies <europeanlawblog.eu/2017/03/17/the-uk-and-sickness-insurance-for-mobile-citizens-an-inequitable-mess-for-brexit-negotiators-to-address> [27 April 2018]. A more general review of the practical problems of the UK's application of EU free movement rules in light of Brexit was prepared by the Migration Observatory shortly after the Brexit referendum <www.migrationobservatory.ox.ac.uk/resources/commentaries/today-gone-tomorrow-status-eu-citizens-already-living-uk> [27 April 2018].

52 Barnard, C. (2016), *The substantive law of the EU; the four Freedoms*. Oxford: Oxford University Press, p. 346.

provide that Union citizens and their family members of any nationality will acquire the right of permanent residence on the territory of a host Member State after having legally resided there for a **continuous period of five years**. In the case law of the CJEU, it has been added that the lawful residence must be on the basis of article 7 of the Citizens Directive. Paragraph 3 provides that continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country. The right of permanent residence shall however be lost in cases where the Union citizen or their family member leaves the territory of the host state for a period exceeding two consecutive years (16(4)). Furthermore, public policy, public security or public health can constitute reasons for the withdrawal of the right to permanent residence (article 27 Citizens Directive). The permanent residence status can hence **not be lost on economic grounds**.

Article 17 of the Citizens Directive provides for **exemptions** to the five-year period for persons no longer working in the host Member State and their family members. Paragraph 4 contains the conditions for family members to acquire a right of permanent residence in the host Member State in case of death of the worker or self-employed person before they (i.e. the worker or the self-employed person) acquired the **permanent residence status**. Article 18 provides that, in the event of death of the EU citizen or termination of the relationship through divorce or annulment of the marriage or termination of the registered partnership, TCN family members of EU citizens will acquire the right to permanent residence after having legally resided on the territory of the host Member State for a period of five consecutive years.

## 2.2. During the transition period

On 19 March 2018 the EU and the UK agreed a **transition period**<sup>53</sup> (called 'implementation period' by the UK government) to **31 December 2020**.<sup>54</sup> Part 2 of the WDA, containing provisions regarding the status of EU citizens and UK nationals, had been agreed to at negotiators' level and will probably only be subject to technical legal revisions. Even though the text of the agreement as it stood on 19 March 2018 was considered to be sufficiently final that the negotiations could move forward to other issues, it has to be borne in mind that this text is not final. The parties have after all agreed that until all issues are agreed nothing is final.<sup>55</sup>

The WDA, unusual for an agreement concluded by the EU with a third country, includes the main operative parts of Directive 2004/38 and Regulation 492/2011 and is designed to protect residence and work rights of EU citizens or UK nationals, and their family members of any nationality after Brexit during the transition period. The objective of part 2 of the WDA is to **secure the rights of EU citizens and UK nationals** who have exercised their free movement rights in accordance with EU law. It refers directly to articles 21, 45 and 49 of the TFEU.

The WDA (part I) divides citizens into two categories: EU citizens (nationals of the EU Member States excluding the UK) and UK nationals (article 2(c) and (d)). If the current position becomes law, **EU citizens in the UK** will continue to reside in the UK under domestic law which mirrors the rights they would have had under EU law but for the departure of the UK from the EU. This will also apply to EU citizens who arrive in the UK to start exercising free movement rights before 1 January 2021.

53 Article 121 Withdrawal Agreement (of 19 March 2018).

54 An analysis of the citizens' part of the (draft) Withdrawal Agreement has been commissioned by the PETI Committee of the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs: <[www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL\\_IDA\(2018\)604959\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL_IDA(2018)604959_EN.pdf)>, [5 July 2018].

55 Guild, E. & K. Vowden (2018), 'BREXIT and the Fate of EU Citizens', *A&MR* 2018/6-7, p.301-306.

**UK nationals** will cease to be EU citizens after Brexit. However, the WDA currently provides that UK nationals living in EU Member States will enjoy free movement rights in a mirror of the rights contained in Directive 2004/38 as long as they arrive and start exercising free movement rights before **1 January 2021**. As they are no longer EU citizens, UK nationals will after Brexit only have the right to reside and work, study etc. in the Member State where they are resident, and **not enjoy free movement** to another Member State. Earlier versions of the WDA provided in article 32 that:

*In respect of UK nationals and their family members, the rights provided for by this Part shall not include further free movement to the territory of another Member State, the right of establishment in the territory of another Member State or the right to provide services on the territory of another Member State or to persons established in the other Member State.<sup>56</sup>*

The purpose of article 32 was to clarify the scope of the WDA, by explaining what was not covered by it. As the article was considered redundant from a legislative point of view, it has been deleted from the text of the WDA as it stood on 19 March 2018. The deleted article has received criticism from scholars for failing to take account of the acquired rights to free movement for UK nationals in the (other) EU Member States.<sup>57</sup> The absence of full free movement rights for UK nationals after Brexit has also been criticised by the Brexit steering group of the European Parliament.<sup>58</sup>

### 2.2.1. Scope of the Withdrawal Agreement

The position of the Commission from the beginning of the negotiations has been that it would seek to protect the rights contained in **article 21 TFEU** – the right of EU citizens to move and reside anywhere in the EU – and articles 45 to 49 TFEU – free movement of workers, the self-employed and service providers. UK nationals and EU citizens who do not come within the scope of these free movement provisions will not benefit from the Agreement. Two **categories** of citizens are legally **excluded** by the WDA: own citizens and UK nationals and EU citizens whose residence status derives from national rather than Union law.<sup>59</sup> As for EU citizens based in the UK not covered by the WDA, the European Commission assumes that such people:

*will have no legal entitlement to stay in the UK and their situation will depend on whether the UK authorities decide to treat them more favourably than required by the deal.*

The main groups of (those who are now) EU citizens (and will lose their EU citizenship after Brexit) who will lose out from Brexit as they will not benefit from the WDA are:

- **UK nationals** who have **returned** to the UK after exercising a free movement right in the EU and who seek to bring or be joined by their third-country national family members (*Surinder Singh* situations);
- **UK children** living in the UK with third-country national parents (*Zambrano* situations).

56 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 15 March 2018. <[ec.europa.eu/commission/sites/beta-political/files/negotiation-agreements-atom-energy-15mar\\_en.pdf](http://ec.europa.eu/commission/sites/beta-political/files/negotiation-agreements-atom-energy-15mar_en.pdf)>, [13 June 2018].

57 Steve Peers has expressed profound criticism of article 32 for failing to enshrine the acquired rights to free movement for UK citizens in the EU 27 states. <[eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html](http://eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html)>, [13 June 2018].

58 European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship (2018/2573(RSP)), para. 54, <[www.epgencms.europarl.europa.eu/cmsdata/upload/e9270809-8891-4d5d-bea4-1a764178e282/European\\_Parliament\\_resolution\\_on\\_the\\_framework\\_of\\_the\\_future\\_EU-UK\\_relationship\\_14\\_March.pdf](http://www.epgencms.europarl.europa.eu/cmsdata/upload/e9270809-8891-4d5d-bea4-1a764178e282/European_Parliament_resolution_on_the_framework_of_the_future_EU-UK_relationship_14_March.pdf)>, [28 June 2018].

59 Article 17(1)(h) Draft Withdrawal Agreement, however, states that those who already have a valid permanent residence document pursuant to Directive 2004/38 or a 'valid domestic immigration document conferring a permanent right to reside in the host state' have the right to exchange that document for a new (Brexit) residence document. See also PETI-Committee report, p. 19 <[www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL\\_IDA\(2018\)604959\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL_IDA(2018)604959_EN.pdf)>, [5 July 2018].

The first group not covered by the WDA concerns family members of UK nationals who return to UK after having exercised their free movement rights in another Member State and who currently derive a right of residence from Article 21 TFEU based on the *Surinder Singh* case law of the CJEU. This case law has been implemented in UK law in regulation 9 of the Immigration (EEA) Regulations 2016. The UK Government has however claimed that ‘it is our intention’ that family members of UK citizens who are lawfully resident in the UK under regulation 9 of these 2016 Regulations by the end of the implementation period, will be eligible to apply under the UK’s settled status scheme (see below).<sup>60</sup> As they are not included in the WDA, experts nevertheless fear their rights will not be adequately protected, as:

*they will be subject to the whims of a government devoted to a low net migration target and the creation of a ‘hostile environment’ to that end.*<sup>61</sup>

For the so-called ‘*Zambrano*-carers’, goes that the residence right these TCNs derive from EU citizens is not dependent on the EU citizen having exercised free movement rights and that, by consequence, they are **not covered** by the WDA. This protection will no longer be available in the UK, although the UK Government has claimed that:

*domestic policy proposals relating to Zambrano carers will be set out in due course.*<sup>62</sup>

UK parents of EU (non-UK) children will, post Brexit, be able to derive residence rights from the Zambrano case law, as the deportation of these UK parents could force, post-Brexit, the EU (non-UK) child to move to the UK and by consequence force them to leave the territory of the EU.<sup>63</sup>

Article 9 WDA defines which persons come within its scope. In short, it provides that:

- **EU citizens** who in accordance with Union law, legally reside in the UK (article 9(1)(a)),
- **UK nationals** who in accordance with Union law legally reside in an EU (non-UK) Member State (article 9(1)(b)) and
- **frontier workers** who exercise their right as a frontier worker in the UK or an EU Member State (article 9(1)(c) and (d)),
- as well as their **family members** as defined by Directive 2004/38 who are legally resident in the host state (article 9(1)(e) under (i)),

fall within the scope of the WDA. For each category goes that they will only be protected by the WDA if they were legally residing (or exercising a right as a frontier worker) in the host state by the **end of the transition period** and continue to reside there (or exercise a right as a frontier worker) thereafter. The words ‘and continue to reside there thereafter’ limit the scope of the agreement to a single state, so that it does not cover EU citizens or UK nationals who return to their state of nationality. As has been stated above, the UK government has reported to intend to protect family members of UK nationals covered by the *Surinder Singh* case law in national law.

Article 9 also protects **family members** who seek to join their principal **after** the transition period, under certain conditions. In case the family member resided outside the host state before the end of the transition period, but fulfils the conditions set out in article 2(2) of directive 2004/38, they

60 UK Government’s response of 16 May 2018 to the third report of session 2017-19 of the Home Affairs Committee of 14 February 2018, <publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1075/107502.htm>, [29 June 2018].

61 Steve Peers in his comment on article 9 of the Draft Withdrawal Agreement <eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html>, [14 June 2018].

62 UK Government’s response of 16 May 2018 to the third report of session 2017-19 of the Home Affairs Committee of 14 February 2018, <publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1075/107502.htm>, [29 June 2018].

63 PETI-Committee report, p. 19, <www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL\_IDA (2018)604959\_EN.pdf>, [5 July 2018].

fall within the scope of the WDA and are protected (article 9(1)(e)(ii)). These conditions seem to imply that the family relation must already have existed before the end of the transition period. The WDA equally protects **children** who are born or adopted after the transition period. They fall under the WDA in case both parents are resident in the host state and fall within the scope of article 9(1)(a) to (d) of the WDA, or if this applies to one of the parents, the other being a national of the host state. However, if these children seek to join a parent who falls under the scope of the agreement, while the other is a third-country national or absent, the parent in the host Member State must have 'sole or joint rights of custody of the child', in accordance with domestic law. The UK rules of sole responsibility are much harder to comply with than those in EU law.<sup>64</sup>

Furthermore, article 9(1)(f) WDA provides that family members with **retained rights** under articles 12, 13 and 16(2), 17 and 18 of Citizens Directive 2004/38 fall within its scope. As explained above, these articles serve to protect the right to residence of family members (of any nationality) after the death, departure, divorce or termination of a registered partnership of their principal.

Lastly, article 9(2) and 9(3) contain obligations for the host state to '**facilitate entry and residence**' for certain categories of family members. Article 9(2) provides that the UK and the EU-27 shall facilitate entry and residence of persons falling under 3(2) under (a) and (b) of Directive 2004/38, provided that they resided in the host state in accordance with Union law before the end of the transition period and continue to reside there thereafter.<sup>65</sup> Article 9(3) allows a slightly more favourable provision for duly attested partners, as the facilitation obligation will also apply in cases where the partner wants to join the principal after the end of the transition period. It should be noted however that the obligation to facilitate entry and residence is not a right to admission as such.<sup>66</sup>

According to the joint report of the negotiators of the EU and the UK government of 8 December 2017, the right to be joined by **family members** not covered by the WDA after the UK leaves the EU will be subject to national law.<sup>67</sup> Family members of EU citizens in the UK not protected by the WDA will hence need to apply under the **stringent UK immigration rules** if they wish to live in the UK.<sup>68</sup> It is to be noted that article 22(2) of the WDA covers a group of children and carers who will in some cases **fall outside** the scope of Article 9 (see below).<sup>69</sup>

Article 11 WDA provides that all persons that fall within the agreement's scope enjoy a right to **non-discrimination** on grounds of nationality as exists in EU-law. As the article refers to article 18(1) of

64 Guild, E. & K. Vowden (2018), 'BREXIT and the Fate of EU Citizens', *A&MR* 2018/6-7, p. 301-306.

65 Article 3(2)(a) and (b) Dir. 2004/38 provides that "[...] the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested."

An earlier version of the Withdrawal Agreement contained protections for EU citizens who marry or enter into civil partnerships *after* 31 December 2020, enabling these partners to come to live in the UK at a later date. See Desira, C. (2018), 'Brexit: settled status and citizens' rights – what has been agreed?

<[www.freemovement.org.uk/brexit-settled-status-citizens-rights/](http://www.freemovement.org.uk/brexit-settled-status-citizens-rights/)> [4 July 2018].

66 CJEU 5 September 2012, C-83/11, *Rahman*, ECLI:EU:C:2012:519; comments on *Rahman* by Steve Peers at <[eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html](http://eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html)>.

67 Joint report from the negotiators of the European Union and the United Kingdom government on progress during phase 1 of negotiations under article 50 TEU on the United Kingdom's orderly withdrawal from the European Union.

<[assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/665869/Joint\\_report\\_on\\_progress\\_during\\_phase\\_1\\_of\\_negotiations\\_under\\_Article\\_50\\_TEU\\_on\\_the\\_United\\_Kingdom\\_s\\_orderly\\_withdrawal\\_from\\_the\\_European\\_Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665869/Joint_report_on_progress_during_phase_1_of_negotiations_under_Article_50_TEU_on_the_United_Kingdom_s_orderly_withdrawal_from_the_European_Union.pdf)>, [14 June 2016].

68 Desira, C. (2018), *Brexit: settled status and citizens' rights – what has been agreed?*, <[www.freemovement.org.uk/brexit-settled-status-citizens-rights/](http://www.freemovement.org.uk/brexit-settled-status-citizens-rights/)>, [29 June 2018].

69 Peers, S. <[eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html](http://eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html)> [14 June 2018].

the TFEU, the relevant CJEU case law will apply.<sup>70</sup> Article 21 provides for equal treatment with respect to social security, social assistance, health care, employment, self-employment and setting up and managing an undertaking, education (including higher education) and training, social and tax advantages for EU citizens and UK nationals residing on the basis of the WDA with the nationals of the host state they will be residing in. The reference to EU law means that the case law on articles 6, 14(4)(b) and 24 of the Citizens Directive will apply.<sup>71</sup>

Last but not least, article 35 WDA provides for '**life-long protection**', stating that 'the persons covered by this Part shall enjoy the rights provided for in Relevant Titles of Part Two for their lifetime, unless they cease to meet the conditions set out in those Titles.' Those covered by the WDA will hence be covered for life as long as they continue to meet certain conditions.<sup>72</sup>

### 2.2.2. Residence rights

Article 12 WDA provides that the conditions for acquiring the right of residence under the WDA are those set out in articles 6 and 7 of Directive 2004/38. More precisely, article 12(1) refers to the EU law rules on citizenship and free movement (article 21 TFEU), free movement of workers (article 45 TFEU), free movement of self-employed people (article 49 TFEU), initial stays (article 6(1), Citizens Directive), stays after three months (article 7(1)(a) to (c), Citizens Directive), stays as a former worker (article 7(3) Citizens Directive), stays looking for work (article 14 Citizens Directive), and permanent residence (article 16(1) or article 17(1) Citizens Directive).

Article 12(2) of the WDA provides that **rules corresponding** to those mentioned in the **Citizens directive** apply to family members of the principal who are EU citizens or UK nationals, while article 12(3) sets out corresponding rules for those family members who are not. Both paragraphs provide that retained rights of residence of family members under articles 12, 13, 16(2), 17 and 18 of the directive are protected within the scope of the agreement. This means that the right of residence for family members is protected in case of family breakdown due to death, departure, divorce or termination of a registered partnership of their principal.<sup>73</sup>

Articles 14 and 15 WDA provide that the conditions for acquiring the right of permanent residence are **similar** to those set out in articles 16, 17 and 18 of Directive 2004/38. This means that a right to permanent residence, referred to as '**settled status**' by the UK authorities, which offers extended security of residence for EU citizens and their family members, can usually be acquired after 5 years, or less in cases where article 17 of the Citizens Directive applies.<sup>74</sup> Persons who acquire the permanent residence right in the host state under the WDA can be absent from its territory for a period not exceeding five consecutive years without losing their residence right under the WDA, which is **more generous** than the mirror provision of article 16(4) of the Directive, which provides that the right of permanent residence shall be lost after a period of absence of two years or more from the host Member State.

For the calculation of the qualifying period, periods of legal residence **before, during and after** the transition period will be included (article 14 and 15).<sup>75</sup> Article 16 provides for the right for people to

70 Peers, S. <eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html> [17 June 2018].

71 Peers, S. <eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html> [17 June 2018].

72 Benton, M, A. Ahad, M. Benson, K. Collins, H. McCarthy & K. O'Reilly (2018), *Next Steps. Implementing a Brexit deal for UK citizens living in the EU-27*, Migration Policy Institute Europe, p. 9.

73 Guild, E. & K. Vowden (2018), 'BREXIT and the Fate of EU Citizens', *A&MR* 2018/6-7, p.301-306.

74 <www.gov.uk/guidance/status-of-eu-nationals-in-the-uk-what-you-need-to-know> [4 July 2018].

75 Steve Peers notes that it is hard to see how to distinguish article 16(1) from article 14(1) of the Withdrawal Agreement as both articles seem to cover those who do not yet qualify for permanent residence at the end of the transition period. <eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html>, [17 June 2018].

**change** the basis of their stay. This means that they can for instance go from being a worker to being a student or self-employed without breaking the continuity of their residence status. This right is not explicitly provided for under the Citizens Directive but has always been protected in practice under the CJEU case law.<sup>76</sup> Article 16(2) of the WDA provides that ‘the rights provided for in this Title for the family members, who are dependent on Union citizens or UK nationals before the end of the transition period, shall be maintained even after they cease to be dependent.’ Family members will hence not be able to change their status. In practical terms, this will for instance mean that even in cases where a carer is protected as a family member, they will not be able to regain an autonomous right of residence once they can return to the workforce no longer having caring responsibilities.<sup>77</sup>

### 2.2.3. Issuance of residence documents

Article 25 of the Citizens Directive provides that the holding of forms cannot be a precondition for having any form of status under the directive. According to this article, beneficiaries of the right to reside in an EU Member State under the directive hence acquire that right by operation of law. However, the UK government has fiercely **opposed** the possibility that those EU citizens who have acquired their rights by operation of law (rather than documentation) will be able to keep those rights. The UK’s position has been that all EU citizens must **obtain residence documents** by making an application to the Home Office for settled status or pre-settled (temporary) status within six months of the end of the transition period, i.e. by 30 June 2021 at the latest (article 17(1)(b) WDA). Indeed, it has indicated that any EU citizen who has not applied for a new status from the Home Office by the **deadline** may face **consequences**. The administrative operation of issuing residence documents to all EU citizens in the UK is nevertheless a far greater issue than in the other EU Member States, due to: (a) the numbers (3x times higher in the UK than all UK nationals in all (other) Member States together, see annexes) and (b) the absence of a population registration in the UK.<sup>78</sup>

To **protect** EU citizens in the UK, the WDA sets out in great detail the obligation of the UK authorities to issue **residence documents**.<sup>79</sup> All administrative formalities are to be kept to a minimum and so are the costs involved in applying for a new residence document.<sup>80</sup> In a letter to the Member of the EP Guy Verhofstadt, Brexit coordinator for the European Parliament, UK Home Secretary Javid declared that the application process for settled status will be made as easy as possible for EU citizens, and that a minimum of proof will be required.<sup>81</sup> Furthermore, EU citizens with an 'indefinite leave to

76 <eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html>, [17 June 2018].

77 PETI-Committee report, p. 20, <www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL\_IDA(2018)604959\_EN.pdf>, [5 July 2018].

78 It is advised that EU citizens and their family members currently residing in the UK on the basis of EU law apply for a residence document now in order to avoid the having to undergo a full assessment later, simultaneously with three million other EU citizens plus their family members. See for example Desira, C. (2018), *Brexit: settled status and citizens’ rights – what has been agreed?*, <www.freemovement.org.uk/brexit-settled-status-citizens-rights>, [29 June 2018].

79 Article 17 Draft Withdrawal Agreement. As Spaventa notes in the PETI-Committee report that article 17 is silent with regard to work seekers, and that, by consequence, it remains to be seen how (and if) work seekers will be able to prove their entitlement to Brexit status (PETI-Committee report, p. 16) <www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL\_IDA(2018)604959\_EN.pdf>, [5 July 2018].

80 PETI-Committee report, p. 11 <www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL\_IDA(2018)604959\_EN.pdf>, [5 July 2018].

81 EU citizens will not need to evidence that they have been and are living in the UK, but not *how* they meet the requirements of articles 6 and 7 of the Citizens Directive. Desira, C. (2018), *Brexit: settled status and citizens’ rights – what has been agreed?*, <www.freemovement.org.uk/brexit-settled-status-citizens-rights>, [29 June 2018].

remain immigration status' will not have to apply for settled status.<sup>82</sup> The UK government has apparently decided to treat people more favourably than it is strictly required to.<sup>83</sup> According to immigration minister Nokes, EU citizens will only need to show that they have been and are still living in the UK in order to qualify for **settled status**:

*We are not going to apply any tests about whether they have been working and exercising their treaty rights; it literally is just if they can demonstrate residency.*<sup>84</sup>

Moreover, the Home Office has claimed that it will **not enforce** the requirement to hold comprehensive sickness insurance for those EU citizens seeking evidence of their residence status.<sup>85</sup> Up until now, the UK has applied a very strict interpretation of this condition by requiring those who are not workers (or work seekers) or self-employed persons to fulfil the conditions of article 7(1)(b) of the Citizens Directive.<sup>86</sup> According to former immigration minister Brandon Lewis, the UK "are removing the need to demonstrate comprehensive sickness insurance (...) to secure settled status".<sup>87</sup>

The policy of treating EU citizens **more favourably** than is required is a unilateral, discretionary policy rather than a requirement of the WDA. This means that, in case of policy change, EU citizens' cases could be reopened and reconsidered on the basis of whether they complied with the formal requirements for residence at the relevant time.

The UK has hence decided that the main **requirement** for settled status to be granted will be **residence** in the UK, and that, in order to acquire the status, a valid application needs to be made under the EU settlement scheme. This application will however be refused because of serious or persistent criminality or other public policy reasons, as set out in the WDA. Article 17(1)(p) allows for systematic checks of **criminal records** by providing that:

*criminality and security checks may be carried out systematically on applicants with the exclusive aim of verifying whether restrictions set out in Article 18 of this Agreement may be applicable. For that purpose, applicants may be required to declare past criminal convictions which appear in their criminal record in accordance with the law of the State of conviction at the time of the application. The host state may, should it consider this essential, apply the procedure set out in Article 27(3) of Directive 2004/38/EC on enquiries to other States regarding previous criminal records.*

Such systematic checks are **not** allowed under the Citizens Directive.

#### 2.2.4. Restrictions of the right of residence

Article 18 WDA provides that any restrictions on grounds of public policy or security or public health related to conduct (including any criminal convictions relating to it) **before** the end of the transition period (31 December 2020) by a person protected by the WDA, will be assessed according to the **current** EU public policy tests for deportation, as set out in the EEA Regulations. These tests are very high as they require EU citizens to pose a **genuine present** and **sufficiently serious threat** to justify removal from the UK. The longer a citizen has resided in a host Member State, the more difficult it is to

82 <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/707817/180515\_Response\_to\_Guy\_Verhofstadt\_Letter\_FINAL.pdf>. [17 June 2018].

83 <www.freemovement.org.uk/how-to-apply-for-settled-status-temporary-status-brexit/#How\_much\_does\_it\_cost>, [13 June 2018].

84 Oral evidence from immigration minister Caroline Nokes, <data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-scrutiny-committee/eu-withdrawal/oral/79097.html>, [13 June 2018].

85 Home Office (2018), *EU Settlement Scheme: Statement of Intent*, 21 June 2018, p. 11.

86 Guild, E. & K. Vowden (2018), 'BREXIT and the Fate of EU Citizens', *A&MR* 2018/6-7, p.301-306.

87 Oral evidence immigration minister Brandon Lewis, <data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-citizens-rights/oral/75516.pdf>, p. 14.

deport them. After 5 years, deportation can only occur if it is justified by 'serious' grounds of public policy or security, and after 10 years on imperative grounds of public security only.

Article 18(2) WDA however provides that any restrictions related to conduct **after** the transition period will be in accordance with national law. The UK assessment of criminality has a **lower threshold** to justify removal, which means that there will be a **greater risk of deportation** from the UK for EU citizens and their family members after the end of the transition period.<sup>88</sup> Spaventa notes that this will open up the possibility to use expulsion as a penalty, that there is no enhanced protection based on length of residence and that the principle of proportionality will only apply insofar it is provided for in national law.<sup>89</sup>

Article 18(3) provides that the host state may adopt measures to **refuse, terminate or withdraw** any residence rights in cases of **abuse or fraud** as set out in article 35 of the Citizens Directive. Article 18(4) goes a step further by opening up a possibility for host states to **expel** persons who fraudulently (for instance by entering into a marriage of convenience) acquired a residence status even before a final judgment has been handed down.<sup>90</sup>

Guild & Vowden note that article 18 gives reason for substantial concern in the UK where the national implementation of Directive 2004/38 has provided a very wide interpretation of the grounds for refusal of residence to a qualifying EU citizen in the UK.<sup>91</sup> They note that the Home Office and the UK courts (at first instance though eventually overturned) have permitted the exclusion of appeal rights for EU citizens where accused of entering into marriages of convenience<sup>92</sup>, or a non-suspensive appeal right.<sup>93</sup>

Appeal rights for EU citizens and UK nationals are set out in article 19 WDA.

### 2.2.5. Rights of workers

Article 22 WDA guarantees **equal treatment** for workers and frontier workers on the basis of article 45 TFEU and regulation 492/2011. Article 22(1) states that 'subject to the limitations set out in Article 45(3) and (4) TFEU, workers in the host state and frontier workers in the State or States of work shall enjoy the rights guaranteed by Article 45 TFEU or granted by Regulation 492/2011. The limits referred to concern grounds of public policy, public security and public health (article 45(3) TFEU) and limits to employment in the public service (45(4) TFEU).

88 Desira, C. (2018), *Brexit: settled status and citizens' rights – what has been agreed?* <[www.freemovement.org.uk/brexit-settled-status-citizens-rights/](http://www.freemovement.org.uk/brexit-settled-status-citizens-rights/)>, [29 June 2018].

89 PETI-Committee report, p. 18 <[www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL\\_IDA\(2018\)604959\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL_IDA(2018)604959_EN.pdf)>, [5 July 2018].

90 Peers notes that article 18(4) of the agreement refers to article 31 of the Citizens Directive, which only allows removal from the territory, if the person concerned has applied for an interim order, in a limited number of cases: an expulsion decision based on a prior judicial decision; if there was prior access to judicial review; or where the expulsion is based on "imperative grounds of public security" as defined in the Directive. None of these cases correspond to article 35 of the Directive. Peers suspects that the drafting might intend to confirm that a person who is being excluded on the basis of article 35 can have fewer procedural rights *only* where that person *also* falls within the scope of the exclusions in article 31. He suggests an amendment to article 18(4) to make that more clear: "The host state may remove applicants who submitted fraudulent or abusive applications from its territory to the extent permitted by Directive 2004/38/EC, in particular articles 31 and 35 thereof (...)."

<[eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html](http://eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html)>.

91 Guild, E. & K. Vowden (2018), 'BREXIT and the Fate of EU Citizens', *A&MR* 2018/6-7, p.301-306. <[www.ilpa.org.uk/resource/33380/information-sheet-brexit-12-uk-regulations-on-free-movement-that-may-breach-eu-law](http://www.ilpa.org.uk/resource/33380/information-sheet-brexit-12-uk-regulations-on-free-movement-that-may-breach-eu-law)> [27 April 2018].

92 In general see discussion here: <[www.freemovement.org.uk/no-in-country-appeal-against-eea-sham-marriage-removals-says-upper-tribunal/](http://www.freemovement.org.uk/no-in-country-appeal-against-eea-sham-marriage-removals-says-upper-tribunal/)> [27 April 2018].

93 R (on the application of Bilal Ahmed) v Secretary of State for the Home Department (EEA/s 10 appeal rights: effect) IJR [2015] UKUT 436.

Article 22(2) provides that **primary carers of children of workers** who are no longer residing in the host Member State shall have the right to reside in that Member State until the child reaches the age of majority, or longer if the education of the child so requires. Article 22(2) thus reflects the case law on article 10 of Regulation 492/2011 and its predecessor Regulation 1612/68.<sup>94</sup> The residence right of the child of a (former) worker itself is covered by article 22(1)(h), that provides that (frontier) workers shall enjoy the right for their children to be admitted to the general educational, apprenticeship and vocational training courses under the same conditions as nationals of the host state. As this article must be interpreted in accordance with prior CJEU case law (as article 4 of the Agreement requires CJEU case law to apply), **children of workers** can derive a right of residence from this article.<sup>95</sup>

Article 22(3) provides that employed **frontier workers** shall enjoy the right to enter and exit the state of work in accordance with Article 13 and shall retain the rights they enjoyed as workers there in accordance with Article 7(3) of Directive 2004/38. Article 7(3) of the Citizens Directive provides that a Union citizen shall retain the **status of worker** in a limited number of cases where he or she is not working, due to temporary inability to work due to conditions such as illness/accident, vocational training related to the job, and interruption in work due to pregnancy and maternity.<sup>96</sup> This means that frontier workers who **voluntarily** resign from their jobs will no longer be covered by the WDA and lose their Brexit-status.<sup>97</sup>

#### 2.2.6. Rights of self-employed persons

Article 23 WDA contains the rights of self-employed persons. Paragraph 1 specifies that 'self-employed persons in the host state and self-employed frontier workers in the State or States of work shall enjoy the rights guaranteed by Articles 49 and 55 TFEU'. These rights include:

- the right to **take up and pursue activities** as self-employed persons and to set up and manage undertakings under the conditions laid down by the host state for its own nationals, as set out in Article 49 TFEU;
- the rights as set out in Article 22(1)(c)-(h) WDA.

The reference in article 22 is significant, as regulation 492/2011 as such does not apply to self-employed workers. Their equal treatment rights are rather based in the Treaties.<sup>98</sup> Paragraph 2 of article 23 provides that paragraph 2 of article 22 WDA shall apply to direct descendants of self-employed workers, meaning that their **primary carers** will have the **right to reside** in the host state in case the self-employed worker has left the host state. Like children of workers, **children of self-employed** persons will derive a residence right from article 22(1)(h) WDA. Lastly, paragraph 3 of article 22 provides that article 22(3) shall apply to self-employed frontier workers, without prejudice to Article 32 concerning the scope of rights.

94 CJEU 17 September 2002, C-413/99, *Baumbast*, ECLI:EU:C:2002:493; CJEU 23 February 2010, C-480/08, *Teixeira*, ECLI:EU:C:2010:83.

95 <eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html>, [18 June 2018]. Case law: CJEU 17 September 2002, C-413/99, *Baumbast*, ECLI:EU:C:2002:493; CJEU 23 February 2010, C-480/08, *Teixeira*, ECLI:EU:C:2010:83; CJEU 23 February 2010, C-310/08, *Ibrahim*, ECLI:EU:C:2010:80.

96 The latter condition is included in article 7(3) due to *Saint Prix* (CJEU 19 June 2014, C-507/12, *Saint-Prix*, ECLI:EU:C:2014:2007).

97 PETI-Committee report, p. 12, <www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL\_IDA(2018)604959\_EN.pdf>, [5 July 2018].

98 Steve Peers, <eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html>, [18 June 2018].

### 2.2.7. Social security rights

Social security coordination has always been an important instrument to **stimulate** free movement of workers and persons. At the moment, this branch of Union law is dealt with in Regulation 883/2004 and Regulation 987/2009.<sup>99</sup> These measures only concern the coordination and not the harmonisation of social security systems. It applies to all traditional branches of social security. The personal scope of Regulation 883/2004 was **extended** by Regulation 1231/2010 to third country nationals of who are legally residing on the territory of a Member State and who find themselves in a cross-border situation.<sup>100</sup> The core principles of social security coordination are:

- only one legislation applicable,
- equal treatment with nationals,
- aggregation of insured periods, and
- export of cash benefits.

The coordination system will apply **during the transition period** which means that up to and including 31 December 2020 everyone in a **cross-border situation** is covered under Regulation 883/2004. Also, **after 31 December 2020** everyone who was covered, will stay covered as long as they perform mobile activities. But if mobility activities only started after 31 December 2020, they are not covered anymore. The above for instance means that pensioners who reside in a host-State at the end of the transition period will be able to continue living in the host country as their pension and health insurance will continue as pre-Brexit.<sup>101</sup> This is important for many 'life style' migrants from the UK currently based in Spain (see introduction of this chapter).

### 2.3. After the transition period

As section 2.2 has shown, the rights of EU citizens and UK nationals and their family members who move or have already used free movement rights before 1 January 2021 will be fairly thoroughly protected in alignment with the rights they would have had but for Brexit. UK nationals however have a less favourable position, as there is no right of free movement for UK nationals to EU Member States than their host Member State.<sup>102</sup> Furthermore, they do not benefit from the free movement rights once they return to the UK, and the residence rights of TCN family members who depend on a 'static' UK national are not protected anymore either. The WDA does not contain legal measures regarding the **future movement of persons** between the EU and the UK **after the transition period**. Thus, it is entirely left to national law of the UK and the EU Member States, unless both sides would agree on new rules on this part of their future relationship.

Below, the possibilities and limitations of the main TCN legal migration directives for UK nationals in the EU will be described, including possibilities for their (TCN) family members to rely on those directives. Comparable basic rules restricting discretion of the national legislator and immigration authorities do not exist for EU citizens and their (TCN) family members in the UK after Brexit. UK

99 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland). Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland).

100 Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

101 PETI-Committee report, p. 8 <[www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL\\_IDA\(2018\)604959\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL_IDA(2018)604959_EN.pdf)>, [5 July 2018].

102 UK nationals having a residence permit in one Member State will however be entitled to the right of entry and circulation up to three months in the whole Schengen area.

nationals and their family members living in or moving to an EU Member State who are not covered by the WDA either because they do not fall within its scope or because they chose to move after the end of the transition period, can claim rights based on these directives in case they fulfil the relevant criteria. The directives will apply regardless of the WDA entering into force and will hence constitute an important means for UK nationals to derive rights in case of a **no-deal** situation. It is important to note that secondary EU law offers limited possibilities for transforming residence as EU citizen into a TCN residence status with comparable security of residence.<sup>103</sup> By losing their EU citizenship and becoming TCNs, UK nationals have more at stake than citizens of the EU.<sup>104</sup> Despite the rights conferred to them by the directives analysed below, clear **distinctions** between **TCNs** and **EU citizens** remain in force.

### 2.3.1. EU legislation relating to access and residence of TCNs

Section 1.2 of this report lists all EU measures adopted in the area of regular migration. This section will describe the residence rights of TCNs based on the main EU directives providing such rights:

- Directive 2003/109 (Long Term Residents directive)
- Directive 2003/86 (Family Reunification directive)
- Directive 2009/50 (Blue Card directive)
- Directive 2016/801 (Researchers and Students directive).

These TCN migration directives do not apply in Denmark, Ireland and the UK. The first two directives concern the integration of TCNs who have already been admitted to a Member State under national law. The other Directives award TCNs a right of entry under EU law to the Member States.<sup>105</sup>

#### *Family reunification and long-term residents directives*

Both the Family Reunification Directive (FRD) and the Long-Term Residents Directive (LTRD) have been inspired by the conclusions of the 1999 European **Council of Tampere**, containing a commitment to fairer treatment of third-country nationals, and a 'near equality' of third-country nationals with EU citizens.<sup>106</sup> Both Directives aim at **integrating** TCNs into the community of the host state and ensuring their fair treatment.<sup>107</sup> Despite these goals, clear **distinctions** between **TCNs** and **EU citizens** remain.<sup>108</sup>

For the past twenty years, family migration has been one of the main **sources of immigration** to the EU.<sup>109</sup> For family reunification for TCNs, conditions differ from those applicable to EU citizens. According to the family reunification directive, Member States may require that the sponsor holds a residence permit with a period of validity of one year or more and has reasonable prospects of obtaining the right of permanent residence.<sup>110</sup> The sponsor must have appropriate accommodation, sickness insurance and stable and regular resources. Member States may impose integration measures.<sup>111</sup> Furthermore, Member States are allowed to **limit the scope** to core family members

103 Unless UK nationals can derive rights from the Citizens Directive as family members of EU citizens. Schrauwen, A. (2017), *(Not) losing out from Brexit. Europe and the World: A Law Review*, p. 12.

104 Benton, M, A. Ahad, M. Benson, K. Collins, H. McCarthy & K. O'Reilly (2018), *Next Steps. Implementing a Brexit deal for UK citizens living in the EU-27*, Brussels: Migration Policy Institute, p. 3.

105 Barnard, C. (2016), *The Substantive Law of the EU; the four Freedoms*, Oxford: Oxford University Press, p. 500.

106 Council of the European Union (1999), Presidency Conclusions, Tampere, 15-16 October 1999.

107 Barnard, C. (2016), *The substantive law of the EU; the four Freedoms*, Oxford: Oxford University Press, p. 498.

108 Strik, T. (2017), 'Two decades EU migration law for third-country nationals', in: Grütters, C., S. Mantu & P. Minderhoud (eds.), *Migration on the Move*, The Hague: Brill, p. 76-92.

109 COM(2008) 610, p. 3, cited in Barnard, C. (2016), *The substantive law of the EU; the four Freedoms*, Oxford: Oxford University Press, p. 496.

110 Article 3(1) and 8 Family Reunification Directive.

111 Article 7(2) Family Reunification Directive.

(spouses and minor children). The scope of family members, TCN or other, under the Citizens Directive is much wider. During the first five years after admission, the rights and status of admitted family members remain **dependent** on the sponsor fulfilling the requirements. The FRD contains a subjective right to family reunification, but it has to be noted that many Member States have made use of the optional clauses of the family reunification directive to adopt measures which are meant to **restrict family migration**, such as pre-entry language tests, a minimum age level of 21 for spouses and the three-month time limit for family reunification of refugees. Moreover, many Member States have intensified their methods to verify family members' identity or relationship or the genuineness of the marriage or partnership.

TCNs who have legally and continuously resided **five years** or longer in an EU Member State can apply for the status of **EU long-term resident** under the LTRD, provided they meet the income requirement and have sickness insurance. As has been shown above, the Citizens Directive does not impose similar obligations on EU citizens who have **permanent residence**. Furthermore, in order to obtain the status, some Member States impose **language and integration tests**. 14 Member States have currently made the acquisition of the status dependent on the fulfilment of integration conditions.<sup>112</sup> Status holders will have the right to family reunification under the FDR.<sup>113</sup> As we have seen above, the Citizens Directive offers a more **extensive right** to family reunification.

Once obtained, the status can be withdrawn only on grounds of public policy, or on grounds of absence from the territory of the EU for twelve months or more.<sup>114</sup> By comparison, the permanent residence status under the Citizens Directive will be lost after two years' absence. Those who hold the status have rights to **equal treatment** and **protection against expulsion**. LTR-status holders and their family members have the **right to reside** on the territory of another Member State in case they are exercising an economic activity or studying there and have comprehensive sickness insurance or have adequate resources and sickness insurance ('secondary mobility').<sup>115</sup>

Economic activity as such is insufficient for settlement in another Member State; instead a **minimum income** is required and the second Member State can apply a labour market test, prioritising EU citizens. Seven Member States have exempted long-term residence status-holders from the labour market test.<sup>116</sup> The large majority of Member States hence does not treat holders of the EU LTR-status differently than TCNs entering directly from outside the EU. Any onward settlement is permitted only after five years of residence in the second Member State.<sup>117</sup> Holders of the EU **LTR-status** hence do not have the right to move freely on the whole of the territory of the EU similar to EU citizens.

The actual application and practical relevance of the LTRD varies a lot between Member States. In some Member States less than 1% of the LTR TCN have the EU LTR status (e.g. Sweden and Bulgaria), and in France less than 5% of all long-term resident TCNs obtained the EU-status. In other Member States this is almost 100% (Austria and Italy).<sup>118</sup> Despite differences compared to EU citizens, both directives have strengthened the rights of TCNs in the EU. Family reunification and the granting of a long-term residence status are subjective EU rights and Member States can only use discretion in the

112 COM(2011)585, 28 September 2011. These Member States are Austria, the Czech Republic, Germany, Estonia, Greece, France, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Portugal and Romania.

113 Article 2(e) and 16 LTR Directive

114 Articles 9 and 12 LTR Directive.

115 Articles 14-16 LTR Directive.

116 COM(2011)585, p. 7. These Member States are: Belgium, Cyprus, Hungary, Latvia, Poland, Portugal and Sweden.

117 Strik, T. (2017), 'Two decades EU migration law for third-country nationals', in: Grütters, C., S. Mantu & P. Minderhoud (eds.), *Migration on the Move*, 76-92. The Hague: Brill.

118 Percentages calculated on the basis of Eurostat data for the year 2016, <appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>, [4 July 2018].

application of the requirements in the directives to the extent to which the measures taken respect the EU principles of proportionality and effectiveness.<sup>119</sup>

### *Blue Card Directive*

On 25 May 2009, Blue Card Directive was adopted.<sup>120</sup> Denmark, the UK and Ireland have not opted in. The objective of the Blue Card Directive is, as recital 7 explains, to contribute to achieving the Lisbon Strategy goals and addressing labour shortages by making the Community more attractive to **highly skilled workers** from around the world and sustain its competitiveness and economic growth. To this end, the Directive sets out the conditions of entry and residence for highly skilled workers and their family members, both in the first Member State of residence and in the other Member States. A TCN with a work contract or a job offer of at least one year for 'highly qualified' work, meaning work requiring higher education qualifications or, where permitted by national law, five years' equivalent professional experience, in an EU Member State who has sickness insurance and is not considered a threat to public policy, security or health, must be issued with an **EU blue card**.<sup>121</sup> According to article 5(3) of the directive, the gross annual salary of the worker must not be inferior to a threshold that must be at least 1.5 times the average gross annual salary in the Member State concerned. Member States may decide not to issue a blue card in cases where, for example, the vacancy can be filled by a member of the **national or EU workforce**, where the Member State deems the volume of admission of TCNs is too high, or where the job is in a sector suffering from a lack of qualified workers in the country of origin.<sup>122</sup> Once they acquired the blue card, the TCNs are required to carry out the work they came for during the first two years. After that, Member States may grant the persons concerned **equal treatment** with nationals as regards access to highly qualified employment.<sup>123</sup> The FRD gives rights to the family members of the Blue Card holders, but some measures that can hinder family reunification, such as pre-entry language and integration tests, may not be applied.<sup>124</sup>

The directive allows for **secondary mobility** by awarding blue card holders and their family members the right to reside in the second Member State after 18 months of legal residence in the first Member State in order to undertake highly qualified employment.<sup>125</sup> After five years, they can apply for the status of long-term resident under the LTRD.<sup>126</sup> The Directive leaves the possibility for more advantageous national programmes. The Netherlands for instance has introduced the 'highly skilled migrant scheme' (HSM scheme), to which the Blue Card Scheme is complementary and which provides more benefits for employers and employees, even though the latter are awarded increased intra-EU mobility possibilities when opting for an EU Blue Card. This probably explains the low number of applications for a Blue Card in the Netherlands,<sup>127</sup> opposite to the high number of Blue Cards in Germany.<sup>128</sup> The numbers are compared in Table 6, Table 7 and Graph 7 (in the Annex).

119 On the Family Reunification Directive: CJEU 4 March 2010, C-578/08, *Chakroun*, ECLI:EU:C:2010:117; CJEU 9 July 2015, C-153/14, *K. and A.* ECLI:EU:C:2015:453. On the LTR Directive: CJEU 4 June 2015, C-579/13, *P. & S.*, ECLI:EU:C:2015:369.

120 Directive on the Conditions of Entry and Residence of Third-country Nationals for the Purposes of Highly Qualified Employment (Dir. 2009/50, Blue Card Directive).

121 Articles 5 and 7.

122 Articles 6 and 8.

123 Article 12(1).

124 Article 15.

125 Article 18.

126 Article 16.

127 Oers, R. van & P. Minderhoud (2012), 'The Dutch position in the battle for brains. An overview of Dutch policy and legislation on highly skilled labour migration', Nijmegen migration law working paper series 2012/1, Nijmegen: Radboud University Nijmegen, p. 39. The number remained below ten on 14 October 2011.

128 Already before 2015, 35,000 EU Blue Cards were issued by Germany, <[www.apply.eu/Questions](http://www.apply.eu/Questions)>, [4 July 2018]. Very few Blue Cards were issued by other Member States.

### *The Researchers and Students Directive*

On 11 May of 2016, a new directive 2016/801 was published containing a recast of existing directives regarding admission and residence of TCNs for the purpose of research (Researchers Directive 2005/71) and study (Students Directive 2004/114). Member States are required to have transposed the Directive into their national legislation by 23 May 2018 at the latest. Next to provisions on researchers and students, the directive contains provisions regarding the entry and residence of TCNs for the purpose of training, voluntary service, pupil exchange schemes or educational projects and au pairing. Considering the large number of **UK nationals** taking up **studies abroad**, in this section attention will be paid to the provisions relating to entry and residence of students. The new directive is meant to **repair** flaws of the former directives on researchers and students. Recital 4 mentions insufficiencies relating to admission conditions, rights, procedural safeguards, students' access to the labour market during their studies and intra-EU mobility provisions and highlights the need for better job-seeking possibilities for (researchers and) students.

Article 5 of the Directive provides that, in case the general conditions on admission and residence of article 7, and the specific provisions applicable to the different categories of TCNs falling under the scope of the directive are met, the TCN shall be entitled to an **authorisation**. The Directive offers students a subjective right to entry and residence to the TCNs covered by it. Article 7 of the Directive contains the general conditions for **admission**. Students are required to have applied for sickness insurance and must provide the evidence requested by the Member State concerned that during the planned stay the third-country national will have sufficient resources to cover subsistence costs without having recourse to the Member State's social assistance system and return travel costs. Article 7(6) provides that TCNs who are considered to pose a threat to public policy, public security or public health shall not be admitted.

Article 11 of the Directive contains certain provisions applying specifically to **students**. It provides that, in addition to the general conditions laid down in Article 7, in order to be admitted to the territory of the host Member State to study, TCNs shall provide evidence:

- (a) that they have been **accepted** by a higher education institution to follow a course of study;
- (b) if the Member State so requires, that they have paid the **fees** charged by the higher education institution;
- (c) if the Member State so requires, that they possess sufficient **knowledge** of the **language** of the course to be followed;
- (d) if the Member State so requires, that they will have sufficient **resources** to cover the study costs.

Article 18(2) provides that the period of validity of an authorisation for students shall be at least one year, or for the duration of studies where this is shorter. Member States can withdraw or refuse to renew an authorisation in cases where a student does not make sufficient progress in the relevant studies in accordance with national law or administrative practice.<sup>129</sup>

Article 24 provides that students may carry out **economic activities** as workers or self-employed persons for a maximum number of hours which may not be less than 15 hours per week, which is more than under the former Directive, which set the maximum at ten hours per week. The absence of a provision opening up possibilities for students to look for work in the host Member State after finishing their studies was seen as one of the major shortcomings of the former students directive.<sup>130</sup> The current Directive provides that students, after the completion of their studies, shall have the possibility to stay on the territory of the host Member State for a period of at least nine months in order to seek employment or set up a business.<sup>131</sup> The nine month extension for graduated students or after

129 Article 21(2)(f).

130 COM(2011) 587 def.

131 Article 25(1).

completed research to look for a job may become relevant for UK students and researchers in the EU. Similar to the Blue Card directive, this directive gives in article 26 privileged rights to family members of researchers, going beyond what is provided in the FRD: some measures that can hamper family reunification, such as pre-entry language and integration tests, may not be applied.<sup>132</sup> Neither this directive nor the FRD provides a right to **family reunification for students**. As regards intra-EU mobility, article 27 provides that TCNs who hold a valid authorisation issued by the first Member State for the purpose of studies in the framework of a Union or multilateral programme that comprises mobility measures may enter and stay in order to carry out part of the studies in one or several second Member States on the basis of that authorisation and a valid travel document for a maximum of 360 days.

### 2.3.2. UK nationals as third-country family members of EU citizens: The Citizens Directive

After Brexit, UK nationals will **no longer** be EU citizens and for that reason can no longer rely on the Citizens Directive. However, the Citizens Directive can offer **protection** to those who reside as a family member of an EU citizen in a Member State other than that of the nationality of the EU citizen, or in cases where the CJEU has ruled that the directive will apply even though the EU citizen has not exercised (or has stopped exercising) his or her free movement rights.<sup>133</sup> As a family member of an EU citizen, UK nationals, being TCNs after Brexit, have a **derived right of residence** under the Citizens Directive.<sup>134</sup> Their right to continue residence in the event of death or departure of the EU citizen, or in the event of divorce or termination of the relationship will require a certain period of residence in the host state with the EU citizen. This differs from the rights they currently have as family members of (other) EU citizens under the Citizens Directive.<sup>135</sup>

## 2.4. Common Travel Area

The implications of UK withdrawal from the EU in so far as concerns (1) the **Irish land border**, (2) the **Common Travel Area** (CTA)<sup>136</sup>, and (3) the status of **Irish citizens** in the UK, are not particularly straight forward but reveal a certain incoherence in UK border control policy.<sup>137</sup>

The UK government has stated that it intends to maintain the Common Travel Area between Ireland and the UK which has been in place since the 1920s but has never been codified in legislation.<sup>138</sup> It is a practice whereby nationals of Ireland and the UK travel freely between the two countries without being subject to border controls. The CTA as a **border control free area** has been better served by the UK authorities than by their Irish counterparts which do apply border controls on flights arriving from the UK. The status of Irish nationals in the UK was determined by the 1949 Ireland Act (on Irish independence) according to which **Irish nationals** are **not** classified as **foreign nationals** in UK law.<sup>139</sup> Thus, the logic of the CTA is that Irish nationals do not require leave to enter the UK so

132 Article 15.

133 These are cases similar to those of the *Surinder Singh*, *Carpenter* and *Ruiz Zambrano* judgments.

134 Schrauwen, A. (2017), (Not) losing out from Brexit. *Europe and the World: A Law Review*, 1(1), p. 8. <doi.org/10.14324/111.444.ewlj.2017.04>.

135 Articles 8, 12 and 13 of the Citizens Directive.

136 Article 35(2) of the Withdrawal Agreement refers explicitly to the CTA.

137 B. Ryan (2016), *Written evidence. Submission to House of Lords European Union Committee inquiry on Brexit: UK-Irish Relations*. B. Ryan (2016), *The implications of UK withdrawal for immigration policy and nationality law: Irish aspects*, EU Referendum Position Papers, London: ILPA. Bernard Ryan (2001), 'The Common Travel Area between Britain and Ireland', 64 *Modern Law Review*, p. 855-874.

138 <www.citizensinformation.ie/en/moving\_country/moving\_abroad/freedom\_of\_movement\_within\_the\_eu/common\_travel\_area\_between\_ireland\_and\_the\_uk.html [31 July 2018].

139 Section 2(1) of the 1949 Ireland Act states that 'notwithstanding that the Republic of Ireland is not part of [Her] Majesty's dominions, the Republic of Ireland is not a foreign country for the purposes of any law in

there is no need for border controls between the two states. The fly in the ointment here is of course the status of third country nationals crossing the Irish–UK border. This problem is the same as the equivalent of the Schengen area: if there are no border controls among some states then third country nationals irregularly present in one state can in practice simply move to the other state. This problem is resolved in respect of the **CTA** about as effectively as in the **Schengen** area. In law third country nationals crossing the intra-CTA border are required to fulfil the necessary conditions for entering the UK via Ireland<sup>140</sup> and vice-versa but in practice only if a third country national comes to the attention of the authorities which begin to investigate how the person came to be present on the territory does an issue arise.

Again, similarly to the Schengen area arrangements, increasing information and data sharing takes place between the border authorities of the two states (including Advanced Passenger Information and Passenger Name Records).<sup>141</sup> One objective is to have access to information about third country nationals crossing the Irish-UK border (at least on flights and ferries).

In respect of Brexit, the UK is very keen to maintain the CTA. The Irish authorities are silent on the subject and it is unclear whether they envisage entry into the Schengen border control free area. Should **Ireland** remain **outside** the **Schengen** area then the maintenance of the CTA is not problematic for the EU. All persons arriving in an EU Member State not participating in the Schengen system, i.e. Ireland, are subject to a control on their first entry on the basis of national law. Subsequently, all persons - irrespective of their nationality - arriving in the Schengen area are subject to a control on their first entry on the basis of the Borders Code.

Should **Ireland** seek to **join** the **Schengen** border control free area then it would have to denounce the CTA as a condition of membership. The reason for this is that entry into Ireland would be subject to the Schengen Border Code and Ireland would be required to control all persons arriving in Ireland from a third country in accordance with the Code. It is very difficult to see how an arrangement could be reached whereby Ireland could maintain the CTA and be part of the Schengen area as the security of the AFSJ would be at stake. If no border and immigration controls were performed on persons travelling from the UK to Ireland, then anyone entering Ireland post its participation in the Schengen area would be free to travel without border or immigration controls to any other Schengen state. Only EU Member States not yet admitted to Schengen in full would be able to apply border controls on such persons.

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force in any part of the UK.' It goes on to provide that 'references in any Act of Parliament, other enactment or instrument whatsoever ... to foreigners, aliens [etc ...] ... shall be construed accordingly.'

140 Immigration Act 1999, section 1(1), read together with Aliens (Exemption) Order 1999.

141 Guild, E. (2014), 'Whose is sharing personal data obtained in immigration procedures with whom?', Immigration Law Practitioners' Association European Update September 2014 p. 1-6.

### 3. Models for future cooperation between the EU and the UK in the field of migration and mobility

#### KEY FINDINGS

- The EU has a long history of negotiating **agreements with third countries** which cover aspects of migration and borders.
- There are **six relevant categories** of mobility: visitors, workers, self-employed, service providers, students and pensioners.
- The EU can treat each category **differently in agreements** with third countries and does so.
- Non-discrimination on the basis of nationality in each of the six categories is the **most advantageous status**.
- The **hierarchy of favourable agreements** on mobility from most favourable to least are: EEA, Switzerland, Turkey, Partnership and Cooperation Agreement countries (mainly Europe), Stabilisation Agreement countries (Western Balkans), Euro-Mediterranean Agreements (North Africa), African, Caribbean and Pacific (ACP) countries, Chile and Canada.
- In the **future relationship** between the EU and the UK a **new arrangement** to guarantee **social security coordination** has to be made. Existing agreements provide different options between continuing full coordination to a very limited form of coordination.
- The UK could seek to secure **bilateral social security agreements** on reciprocal rights with individual EU Member States or seek a single agreement with the EU as a whole. But an agreement is necessary to protect social security rights after the withdrawal of the UK from the EU.

The EU has **long experience** in negotiating with third countries regarding **mobility and migration**. Chapters on workers and establishment have long been features of agreements. More recently, provisions on students and a new breed of agreements on visa waiver have been negotiated with a range of countries. In this chapter we will look at the content of the provisions on mobility and migration from the perspective of the **six categories of third country nationals** which the EU includes in such agreements. These are:

- (1) visitors (tourists),
- (2) workers,
- (3) establishment (both self-employment and the right of companies to move their personnel),
- (4) service providers,
- (5) students,
- (6) pensioners and economically inactive (but intending to stay more than the Schengen 90 days).

The reason we start with visitors is because of the importance of the **Schengen** system to all other categories of mobility and migration. Where third countries are within the Schengen system for the purposes of external border crossing, more liberal arrangements are possible in the area of migration for their citizens. The intra-Schengen third countries are parties to the EEA Agreement (Iceland, Liechtenstein and Norway). The EEA Agreement covers all the categories, mentioned in section 3.1-3.7,<sup>142</sup>

<sup>142</sup> Directive 2004/38 was incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII to the Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17) ("the Joint Committee Decision"), which entered into force on 1 March 2009.

but the concept of EU citizenship does not apply and there is no equivalent in the EEA Agreement.<sup>143</sup> Those third countries which do not participate in the Schengen system are never permitted such privileged access to the EU labour and establishment markets for their citizens. It is important to remember that EU third country agreements are always reciprocal. The third country must provide the same access for EU citizens as the EU provides to the third country national.

To provide a clear comparison of the different types of agreements we will proceed by category of person as identified and used by the EU in its relations with third countries. We will then consider the most important and long-term categories – workers and establishment, followed by somewhat less contentious categories of students, pensioners and the economically inactive but long staying. **Two aspects** are of particular interest, firstly **entry rights** and secondly **non-discrimination**. Because of the importance of the non-discrimination provisions we will include a separate section (3.8) on this regarding the scope in different agreements. Special attention will be paid in the end to the issue of social security coordination, which is an important instrument to stimulate free movement of workers or persons (section 3.9).

### 3.1. Visitors

#### 3.1.1. EEA Agreement

All the non-EU countries, which are parties to the **EEA agreement** also participate fully in the Schengen external border rules.<sup>144</sup> As a result, their citizens are by definition not subject to visa requirements. As third country national visitors they are permitted to travel to the EU for 90 days out of every 180 in accordance with the Schengen Border Code.<sup>145</sup> However, under the EEA Agreement their citizens are also entitled to extension work and residence rights which will be considered below.

#### 3.1.2. EC-Swiss Agreement

The EC-Swiss Agreement which entered into force in 2002 governing the free movement of persons between the two entities.<sup>146</sup> Because the agreement has to be amended every time there is a change to EU law, EUR-Lex has made available a consolidated version (without legal effect but including the

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143 Recitals 8 and 9 of the Joint Committee Decision read as follows:

(8) *The concept of 'Union Citizenship' is not included in the Agreement.*

(9) *Immigration policy is not part of the Agreement.*

Article 1 of the Joint Committee Decision reads:

(...) The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations: (...)

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States (...).

Attached to the Joint Committee Decision was a Joint Declaration by the Contracting Parties to the decision. That declaration reads:

*The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship.*

See also EFTA Court 26 July 2016, E-28/15, *Jabbi* (on the derived rights of TCN family members).

144 Iceland, Liechtenstein and Norway. See for an extensive description of the EEA, section 4.5.1.

145 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) *OJ* 2016 L 77/1.

146 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons - Final Act - Joint Declarations - Information relating to the entry into force of the seven Agreements with the Swiss Confederation in the sectors free movement of persons, air and land transport, public procurement, scientific and technological cooperation, mutual recognition in relation to conformity assessment, and trade in agricultural products *OJ* 2002 L 114/6.

relevant Joint Committee Decisions) which takes into account all changes until 2017.<sup>147</sup> Article 3 establishes a right of entry for nationals of the parties onto the territory of the other. The conditions are set out in Annex 1 of this agreement. This Annex sets out the **essential elements** following closely what is now the right of entry-exit in Directive 2004/38. Switzerland is also a party to the Schengen Implementing Agreement 1990 but with modifications.<sup>148</sup>

### 3.1.3. Visa waiver agreements

These agreements abolish **visa requirements** on citizens of the EU and the third country for visitors.<sup>149</sup> While the agreements do not clearly specify the activities which nationals of the parties may carry out on the territory of the other, they usually include an annex which includes a wide range (but not exclusive) list of permitted activities such as business engagements, sporting events etc.<sup>150</sup> The EU does not have readmission agreements with any of the states with which it has visa waiver agreements (to our knowledge). However, the Council in June 2017 called for 'reassessing visa policy towards third countries, as needed' as a means of achieving real progress in return and readmission.<sup>151</sup>

### 3.1.4. Visa Code

The Schengen Visa Code<sup>152</sup> applies to countries which are on the EU's visa black list.<sup>153</sup> This regulation is amended frequently and there has been a **steady reduction** of the number of countries on the EU's visa black list over the past five years. Nationals of those third countries which are on the EU's visa white list are not required to obtain visas before travelling as visitors to the EU.<sup>154</sup> The Schengen Borders code applies to them. A number of countries with **visa-free travel** or **visa-facilitation** to the EU also have readmission agreements for the facilitated return of their own nationals and in some cases also any third country nationals who arrived in the EU through that state.<sup>155</sup> It is unlikely that the UK would be added to the visa black list unless it adds to its own black list any EU states (see below on reciprocity). Further, the UK could ratify the 1957 Council of Europe Agreement on Movement of Persons to which 14 of the current EU Member States are parties.<sup>156</sup> That agreement guarantees **visa free movement**

147 <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02002A0430(01)-20170101> [18 June 2018].

148 <www.ezv.admin.ch/ezv/de/home/themen/schengen--zollkontrollen-bleiben.html>.

149 See par. 1.5.3 for a list of these agreements.

150 An example from the Dominica Agreement: "Joint Declaration on the Interpretation of the Category of Persons Travelling for the Purpose of Carrying out a Paid Activity as Provided for in Article 3(2) of this Agreement:

Desiring to ensure a common interpretation, the Contracting Parties agree that, for the purposes of this Agreement, the category of persons carrying out a paid activity covers persons entering for the purpose of carrying out a gainful occupation or remunerated activity in the territory of the other Contracting Party as an employee or as a service provider. This category should not cover:

- \* businesspersons, i.e. persons travelling for the purpose of business deliberations (without being employed in the country of the other Contracting Party),
- \* sportspersons or artists performing an activity on an ad-hoc basis,
- \* journalists sent by the media of their country of residence, and,
- \* intra-corporate trainees.

The implementation of this Declaration shall be monitored by the Joint Committee within its responsibility under Article 6 of this Agreement, which may propose modifications when, on the basis of the experiences of the Contracting Parties, it considers it necessary."

151 COM(2018)251 paragraph 3.1.

152 Regulation 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

153 Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

154 Limitations may apply depending on the type of passport the national has.

155 Albania (1 May 2006); Bosnia Herzegovina, Former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia and Ukraine (1 January 2008) and Georgia 1 November 2011.

156 Austria, Belgium, Cyprus, France, Germany, Greece, Hungary, Italy, Luxemburg, Malta, The Netherlands, Portugal, Slovenia and Spain.

among the parties, so the EU states parties to the agreement would have to denounce it before they could put the UK on the EU visa black list.

The EU has adopted legislation to create an **EU Travel Information and Authorisation System** (ETIAS) which is planned to resemble the US ESTA system. All travellers to the EU who are not EU citizens or nationals with a visa will have to apply for and receive an ETIAS authorisation before travel to the EU. The Commission has established a dedicated website to the ETIAS system to explain how the system will operate.<sup>157</sup> According to the Commission there is no clarity on whether UK nationals will be required to obtain ETIAS authorisations to travel to the EU after 29 March 2019. However, in the absence of agreement to the contrary this will also apply to UK nationals.

### 3.1.5. EEC-Turkey Association Agreement

Turkey is on the EU visa black list and there is a readmission agreement in force with it since 1 October 2014.<sup>158</sup> According to the EEC-Turkey Association Agreement's Additional Protocol, Article 41(1):

*The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.*

In EU law, as interpreted by the CJEU, the right to service provision also includes the right to receive services (which includes most visitors or tourists).<sup>159</sup> A visa requirement is a restriction on the right to move to receive services in another state. However, in a landmark decision, *Demirkan*<sup>160</sup> the CJEU held that while the agreement's provision prevented the application of stricter rules to individuals in the field of service provision than those which applied at the time the agreement became applicable in the relevant Member State (the standstill provision) and although in the case of Germany at the time of entry into force of the agreement there was no visa requirement on Turkish visitors to the country, the standstill provision relating to service provision did not apply to service recipients. Thus, the continued application of mandatory visas for Turkish nationals seeking to visit EU states was lawful.<sup>161</sup>

## 3.2. Workers

The EU has a variety of ways of addressing third country national workers in their agreements with third countries. The most extensively used is an equal treatment provision guaranteeing to third country national workers equal treatment in working conditions and wages (sometimes also extending to dismissal). Similarly, very common are the inclusion of equal treatment provisions on social security for workers. Starting with the most generous provisions the following agreements can be distinguished.

### 3.2.1. EEA Agreement

Under Article 28 EEA agreement, nationals of EEA countries have **full free movement rights** as workers on one another's territory.<sup>162</sup> The wording of Article 28 is based on that in Article 45 TFEU, modified for the purpose. Annex V of the agreement provides the detail and must be renegotiated every time a new

157 ETIAS: <etias.com> [30 July 2018].

158 This agreement was supposed to be extended to cover also third country nationals from 2016 but we understand that the necessary implementing measures have not yet been adopted in Turkey. Zoetewij, M.H. & O. Turhan, 'Turkey's Role in EU Migration Law and Policy: Turkey's Voting for Christmas', in: C. Grütters, S. Mantu & P. Minderhoud (eds.), *Migration on the Move*, The Hague: Brill 2017, p. 172-194.

159 This is the broad interpretation of the scope of passive freedom to provide services, see: CJEU 24 November 1998, C-274/96, *Bickel and Franz*, ECLI:EU:C:1998:563, in which the CJEU held that "passive freedom to provide services applies to all nationals of Member States who, independently of other freedoms guaranteed by European Union law, visit another Member State where they intend or are likely to receive services".

160 CJEU 24 September 2013 (GC), C-221/11, *Leyla Demirkan v Bundesrepublik Deutschland*, ECLI:EU:C:2013:583.

161 CJEU 19 February 2009, C-228/06, *Soysal & Savatli*, ECLI:EU:C:2009:101.

162 EEA countries are: all EU Member States plus 3 EFTA states: Iceland, Liechtenstein and Norway.

EU measure is adopted in the field in order for it to be applicable also in the context of the EEA Agreement. Both Directive 2004/38 and Regulation 492/2011 have been included in the Annex. Article 112 of the Agreement states that “if serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113.” This is generally known as a safeguard clause which “allows EEA states to apply an **‘emergency brake’** in certain circumstances.”<sup>163</sup> This provision applies to all areas of the EEA Agreement and we will not discuss it again under the other areas of residence rights.

### 3.2.2. EC-Swiss Agreement

Article 4 of the EC-Swiss Agreement provides for nationals of the parties to exercise a right of residence and economic activities on the territory of the other. Annex 1 Articles 6–11 follow the model of the Citizens Directive. Article 10 provides a five-year transitional arrangement during which quantitative limits for residence over four months are permitted (Article 10). This five-year delay has applied also to states which join the EU (increased to twelve years for the 2004 and later acceding countries, but ten for Croatia, in the case of a serious disturbance to the Swiss labour market). **Quotas for new residence permits** were established by Switzerland, initially 15,000 per year for EU citizens who were employed or self-employed.

### 3.2.3. EEC-Turkey Association Agreement

Under Decision 2/76 and 1/80 adopted under the EEC-Turkey Association Agreement, Turkish nationals who have been admitted to the labour market are entitled to extension of their work (and residence permits after one, three, and four years employment with varying conditions (Article 6 Decision 1/80). There is also a standstill provision prohibiting a deterioration of the rights of Turkish workers. After four years employment the Turkish worker is entitled to **free access to the labour market**. There is extensive jurisprudence by the CJEU on the subject. The agreement also extends rights to the family members of Turkish nationals once they have been admitted to the Member State.

### 3.2.4. Partnership and Cooperation Agreements

A generation of agreements follows the dissolution of the Soviet Union. Throughout the 1990s, the EU negotiated agreements with virtually all of the new states. The agreements are very similar in their scope and provisions. The EU Russia Agreement<sup>164</sup> is used for the purposes of this study to exemplify a model available and already in existence. Article 23 sets of a right to **equal treatment for workers**, nationals of the parties, legally employed on the territory of the other state. It covers working conditions, remuneration or dismissal and the comparator is own nationals.<sup>165</sup>

### 3.2.5. Stabilisation Agreements

Agreements were concluded with all the Western Balkan countries in the first decade of the new millennium. All the agreements are very similar. The agreement with Albania will be used as the example here.<sup>166</sup> Articles 46 – 48 cover the rights of workers. Workers, nationals of a party and **legally employed** on the territory of the other are entitled to **non-discrimination** on the basis of nationality as regards working conditions, remuneration or dismissal. The comparator is own nationals. The Stabilisation Council is called upon to examine the possibility of granting other improvements.

163 European Union Committee UK-EU relations after Brexit 17<sup>th</sup> Report of Session 2017-19 [published 8 June 2018] HL Paper 149 par. 72. However, this has never been used in practice.

164 'Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part', *OJ* 1997 L 327.

165 CJEU 12 April 2005, C-265/03, *Simutenkov*, ECLI:EU:C:2005:213.

166 'Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part', *OJ* 2009 L 107.

### 3.2.6. Euro-Mediterranean Agreements

New agreements with countries on the Southern shores of the Mediterranean were negotiated in the 1990s. They remained many of the features of the previous agreements (negotiated in the 1970s) including provisions on workers. The Morocco Agreement is a good example of this kind of agreement.<sup>167</sup> Article 64 provides for **non-discrimination on the basis of nationality in the treatment of workers**, nationals of the parties as regards working conditions, remuneration and dismissal, once lawfully employed to the territory of a Member State.<sup>168</sup>

### 3.2.7. ACP (or Cotonou) Agreement

79 countries in the Africa, Caribbean and Pacific region are parties to the ACP (or Cotonou) Agreement.<sup>169</sup> It includes in Article 13(3) a **prohibition of discrimination on the basis of nationality of any worker** national of an ACP country who is legally employed in the EU in respect of working conditions, remuneration and dismissal. The comparator is own nationals.

## 3.3. Establishment

### 3.3.1. EEA Agreement

Article 31 of the EEA Agreement mirrors Article 49 TFEU with appropriate adjustments. Annex VIII provides for some exceptions in respect of Liechtenstein on account of its size. As in respect of workers, when new EU legislation is adopted, such as Directive 2004/38, negotiations to amend this annex have to be undertaken to ensure that EU law and EEA rules remain in alignment.

### 3.3.2. EC-Swiss Agreement

While the EC-Swiss Agreement provides for **full free movement of the self-employed**, the transitional provision, Article 10 permits limitations for up to twelve years (see above under workers).

### 3.3.3. EEC-Turkey Association Agreement

Article 41 Additional Protocol of the EEC-Turkey Association Agreement creates a **standstill provision** regarding establishment. Thus, the rules of entry and residence of Turkish self-employed persons cannot be made stricter after the entry into force of the Additional Protocol (or the accession of the Member States to the EU). There is extensive jurisprudence of the CJEU on the scope of the right.

### 3.3.4. Partnership and Cooperation Agreements

In this generation of agreement, exemplified by the Russia Agreement, there is no right for an individual, national of one of the parties to move to the territory of the other for the purpose of self-employment. However, **companies** and subsidiaries of companies do have a right to transfer **key personnel** under Article 28. The modalities make its use limited.

### 3.3.5. Stabilisation Agreements

Article 49 et seq. Albania Agreement provides a right of legal persons (companies) to send their key personnel, nationals of the party, to a subsidiary on the territory of the other party. Article 50(4)

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167 'Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, OJ 2000 L 70/2.

168 CJEU 31 January 1991, C-18/90, *Kziber*, ECLI:EU:C:1990:36; CJEU 14 December 2006, C-97/05, *Gattoussi*, ECLI:EU:C:2006:780.

169 'Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part', signed in Cotonou on 23 June 2000, OJ 2000 L 317.

provides that the Stabilisation and Association Council shall establish the modalities to extend the **right of establishment** to nationals of the parties.

### 3.4. Service Providers

#### 3.4.1. EEA Agreement

Article 36 EEA Agreement mirrors Article 56 TFEU providing for free movement of services, including by **service providers**. Annex X EEA Agreement applies to service provision and only provides for adjustments relevant to the nature of service provision.

#### 3.4.2. EC-Swiss Agreement

Article 6 of the EC-Swiss Agreement covers service providers. This covers a right to enter to provide services and also to receive them (expressly stated Article 5(3)). The quota limits of Article 10 cannot be applied to these persons (Article 5(4)).

#### 3.4.3. EEC-Turkey Association Agreement

Article 41 Additional Protocol of the EEC-Turkey Association Agreement also extends a **standstill provision** to service providers. As mentioned above, this standstill provision does not extend to service recipients.

#### 3.4.4. Partnership and Cooperation Agreements

Article 36 et seq. of the Russia Agreement covers the provision of services. The right is limited to **companies and businesses**.

#### 3.4.5. Stabilisation Agreements

Article 57 et seq. of, for example, the Albania Agreement provide for access to the territory of the parties for service provisions from five years after entry into force of the agreement. The deadline is part of the agreement contained in the provision on service providers. It covers both **natural and legal persons**.<sup>170</sup>

#### 3.4.6. Euro-Mediterranean Agreements

Article 32 Morocco Agreement confirms the parties **GATS** undertakings.

#### 3.4.7. EU-Chile Agreement

Article 101 EU Chile Agreement provides for consideration of extending service provision to natural persons within two years of entry into force.<sup>171</sup>

#### 3.4.8. EU-Canada Agreement

The Comprehensive Economic and Trade Agreement (CETA) with Canada is the most recent trade agreement including provisions on services.<sup>172</sup> It covers some liberalisation for categories of persons: **business visitors, investors, intra-corporate transferees** who are senior personnel, **specialists** or **graduate trainees**. There is a maximum period of residence between 90 days and 3 years depending on the category of personnel with the possibility of an 18 months extension.

<sup>170</sup> Stabilisation and Association Agreement between Albania and the European Union, entry into force: 1 April 2009, *OJ* 2009 L 107/166.

<sup>171</sup> 'Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile of the other part', *OJ* 2002 L 352/3.

<sup>172</sup> *OJ* 2017 L 11/23.

### 3.4.9. GATS

Part of the World trade organisation agreements, the General Agreement on Trade in Services, covers what is called mode 4 – the movement of **natural persons who are service providers** or employees of a service provider and being sent to another GATS party to provide services.<sup>173</sup> The system is based on the principle of market access and most favourable nation status (a form of non-discrimination) for parties. However, the commitments are designed on an opt-in basis and are sectorial. Both the EU and the Member States have reservations, which limits the categories of persons who can provide services under GATS.

## 3.5. Students

### 3.5.1. EEA Agreement

EEA students are entitled to free movement in accordance with Directive 2004/38 in accordance with (EEA) Joint Committee Decision 158/2007. The **same rights** and limitations apply to EEA students on the territory of one of the Contracting Parties.

### 3.5.2. EC-Swiss Agreement

EU and Swiss students are also covered by the agreement with a right of residence renewable annually (Article 24). They must have **sufficient financial means**, not to have to apply for social assistance benefits and have all risks sickness insurance. They are not entitled to vocational training or maintenance assistance (Article 24(4)).

### 3.5.3. EEC-Turkey Association Agreement

The EEC-Turkey Association Agreement does not cover students.<sup>174</sup> Association Council Decision 1/80 provides a residence right for **children of Turkish migrant workers** who have been admitted to a Member State. However, students who are permitted to work and who do so can acquire rights as workers (see above).<sup>175</sup>

## 3.6. Pensioners

### 3.6.1. EEA Agreement

EEA pensioners are **entitled to reside** on the territory of one of the Contracting Parties on the basis of the rules contained in Directive 2004/38. This was incorporated into the EEA arrangements by Joint Committee Decision 158/2007. The same limitations which apply in Directive 2004/38 also apply to pensioners' rights in the EEA arrangements.

### 3.6.2. EC-Swiss Agreement

Article 24 of the EC-Swiss agreement provides a right of residence for the **economically inactive**. This includes **pensioners**. They must have sufficient financial means not to have to apply for social assistance benefits and have all risks sickness insurance. Residence permits may be valid first for two years and automatically extendable for five years.

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173 Tans S. (2017), *Service Provision and Migration: EU and WTO service trade liberalisation and their impact on Dutch and UK Immigration Rules*, The Hague: Brill.

174 Hoogenboom, A. (2013), 'Turkish Nationals and the Right to Study in the European Union: A Progressive Interpretation', 15(4) *European Journal of Migration and Law*, 387-412

175 CJEU 24 January 2008, C-294/06, *Payir*, ECLI:EU:C:2008:36.

### 3.6.3. EEC-Turkey Association Agreement

The EEC-Turkey Association Agreement does not extend a right to remain after a Turkish worker has left the labour market permanently and has no prospect of **reintegration**.<sup>176</sup>

## 3.7. Economically Inactive

### 3.7.1. EEA Agreement

Economically inactive nationals of the EEA are **entitled to reside** on the territory of one of the Contracting Parties on the basis of the rules contained in Directive 2004/38. This was incorporated into the EEA arrangements by Joint Committee Decision 158/2007. The same limitations which apply in Directive 2004/38 also apply to these persons rights in the EEA arrangements.<sup>177</sup>

### 3.7.2. EC-Swiss Agreement

Article 24 of the EC-Swiss agreement provides a right of residence for the economically inactive. They must have **sufficient financial means** not to have to apply for social assistance benefits and have all risks sickness insurance. Residence permits may be valid first for two years and automatically extendable for five years.

### 3.7.3. EEC-Turkey Association Agreement

There is **no relevant provision** in the EEC-Turkey Association Agreement.

## 3.8. Scope of any non-discrimination provision

### 3.8.1. Visitors

The EEA (Article 4) and EC-Swiss (Article 2) agreements include a **full non-discrimination** on grounds of nationality provision covering all aspects of free movement of persons.

### 3.8.2. Workers

The EEA (Article 4) and EC-Swiss (Article 2) agreements include a full non-discrimination on grounds of nationality provision covering all aspects of free movement of persons. The EEC-Turkey Association Agreement includes, at Article 9, a **non-discrimination provision** on grounds of nationality. It only applies within the scope of the agreement (which includes workers). The Russia Agreement guarantees non-discrimination on the basis of nationality for workers nationals of the parties (Article 23). Article 46 of the Albania Agreement protects workers from discrimination on the basis of nationality.

### 3.8.3. Establishment

The EEA (Article 4) and EC-Swiss (Article 2) agreements include a full non-discrimination on grounds of nationality provision covering all aspects of free movement of persons. The EEC-Turkey Association Agreement includes, at Article 9, a **non-discrimination provision** on grounds of nationality. It only applies within the scope of the agreement (which includes the self-employed). The Russia Agreement only protects legal persons from discrimination on the basis of nationality. Article 56 of the Albania Agreement only prohibits discrimination concerning the activities of EU companies or nationals in Albania.

<sup>176</sup> CJEU 6 June 1995, C-434/93, *Ahmet Bozkurt*, ECLI:EU:C:1995:168; CJEU 7 July 2005, C-383/03, *Ergül Dogan*, ECLI:EU:C:2005:436.

<sup>177</sup> Directive 2004/38 was incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII to the Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17) ("the Joint Committee Decision"), which entered into force on 1 March 2009.

#### 3.8.4. Service providers

The EEA (Article 4) and EC-Swiss (Article 2) agreements include a full non-discrimination on grounds of nationality provision covering all aspects of free movement of persons. The EEC-Turkey Association Agreement includes, at Article 9, a **non-discrimination provision** on grounds of nationality. It only applies within the scope of the agreement (which includes service providers, but not service recipients). The Russia Agreement only protects legal persons from discrimination on the basis of nationality.

#### 3.8.5. Students

The EEA (Article 4) and EC-Swiss (Article 2) agreements include a **full non-discrimination** on grounds of nationality provision covering all aspects of free movement of persons.

#### 3.8.6. Pensioners

The EEA (Article 4) and EC-Swiss (Article 2) agreements include a **full non-discrimination** on grounds of nationality provision covering all aspects of free movement of persons.

#### 3.8.7. Economically inactive

The EEA (Article 4) and EC-Swiss (Article 2) agreements include a **full non-discrimination** on grounds of nationality provision covering all aspects of free movement of persons.

### 3.9. Coordination on social security

As stated in chapter 2, the core principles of social security coordination are: only one legislation applicable, **equal treatment** with nationals, **aggregation** of insured periods and **export** of cash benefits. In the future relationship between the EU and the UK a new arrangement to guarantee this has to be made. The existing agreements provide the following options.

#### 3.9.1. EEA Agreement

According to Article 29 of and Annex VI to the EEA Agreement the **same coordination** of social security instruments as within the EU will apply. This is the only option in which the EU-UK relation regarding social security coordination will remain the same.<sup>178</sup>

#### 3.9.2. EC-Swiss Agreement

Article 8 of the EC-Swiss Agreement provides that pursuant to Annex II the contracting parties coordinate their social security systems. Annex II refers to the **EU social security coordination instruments** with a number of special provisions, specifications and exceptions regarding the relations with Switzerland.<sup>179</sup> There is a Joint Committee to apply changes made in EU law on social security coordination to Switzerland as well.

#### 3.9.3. EEC-Turkey Agreement

Between Turkey and the EU Decision 3/80 of the Association Council is (still) in force.<sup>180</sup> Decision 3/80 deals with the **coordination of the social security schemes** of the Member States for Turkish workers and their family members, not the coordination of the Turkish social security scheme with the coordination rules of the EU. It is not applicable to EU workers in Turkey.<sup>181</sup> The EU wants to replace

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178 All other agreements have a less comprehensive social security coordination scheme.

179 Verschueren, H. (2017), 'Scenarios for Brexit and social security', *Maastricht Journal of European and Comparative Law*, 24(3), p. 367-381.

180 Association Council Decision 3/80, *OJ* 1983 C 110/60.

181 Minderhoud, P. (2016), 'Social Security Rights under Decision No 3/80 of the EEC-Turkey Association Council: Developments in the EU and in the Netherlands', *European Journal of Social Security*, issue 3, p. 268-285

Decision 3/80 by a new EU Turkey Agreement but Turkey has opposed this so far. In the new agreement there is a provision of equal treatment, a full coverage of all benefits under Article 3 Regulation 883/2004 (except for special non-contributory cash benefits) and it also covers EU citizens in Turkey, which would mean reciprocity.<sup>182</sup>

#### 3.9.4. Euro-Mediterranean Association Agreements

In the Euro-Mediterranean agreements with Algeria, Morocco, and Tunisia there is a **limited social security coordination**. There are provisions included which aim to achieve the principle of equal treatment on the basis of nationality, and the aggregation of periods of insurance or residence and the export of long-term benefits. The equal treatment provision has direct effect based on the case law of the CJEU in, among others *Kziber*.<sup>183</sup> In 2010, a series of draft Decisions on the coordination of social security were adopted, including with Algeria, Morocco and Tunisia. It contains equal treatment clauses for workers legally employed in a Member State and family members legally residing with them. It also covers a limited **aggregation of periods** of insurance or residence and the export of all benefits under Article 3 Regulation 883/2004 (except for special non-contributory cash benefits). These new Decisions have not yet entered into force.<sup>184</sup>

#### 3.9.5. Stabilisation and Association Agreements

The Stabilisation and Association Agreements with the Western Balkan countries contain limited social security coordination rules regarding the **aggregation of periods insurance**, employment and residence. They do not provide for equal treatment in the field of social security. Regarding Albania, Montenegro and (FYRO)Macedonia new draft decisions on the coordination of social security were adopted in 2010 and 2012. These decisions contain an equal treatment clause and cover the export of a limited number of long-term benefits. These new Decisions also have not yet entered into force.<sup>185</sup>

#### 3.9.6. GATS

GATS and Free Trade Agreements do not cover social security coordination.

#### 3.9.7. No Deal

Assuming that the WDA is signed and ratified, there will be a transition period with the UK ending on 31 December 2020. If that Agreement is not signed and ratified there will be no transition period and the consequences of 'no-deal' will start immediately on 30 March 2019. If there is no deal after the transition period, UK nationals in a cross-border situation between two or more EU Member States **will remain under the coordination of social security** provisions of Regulation 883/2004 through Regulation 1231/2010.<sup>186</sup> UK nationals resident in an EU Member State (not in a cross-border situation) will be able to invoke the equal treatment provisions regarding social security laid down in the various EU migration Directives that apply to third country nationals.<sup>187</sup> On the basis of these EU migration Directives there is no reciprocity, which means there is no coverage for EU citizens in the UK nor for EU

182 Council Decision 2012/776/EU, *OJ* 2012 L 340/19.

183 CJEU 31 January 1991, C-18/90, *Kziber*, ECLI:EU:C:1991:36.

184 Eisele, K. (2018), 'Social security coordination in Association Agreements: Is a common EU approach with third countries in sight?', *European Journal of Social Security*, p. 116-128.

185 See section 2.2.7. Eisele, K. (2018), 'Social security coordination in Association Agreements: Is a common EU approach with third countries in sight?', *European Journal of Social Security*, p. 116-128.

186 Except for Denmark, which has opted out of Regulation 1231/2010.

187 See art. 11 Directive 2003/109, art. 14 Directive 2009/50, art. 12 Directive 2011/98, art. 23 Directive 2014/36, art. 18 Directive 2014/66 and art. 22 Directive 2016/801 (described in par. 1.2 of this study). See for a detailed overview of the social security rights of TCN in these directives: H. Verschueren (2016), 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', *European Journal of Migration and Law*, 18, p. 373-408.

citizens in a cross-border situation between the UK and another Member State. They will fall under national UK law (and the law of the other Member State in case of a cross border situation). There is no principle of equal treatment applicable to foreigners in British social security law, nor a principle of export of benefits, nor a principle of aggregation of contributions.<sup>188</sup>

There are estimated 23,000 - 30,000 cross-border workers between Northern Ireland and Ireland. This includes UK nationals as well as non-UK and Irish nationals.<sup>189</sup> For situations where mobility starts after 31 December 2020 this will lead to **uncertainty regarding applicable legislation**, export of benefits, aggregation of periods and equal treatment in case there is no deal.

The UK has bilateral social security agreements about national insurance and benefit entitlement with 19 EU Member States. However, most of them are **outdated** like the agreement with Belgium which is from 1957.<sup>190</sup> The UK could seek to secure bilateral social security agreements on reciprocal rights with individual EU or EFTA states, but negotiations could be difficult and protracted, and it is questionable whether the EU would be interested in such an approach. The coordination rules set down in a bilateral agreement may differ from the EU coordination rules in a range of aspects. A complicating factor will be that when an EU Member State concludes a bilateral agreement with a third country, the fundamental principle of equal treatment requires that Member State to grant nationals of other Member States the same advantages as those which its own nationals enjoy under that agreement.<sup>191</sup>

Alternatively, the UK could seek a **single agreement with the EU or EEA** as a whole. Whatever the solution, decisions would have to be made on how to protect social security rights after the withdrawal of the UK from the EU.

### 3.10. Conclusion

The EU has negotiated quite complex arrangements on movement of natural persons in its agreements with third countries. The **most generous** approaching EU law itself, are those in the **EEA Agreement** and the **EC-Swiss Agreement**. They cover free movement of workers, the self-employed, service providers, students, pensions and the economically inactive. Iceland, Liechtenstein, Norway and Switzerland are also states, which participate in the Schengen area of no border controls on the movement of persons.

The EU has negotiated with other states agreements some of which are limited to issues of visas or readmission. Other trade agreements include provisions on workers (mainly equal treatment in working conditions provisions). Some agreements include provisions on a right of establishment either for companies but also for natural persons. These agreements usually also include articles covering service provision. There are many options for the regulation of movement of persons open to the EU on the basis of existing agreements with third countries. The **central element** which is common to all of them, however, is its **reciprocity**. Nationals of both parties are entitled to the same level of rights on the territory of the other party.

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188 Guild, E. (2016), *Brexit and Social Security in the EU*, CEPS Commentary, Brussels: CEPS.

189 McKeever, G. (2018), 'Brexit, the Irish border and Social Security Rights', *Journal of Social Security Law*, nr. 1, p. 48.

190 <[www.ilo.org/dyn/natlex/natlex4.listResults?p\\_lang=en&p\\_country=GBR&p\\_classification=23.01](http://www.ilo.org/dyn/natlex/natlex4.listResults?p_lang=en&p_country=GBR&p_classification=23.01)>

191 This is based on CJEU 15 January 2002, C-55/00, *Gottardo*, ECLI:EU:C:2002:16.

## 4. The applicability of CJEU case law and the jurisdiction of the CJEU

### KEY FINDINGS

- As a result of the Withdrawal Agreement (WDA) **case-law** of the **CJEU** will remain to have significant **influence**, as **UK courts** will have to respect applicable case-law of the CJEU handed down (or already pending) before the end of the transition period, and take due account to later case-law.
- As the personal scope of the WDA is **limited** to persons who reside **outside** their **home country**, UK nationals who have returned to the UK will **not be able to rely** on the CJEU case-law that preserves their free movement rights after Brexit.
- For the same reason as mentioned above, the **Zambrano** and subsequent case law will not be applicable to UK nationals residing in the UK after Brexit. As a result, **UK children** (or dependent adults) **cannot** acquire a **derived residence right** for their third country national family members on which they are dependent.
- The WDA determines that the restrictive approach by the **CJEU** on **public order** and **abuse of rights** as a ground for removal will not be applicable to EU citizens residing in the UK and UK nationals residing in one of the EU-27 Member States for conduct occurring after the end of the transition period.
- After Brexit, EU citizens residing in the UK will be able to enforce their rights in a complaint procedure with an **independent UK authority**, which is also competent to initiate inquiries and legal actions. Citizens' rights referred to in the WDA can also be **invoked** before a **national court**.
- A **Joint Committee** will be set up for the implementation and application of the WDA, with the competence to make recommendations, take binding decisions, or submit a dispute for a ruling to the CJEU.
- During eight years **after** the **transition period**, the CJEU will remain competent to rule on citizens' rights issues following requests from courts in the UK. After this transitional period of eight years, establishing an **EFTA-Court-like body** could be considered for questions on the interpretation of EU law.
- A number of **cooperation models** between the EU and third countries grant an important role to the CJEU, such as the Association Agreement between the EU and Turkey and the EFTA. Although the EFTA court is independent, it is bound to align its interpretation with the CJEU's case law.
- **Dispute settlement** mechanisms established in many other agreements between the EU and third countries include an arbitration procedure, sometimes with the option of appeal. The applicability of such models for a future cooperation between the EU and the UK is limited by the rule that the CJEU is the only instance competent to interpret EU law.

This chapter will focus on the issue of the applicability of **CJEU case law** and the continued **jurisdiction of the CJEU** (Court of Justice of the EU). It will map the possibilities for citizens to **enforce** their **rights** conferred by the WDA, and for the EU and the UK to monitor or enforce compliance with the WDA. Furthermore, it describes the mechanisms on dispute settlement in the framework of the WDA. Finally, the chapter will elaborate on possible mechanisms for **judicial review** and **dispute settlement** after the transition period. With that aim, section 4.5.2 gives an overview of the relevant mechanisms in place in other partnership relations between the EU and third countries.

## 4.1. CJEU case law

This section will start with an overview of the impact of the CJEU case law on free movement of EU citizens has had and still has on the legislation and case law in the UK. It will also answer the question **which current immigration CJEU case law will be affected** after the transition period. This part will be followed by an **analysis** of the most **important trends** in CJEU case law which will remain applicable to the residence and work rights of EU citizens and their family members in the UK, as well as the residence and work rights of UK nationals and their family members in the EU. It concerns citizens who started exercising their free movement rights at the latest before the end of the transition period (i.e. before 1 January 2021).

### 4.1.1. Introduction

The **Citizens Directive** (Dir. 2004/38) gives effect to the right which EU law provides to all EU citizens and their family members to move and reside anywhere in the EU, which is enshrined in articles 20(2) and 21 TFEU and article 45 Charter (EU Charter of Fundamental Rights). The directive also gives effect to the specific rights of free movement of persons which are found in articles 45 (free movement of workers), 49 (the right of establishment) and 56 (the right of service provision). Since 1961, Regulations and Directives have been adopted on free movement of workers (Regulation 15/61), the rights of workers (Regulation 38/64), followed by three Directives in 1990 on the right of residence of students, pensioners and the economically inactive.<sup>192</sup> After the introduction of the status of citizenship of the Union as a formal status in the EC Treaty as of 1993, Member States negotiated until 2004 on a new coherent instrument, which would consolidate the existing legislation. The Citizens Directive therefore builds on the previous measures, adding new rights but not limiting or reducing existing ones. It replaced all the previous Regulations and Directives covering the field with some exceptions.<sup>193</sup> The directive has also codified the CJEU case law on free movement and the rights of EU citizens and their family members (including third country national family members) as established prior to 2001.<sup>194</sup>

In a quantitative research on the use of preliminary rulings to the CJEU in general (so not specifically on free movement), it was found that between 2003 and 2013, **UK courts requested** for a **preliminary ruling** to the CJEU in **19 or 20 cases annually** on average.<sup>195</sup> According to this study, population size and litigation rate are relevant structural factors for explaining the variations in number of preliminary references between Member States. Based on those two factors, the researchers concluded that the UK make significantly fewer references than would be expected. On free movement cases however, it seems that UK courts are relatively more active. Out of the 79 CJEU judgments between July 2008 and September 2018 on the free movement rights of EU citizens, 21 cases concerned the UK legislation, caused by 20 preliminary references by UK courts and one infringement procedure against the UK.<sup>196</sup> From the 8 currently pending preliminary references, 2 come from UK courts. This shows that the CJEU case law on free movement of EU citizens has played an important role, and that up until now, **UK courts** still seek **clarity** on the **interpretation of Union law** and the extent to which UK legislation is compliant. Most of the preliminary references concerned the scope of the Citizens Directive and the implications of **EU citizenship**, the right to **permanent residence** and

192 These Directives were 90/364/EEC, 90/365/EEC and 93/96/EEC. Council Directive 90/366/EEC on the right of residence for students was annulled by the CJEU due to the lack of a proper legal basis: CJEU 7 July 1992, C-295/90, *Parliament v. Council*, ECLI:EU:C:1992:294.

193 The Directive amends Regulation (EEC) No 1612/68 and repeals Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

194 Guild E., S. Peers & J. Tomkin (2014), *The EU Citizenship Directive. A commentary*, Oxford: Oxford University Press, p. 1-2.

195 Broberg M. & N. Fenger (2014), *Preliminary References to the European Court of Justice*, 2<sup>nd</sup> ed., Oxford: Oxford University Press, Chapter 2.

196 See for a complete overview of these cases Table 1 in the Annex.

**public order** issues. In the overview in section 4.1.2, the references from UK courts are given special attention.

#### 4.1.2. Limited impact of CJEU case law due to Brexit

Considering the themes that have not been included in the WDA (see also section 2.2.1), we can already depict some key **CJEU judgments** which will probably **lose its impact** on the **UK immigration** rules. In these judgments, the Court established a right of residence on the basis of article 20 or 21 TFEU for persons who were not eligible, on the basis of the Citizens Directive, for a (derived) right of residence. A number of these cases apply to the situation where the **EU citizen resides** in his or her **home country**.<sup>197</sup> As the WDA limits the rights of UK nationals and their family members to situations where they reside in a Member State and continue to do so after the transition period, the UK doesn't need to comply with the case law of the CJEU that applies to situations falling outside this scope. These situations will be considered as purely internal ones.

However, it should be borne in mind that the provisions of article 9(1) of the WDA refer to Union Law and not specifically only to the Citizens Directive. This implies that the continued recognition by the CJEU of citizens' rights derived from Union law which are not directly based on the Citizens Directive, but rather on article **20** and **21 TFEU** should be **respected** after the transition period as well, as long as their situation falls within the scope of the WDA. Article 35 WDA ensures **life-long protection**, but only CJEU judgments *before* the end of the transition period (and judgments on pending cases as meant in article 82 and 83 WDA) remain applicable to those situations. Relevant CJEU case law *after* this date, will be taken due regard to by the UK government.<sup>198</sup>

Due to the condition of residing outside the country of nationality, three important categories of case law fall outside the scope of the WDA. These are described below.

#### *Surinder Singh cases*

The first important judgment concerns the *Surinder Singh* case.<sup>199</sup> In this case, the CJEU held that an EU citizen who had exercised a right of free movement to go to another EU State and established a family there had a **right**, upon **returning** to his **home State**, to bring his family with him in accordance with EU law even if the provisions of the national law of his home State did not permit it. This judgment, which aims to avoid deterring EU citizens from exercising their free movement rights, overruled the UK's '**primary purpose rule**' for proving the status of a relationship with a British Citizen.<sup>200</sup> Until now, the '*Surinder Singh* Route' is still being used within the UK as a valid immigration option for immigrating spouses and partners. After Brexit, this route may become affected, if the UK decides to return to the more stricter immigration law of 'primary purpose rule'. In that situation, the subsequent case law on returning EU citizens will fall as well.<sup>201</sup> However, the UK government has reported to intend to protect family members of UK nationals covered by the *Surinder Singh* case law in national law (see section 2.2.1). Moreover, the case law of *Martinez Sala* and *Vatsouras & Koupatantze*, where the CJEU acknowledges that certain **rights of a worker** may still have an effect after the exercise of the free

197 CJEU 11 December 2007, C-291/05, *Eind*, ECLI:EU:C:2007:771; CJEU 12 March 2014, C-456/12, *O.&B.*, ECLI:EU:C:2014:135; CJEU 8 March 2011, C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124; CJEU 10 May 2017, C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354, and following case law.

198 Article 85 Withdrawal Agreement.

199 CJEU 7 July 1992, C-370/90, *Surinder Singh*, ECLI:EU:C:1992:296.

200 The Primary Purpose rule required foreign nationals married to British citizens to prove that the primary purpose of their marriage was not to obtain British residency

201 CJEU 11 December 2007, C-291/05, *Eind*, ECLI:EU:C:2007:771; CJEU 12 March 2014, C-456/12, *O.&B.*, ECLI:EU:C:2014:35; CJEU (AG) 10 April 2018, C-89/17, *Banger*, ECLI:EU:C:2018:225.

movement rights, may lose its meaning for UK workers who return to the UK post Brexit from a host Member State.<sup>202</sup>

### *Metock cases*

The second CJEU judgment which may lose its impact in the UK post Brexit is its ruling on the *Metock* case, through which an unlawfully residing third country national in a EU Member State could remain if he or she entered into an 'authentic' relationship with a EU citizen using its free movement rights.<sup>203</sup> The Court, which overturned its previous judgment *Akrich* with this ruling, deemed that the previous immigration status of the family member is irrelevant.<sup>204</sup> It acknowledged the need for Member States to combat and prevent abuse of the free movement rights, but it confirmed its case law prior to *Akrich* that the **motives of EU citizens** for effectively and genuinely **using their rights** under **EU law** are **irrelevant**.

The *Metock* judgment may lose its impact for UK nationals having returned to their country, but not for citizens of the other EU-27 Member States who exercise their free movement rights in the UK before the end of the transition period and continue to reside there, or for UK nationals who continue to reside in the host state in which they exercised their free movement rights before the end of the transition period. Regarding these categories however, the provisions of article 9(1)(e)(i) and (ii) of the WDA limit the scope of the WDA to family members already present in the host state before the end of the transition period who reside there in accordance with Union law, and to third country nationals who belonged to the family (in accordance with the definition of article 2(2) of the Citizens Directive) before the end of the transition period, but who reside outside the UK at that time. **Third country nationals** who **reside(d)** in the host state on an **irregular basis** or who become a **family member** after the transition period, **fall outside the scope**. After Brexit, the UK will most probably require that the family member who did not already enjoy the rights of article 7(1)(d) of the Citizens Directive before the end of the transition period, applies for legal residence outside the UK territory. Family members of UK nationals in one of the other EU-27 Member States who are precluded from the WDA, rely on the national legislation of that Member State. Except for Denmark and Ireland, the Member States are bound by the Family Reunification Directive.

### *Zambrano cases*

The third category of situations falling outside the scope of the WDA concerns the *Zambrano* judgment and the subsequent case law of the Court, where the CJEU decided that article 20 TFEU grants the **right of residence** to a **third country national** who is a **parent** of a **child** of EU citizenship status, if that **child's residence** in the EU **depends** on the **residence** of his **parent**.<sup>205</sup> It also precludes the refusal to grant a work permit to that third-country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attached to the status of European Union citizen. The subsequent related judgments on the basis of article 20 TFEU will lose their impact in the UK as well.<sup>206</sup> As explained in section 2.2.1, the UK government promised to propose domestic legislation on this matter 'in due course'.

202 CJEU 12 May 1998, C-85/96, *Martinez Sala*, ECLI:EU:C:1998:217; CJEU 4 June 2009, C-22/08, *Vatsouras & Koupatantze*, ECLI:EU:C:2009:344.

203 CJEU 25 July 2008, C-127/08, *Metock*, ECLI:EU:C:2008:449.

204 CJEU 23 September 2003, C-109/01, *Akrich*, ECLI:EU:C:2003:491.

205 CJEU 8 March 2011, C-34/09, *Zambrano*, ECLI:EU:C:2011:124.

206 CJEU 6 December 2002, C- 356/11, C-357/11, *O., S. & L.*, ECLI:EU:C:2012:776; CJEU 15 November 2011, C-256/11, *Dereci*, ECLI:EU:C:2011:734; CJEU 10 October 2013, C-529/11, *Alokpa & Moudoulou*, ECLI:EU:C:2013:645; CJEU 30 June 2016, C-115/15, *N.A.*, ECLI:EU:C:2016:487; CJEU 13 September 2016, C-165/14, *Rendón Marin*, ECLI:EU:C:2016:675; CJEU 13 September 2016, C-304/14, *C.S.*, ECLI:EU:C:2016:674; CJEU 10 May 2017, C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354; CJEU 8 May 2018, C-82/16, *K.A. a.o.*, ECLI:EU:C:2018:308; CJEU 5 June 2018, C- 673/16, *Coman*, ECLI:EU:C:2018:385.

#### 4.1.3. Applicability of CJEU case law before and after the end of the transition period

The **applicability** of the **CJEU case law** during the transitional period has been defined in the WDA. Although Part six provides for the rules on the interpretation of the WDA, some provisions of Part one are also of importance for interpretation issues. Article 4 prescribes that where the WDA provides for the application of Union law in the UK, it shall produce the same legal effects in the UK as those which it produces within the EU and its Member States. Article 4(4) WDA provides that its provisions referring to Union law or concepts shall be interpreted in conformity with the relevant case law of the CJEU handed down **before the end of the transition period**. However, UK's judicial and administrative authorities shall have due regard to relevant CJEU case law handed down **after the transition period** (article 4(5)). Article 2 WDA gives the definition of Union law, which is supplemented by article 5, where it is agreed that amendments and supplements of Union law going up to the end of the transition period are included. Citizens of the EU-27 Member States are able to invoke directly in UK courts their rights as enshrined in Part two of the WDA.

This section offers an overview of the CJEU case law which will remain relevant during and after the transition period with respect to the citizens and situations falling under the scope of the WDA. After an introduction on the scope of the WDA, the overview discusses the main developments and interpretation issues regarding family members, retaining residence, permanent residence and public order. Special attention will be paid to the implications for UK legislation.

##### Scope

Apart from the rights of frontier workers and self-employed citizens, the free movement rights as enshrined in the Citizens Directive form the largest part of the citizen's rights in Part two of the WDA. Article 3(1) of this directive precludes a Union citizen who has **never exercised** his right of free movement and has always resided in a Member State of which he is a national, even if he also is a national of another Member State. The *McCarthy case* concerned a **dual citizen** of the UK and Ireland who had never left the UK but sought to rely upon the rules on admission of family members in the Citizens Directive to obtain the admission of her third-country national spouse to the UK.<sup>207</sup> The CJEU emphasized that the Directive only applies to EU citizens who move from one Member State to another. Since Mrs. McCarthy was not within the **scope of the Directive**, her husband was not either. According to the CJEU, Mrs. McCarthy was free to move to another Member State and thus to enjoy the more favourable rules for family reunification under the Directive. The judgment does not necessarily mean that dual nationals who move to the other Member State of which they hold the nationality are always excluded from the Directive. The Court requires that both criteria are fulfilled: always resided in the Member State of nationality, plus never have exercised free movement rights. In this context, the earlier judgment in *Zhu and Chen* is important, which concerned an Irish baby who had always resided in the UK. According to the Court, she fell under the scope of the Citizens Directive despite the fact that she had always lived in the UK, because she only had the Irish citizenship.<sup>208</sup>

The *Lounes* judgment, on the **rights of dual citizens**, is the result of a legal amendment in the UK that had restricted the migration laws concerning EU citizens' family members.<sup>209</sup> The definition of EEA national in Regulation 2 of the Immigration (European Economic Area) Regulations 2006 was amended on 16 July 2012 to preclude dual UK/EEA nationals from benefiting from the Citizens Directive and therefore also to preclude their family members from relying upon free movement rights. Prior to the amendment, UK nationals who were also nationals of another EEA State could successfully rely on the Regulations. The *Lounes* judgment was an answer to a preliminary reference from the High

207 CJEU 5 May 2011, C-434/09, *McCarthy*, ECLI:EU:C:2011:277.

208 CJEU 19 October 2004, C-200/02, *Zhu & Chen*, ECLI:EU:C:2004:639.

209 Polak P.R. (2018), 'A Commentary on the Lounes Case and the Protection of EU Citizens' Rights Post-Brexit', *Revista General de Derecho Europeo* 44, p. 190-203.

Court of Justice (England & Wales), in which the CJEU made clear that an EU citizen who has exercised his freedom of movement by going to and residing legally in another Member State, cannot be treated in the same way as a purely domestic situation merely because the person concerned has acquired the nationality of that State in addition to his nationality of origin.<sup>210</sup> According to the CJEU, that capacity should not be affected by the decision to take dual citizenship, otherwise the effectiveness of article 21(1) TFEU would be undermined. If this person marries to a third-country national after his **naturalisation** while residing in the host Member State, the spouse does not have a derived right on the basis of the Citizens Directive, but on the basis of article 21(1) TFEU. The effectiveness principle however requires that the conditions are not stricter than those provided for by the Citizens Directive. The CJEU did not make clear how long after naturalisation the EU citizen continues to enjoy this 'directive-like' rights. In the case of *Lounes*, the EU citizen lived in the UK since 1996, got naturalised in 2009 and married five years later.

The *Lounes* situation falls under article 9(1)(a) and article 9(1)(e)(i) of the WDA, as it fulfils the requirement that the EU citizen had exercised the right to reside in the UK in accordance with Union law. The same applies to the situation of UK nationals exercising the free movement rights in one of the other 27 Member States before the end of the transition period and continuing to reside there (see article 9(1)(b) WDA). However, article 9(1)(e)(ii) only covers the situation where the family member resided in the host state before the end of the transition period in accordance with Union law, or if the family member resided outside the host state before the end of the transition period. The text implies the exclusion of family members who already live in the host state, but on an **irregular** basis. This exclusion would be in line with precluding *Metock* situations, in which an EU citizen exercising his free movement rights marries a third country national residing irregularly in the host state. Also, **marriages concluded after the transition period** seem to fall outside the scope of the WDA, according to the wording of article 9(1)(e)(ii). So, the *Lounes* judgment seems to remain its impact on situations where an EU citizen after having exercised his free movement rights acquires nationality of the UK and marries before the end of the transition period to a person who already resided lawfully in the UK or resided outside that state. The same applies to UK nationals remaining in the host state after the transition period and their family members. Furthermore, it appears that the WDA excludes the situation where an EU citizen or UK national loses his original nationality while **naturalising**, regardless if the CJEU would apply the same reasoning in these cases as in cases of dual citizenship.<sup>211</sup>

The relevance of this matter is growing with the rise in numbers of UK nationals applying for the nationality of another Member State so as to retain their EU citizenship after Brexit. But also, EU citizens who want to naturalise in the UK in order to secure their residence, may be affected with a restrictive interpretation of the WDA. This is especially relevant to those who married or consider marriage to a third-country national. The UK rules on family reunification with third country nationals are much more restrictive than the rights based on the Citizens Directive. In EU Member States the requirements for family reunification of third country nationals are also stricter compared to the Citizens Directive, but at least the national rules in those states (except in Denmark and Ireland) are governed and limited by the **Family Reunification** Directive (Dir. 2003/86).

### *Family members*

All free movement legislation has consistently addressed the position of the family members of those citizens, for the obvious reason that this is necessary to achieve the aim of facilitating the free movement. Thus, a derived right of residence of a third-country national who is a family member of a

210 CJEU 14 November 2017, C-165/16, *Lounes*, ECLI:EU:C:2017:862.

211 Davies, G. (2018), *Lounes, Naturalisation and Brexit*, 5 March 2018, European Law Blog <europeanlawblog.eu/2018/03/05/lounes-naturalisation-and-brexit>.

Union citizen exists, in principle, only when it is necessary in order to ensure that the Union citizen can exercise his freedom of movement effectively. The prior legislation in this field therefore permitted a wide category of family members to install themselves with the worker and provided access to employment and education for those family members. The relevant provisions were the subject of considerable jurisprudence, especially concerning the admission and status of family members who were third country nationals. To some extent, this case law was integrated into the Citizens Directive, but the developing jurisprudence after 2001 provided for a number of important judgments on this matter.

Member States are not allowed to **discriminate** between **spouses** of own nationals and spouses of EU citizens of another Member State, which implies that more strict requirements on the relationship are not allowed.<sup>212</sup> At the same time, a person's status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States and EU law does not detract from that competence.<sup>213</sup> The Member States are free to decide whether or not to allow marriage for persons of the same sex.<sup>214</sup> Article 2(2) of the Directive recognizes spouses to be 'family members' solely by reference to that legal status. Where the marriage was celebrated is not relevant. They maintain the status of a spouse as long as the marriage is in force, even if they decide to live apart or undergo a period of separation.<sup>215</sup> However, pursuant to article 3(1) of the Citizens Directive, the spouse must be resident in the same Member State as the EU citizen.<sup>216</sup> For those family members who have to be **dependent** in order to fall within the scope of the rules, the **factual situation** of being **supported** by the EU citizen is **determinant**, regardless the reasons for the support or the possibility for the family member to support himself.<sup>217</sup>

The *Rahman* case concerned the policy that the UK requires that dependent family members of an EU citizen only fall under the scope of article 3(2) Directive, if they had resided with this EU citizen in the same Member State before they came to the United Kingdom, and that they continued to be dependent on him or her or were members of his or her household in the United Kingdom.<sup>218</sup> The CJEU reiterated that Member States have to ensure that their legislation contains criteria which enable those persons to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons, that the criteria must be consistent with the normal meaning of the terms 'facilitate' and 'dependence', and not deprive article 3(2) of its effectiveness. The dependency must exist in the country the family member concerned comes from, at the very least at the time when he applies to join the Union citizen on whom he is dependent.<sup>219</sup> Based on recital no. 6 of the Citizens Directive, which emphasises the objective to maintain the unity of the family in a broader sense, the CJEU interprets '**facilitate**' as **treating** those family members **more favourably** than other third country nationals.

An important question is the status of the children and parents with rights pursuant to article 12(3), in particular whether they must comply with conditions of sufficient resources et al, and their access to benefits, employment, and permanent residence status. On the first point the *Ibrahim* and

212 CJEU 17 April 1986, C-59/85, *Reed*, ECLI:EU:C:1986:157.

213 CJEU 2 October 2003, C-148/02, *Garcia Avello*, ECLI:EU:C:2003:539 para. 25; CJEU 1 April 2008, C-267/06, *Maruko*, ECLI:EU:C:2008:179, para. 59; CJEU 14 October 2008, C-353/06, *Grunkin & Paul*, ECLI:EU:C:2008:559, para. 16.

214 CJEU 24 November 2016, C-443/15, *Parris*, ECLI:EU:C:2016:897, para 59.

215 CJEU 13 February 1985, C-267/83, *Diatta*, ECLI:EU:C:1985:67; CJEU 8 November 2012, *Iida*, C-40/11, ECLI:EU:C:2012:691.

216 CJEU 8 November 2012, C-40/11, *Iida*, ECLI:EU:C:2012:691.

217 CJEU 18 June 1987, C-316/85, *Lebon*, ECLI:EU:C:302; CJEU 19 October 2004, C-200/02, *Zhu & Chen*, ECLI:EU:C:2004:639.

218 CJEU 5 September 2012, C-83/11, *Rahman et al.*, ECLI:EU:C:012:519; CJEU 9 January 2007, *Jia*, C-1/05, ECLI:EU:C:2007:1.

219 CJEU 16 January 2014, C-423/12, *Reyes*, ECLI:EU:C:2014:16.

*Teixeira* judgments, both concerning preliminary references by UK courts, make clear that there is **no sufficient resources** requirement in order to retain a **right of residence** under article 12(3), regardless of nationality.<sup>220</sup> In the *Ibrahim* judgment, the CJEU emphasized that the Citizens Directive attaches particular importance to the situation of children who are in education in the host Member State and the parents who care for them. This confirms the case law under the previous regulations.<sup>221</sup> As the sole purpose of the residence right of the carer of these children is to enable them to stay in the host Member State, the **carer is not entitled** to the right of **permanent residence**. In order for the spouse to retain his or her residence rights after divorce under article 13(2) of the Citizens Directive, the application for a divorce must have been submitted before the EU citizen has left the host Member State.<sup>222</sup>

### *Retaining residence*

EU citizens and their family members retain their residence rights under article 14(1) of the Citizens Directive as long as they don't constitute an **unreasonable burden** to the host Member State.<sup>223</sup> However, every request for social benefits will first have to be proceeded in the same way as applications from citizens of that Member State.<sup>224</sup> Economically non-active EU citizens don't need to have an independent source of income in order to have a residence right on the basis of article 7(1)(b) Citizens Directive. The source may come from abroad, for instance through employment outside the host state, or from a family member.<sup>225</sup> This source should nevertheless be independent from the host Member state's social assistance system. In the *Dano* judgment, the CJEU made clear that the economically non-active EU citizen who lacks sufficient resources, has no right of residence on the basis of article 7(1).<sup>226</sup> For that reason, this EU citizen can be refused access to social benefits.<sup>227</sup> A request for social benefits in these circumstances can justify the termination of the legal residence of the whole family, as the family members don't have a right on the basis of article 7(1)(b) either. However, in its judgment *Brey*, the CJEU requires a proportional decision, based on an **individual assessment** of the circumstances and interests; an automatic refusal to grant residence to a person eligible for such a benefit is a breach of article 8(4) Citizens Directive.<sup>228</sup> Furthermore, it should be noted that article 15(2) specifies that the expiry of an identity card or passport which the person used to enter the host Member State and used to obtain a registration certificate or residence card, is not a valid ground for expulsion from that State.<sup>229</sup>

On a question referred to the CJEU by the Supreme Court of the United Kingdom in the case *Saint Prix*, the Court stated that a female EU citizen who **gives up work**, or seeking work, because of the physical constraints of the late stages of **pregnancy** and the aftermath of **childbirth** retains the status of '**worker**', within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.<sup>230</sup> Furthermore the Court has confirmed that a **Union citizen's status** is not static and **may change** during the period of residence in the host Member State,

220 CJEU 23 February 2010, C-310/08, *Ibrahim*, (Court of Appeal, England and Wales), ECLI:EU:C:2010:80; CJEU 23 February 2010, C-480/08, *Teixeira*, (Court of Appeal England and Wales) ECLI:EU:C:480:08.

221 CJEU 2002, C-413/99, *Baumbast*, ECRI I-7091.

222 CJEU 16 July 2015, C-218/04, *Kuldip Singh*, ECLI:EU:C:2015:476; CJEU 30 June 2016, C-115/15, *N.A.*, ECLI:EU:C:2016:487.

223 CJEU 21 September 2011, C-424/10, *Ziolkowski*, ECLI:EU:C:2011:866; CJEU 6 October 2010, C-425/10, *Szeja et al.*, ECLI:EU:C:2011:866.

224 CJEU 12 May 1998, C-85/96, *Martinez Sala*, ECLI:EU:C:1998:217.

225 CJEU 19 October 2004, C-200/02, *Zhu & Chen*, ECLI:EU:C:2004:639.

226 CJEU 11 November 2014, C-333/13, *Dano*, ECLI:EU:C:2014:2358.

227 CJEU 7 September 2004, C-456/02, *Trojani*, ECLI:EU:C:2004:488.

228 CJEU 19 September 2013, C-140/12, *Brey*, ECLI:EU:C:2013:565.

229 CJEU 25 July 2002, C-459/99, *MRAX*, ECLI:EU:C:2002:461.

230 CJEU 19 June 2014, C-507/12, *Saint Prix*, ECLI:EU:C:2014:2007.

for instance from a student to a worker as long as he or she complies with the conditions of that new status of article 7 of the Directive.<sup>231</sup> In the case *Bajratari*, the Court of Appeal in Northern Ireland has asked for a preliminary ruling on the question if **income** from employment that is **unlawful** under national law can establish the availability of **sufficient resources** under article 7(1)(b) of the Citizens Directive.<sup>232</sup> If the Court would answer 'yes', the Court of Appeal wants to know if article 7(1)(b) can be satisfied where the employment is deemed precarious solely by reason of its unlawful character.

#### *Permanent residence*

The judgment of the CJEU in the *Ziolkowski & Szeja* case could be seen as a support of the approach that EU citizens having a social assistance benefit will never fulfil the sufficient resources condition of article 7(1)(b) Citizens Directive and therefore do not have a right of residence based on the Citizens Directive.<sup>233</sup> The CJEU recalls that the concept of **legal residence** implied by the terms 'have resided legally' in article 16(1) Citizens Directive should be construed as meaning a **period of residence** which complies with the conditions laid down in the directive, in particular those set out in article 7(1). Therefore article 16(1) Citizens Directive must be interpreted as meaning that a Union citizen residing for more than **five years** in the host Member State on the sole basis of the national law of that Member State cannot be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not satisfy the conditions laid down in article 7(1) Citizens Directive.

In the case *Alarape and Tijani*, the CJEU ruled in response to a preliminary reference from a UK court that **family members of EU citizens** who are not nationals of a Member State can only obtain permanent residence rights under article 16(1) if, first, the Union citizen himself satisfies the conditions laid down in article 16(1) of that directive and, secondly, that those family members have resided with him for the period in question.<sup>234</sup> The requirements of article 16(1) Citizens Directive also precludes the entitlement of **permanent residence** to a third-country national parent residing as a caregiver of a Union citizen child pursuant to article 12(3) Citizens Directive.

In the case *Onuekwere*, brought before the CJEU by the British Upper Tribunal, the CJEU made clear that the period that a family member was **imprisoned**, does not need to be taken into account while assessing the fulfilment of the conditions of article 16 Citizens Directive.<sup>235</sup> In the joint cases *B. & Vomero*, the Supreme Court of the United Kingdom wanted to know if the protection against expulsion in the meaning of article 28(3)(a) does not apply if, due to a long detention period, the criteria for a right to a permanent residence right are not fulfilled.<sup>236</sup> According to the CJEU, the conditions for a permanent residence right may be satisfied where an overall assessment of the person's situation leads to the conclusion that, notwithstanding that **detention**, the **integrative links** between the person concerned and the host Member State have not been broken. Those aspects include, inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention.

231 CJEU 21 February 2013, C-46/12, *L.N.*, ECLI:EU:C:2013:97.

232 CJEU (pending), C-93/18, *Bajratari*.

233 CJEU 21 December 2011, C-424/10 and C-425/10, *Ziolkowski & Szeja*, ECLI:EU:C:2011:866.

234 CJEU 8 May 2013, C-529/11, *Alarape & Tijani*, ECLI:EU:C:2013:290.

235 CJEU 16 January 2014, C-378/12, *Onuekwere*, ECLI:EU:C:2014:13.

236 CJEU 17 April 2018, C-316/16, and C-424/16, *B. & Vomero*, ECLI:EU:C:2018:256.

*Public order*

Even prior to the granting of a permanent residence right, **withdrawal** of the **residence right** based on the Citizens Directive has to be proportional and based on the personal conduct of the EU citizen, which must constitute a present, **genuine** and **sufficiently serious threat** to the requirements of public policy affecting one of the fundamental interests of society.<sup>237</sup> This phrase is now repeated in article 27(2), second subparagraph Citizens Directive. In its subsequent case law, the CJEU reiterated that the 'public policy' exception must be interpreted **restrictively**, even if the EU citizen concerned breaches laws against narcotic use.<sup>238</sup> As a consequence of the requirement that the threat is still present, the national court has to undertake an **ex nunc assessment** of the expulsion order. Previous criminal convictions in themselves cannot justify the **expulsion**. In its judgment on *E.*, the CJEU makes clear that the fact that a person is imprisoned at the time of the expulsion decision was adopted, without the prospect of being released in the near future, does not exclude that his conduct represents a **present and genuine threat to a fundamental interest of the society** of the host Member State.<sup>239</sup>

Besides the required **proportionality test** regarding the threat to society, Member States also have to examine the proportionality from the perspective of the individual. The elements which need to be taken into account as mentioned in article 28(3) Citizens Directive, apply to all expulsions, even when the person concerned falls within the scope of article 28(2) or (3).<sup>240</sup> Moreover, the CJEU stated that 'in the case of a EU citizen who has lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure'.<sup>241</sup>

On a preliminary reference of the Court of Appeal (England and Wales) in the case *ZZ*, the CJEU answered that articles 30(2) and 31 Citizens Directive, read in the light of article 47 Charter, imply that national courts must ensure that the competent national authority disclose '**precisely and in full**', the **grounds** for the **expulsion** decision, as well as the related evidence (limited to what is strictly necessary) and that they inform the EU citizen of the essence of those grounds (taking due account of the necessary confidentiality of the evidence).<sup>242</sup>

**Public security** has a content distinct from that of **public policy**. It is generally interpreted as covering both internal and external security.<sup>243</sup> However, mere reference to the requirements of defence of the national territory is insufficient to trigger the public security exception; it should be demonstrated that the danger would not be encountered with less restrictive procedures. In the case *P. & I.*, the CJEU required that in order to meet the criterion 'compelling reasons of public security' of article 28(3) of the Directive, a decision to expulsion is based on a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population.<sup>244</sup> On a preliminary reference by the Upper Tribunal (Immigration and Asylum Chamber) in the case *M.G.*, the CJEU answered that a period of imprisonment can interrupt the continuity of the period of residence for the purpose of article 28(3)(a) Citizens Directive, even where the person concerned resided in the host Member State for 10 years prior to imprisonment.<sup>245</sup> However, the fact that that person resided in the host Member State for 10 years prior to imprisonment

237 CJEU 27 October 1977, C-30/77, *Bouchereau*, ECLI:EU:C:1977:172;

238 CJEU 29 April 2004, C-482/01 and C-493/01, *Orfanopoulos & Oliveri*, ECLI:EU:C:2004:262.

239 CJEU 13 July 2017, C-193/16, *E.*, ECLI:EU:C:2017:542.

240 CJEU 23 November 2010, C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708.

241 CJEU 23 November 2010, C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, para. 53.

242 CJEU 4 June 2013, C-300/11, *ZZ*, ECLI:EU:C:2013:363.

243 CJEU 13 July 2000, C-423/98, *Albore*, ECLI:EU:C:2000:401.

244 CJEU 22 May 2012, C-348/09, *P. & I.*, ECLI:EU:C:2012:300.

245 CJEU 16 January 2014, C-400/12, *M.G.*, ECLI:EU:C:2014:9.

may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken.

The case law on article 35 Citizens Directive has caused much debate within the Council on the possibilities to combat **fraud** such as **sham marriages**, and **abuse** of free movement rights, leading to several documents of the Commission on how to apply this provision.<sup>246</sup> In the *Zhu & Chen* judgement, concerning a Chinese citizen's decision to give birth to a child in Northern Ireland with the admitted intention of acquiring a residence right in the UK because her child would obtain Irish nationality, the CJEU rejected the UK government's argument that the persons concerned could not rely upon EU law because they were attempting to **exploit** it improperly.<sup>247</sup> This reasoning was also reflected in the cases on return to the home country after the EU citizen had gained a residence right for his third country national family members on the basis of the Citizens Directive.<sup>248</sup> According to the Court, the **motives** leading to a stay in another Member State or the return to the home Member State were **irrelevant**, as long as the **activity** carried out there was **genuine** and effective. Such conduct cannot constitute an abuse, except in cases of marriages of convenience. The dissatisfaction of the UK government with these outcomes has most probably led to the exclusion of both return situations and the prohibition to require prior legal residence from the family members from the scope of the WDA.

The case *Sean McCarthy* concerned the general policy of the UK to refuse third country national family members of EU citizens their right conferred by article 5(2) Citizens Directive exempting them from the obligation to obtain an entry visa.<sup>249</sup> The referring High Court of Justice of England and Wales considered this measure necessary in order to avoid 'a systemic abuse' by 'the business of sham marriages', but it wanted to know if this general measure is in compliance with article 35 Citizens Directive. The CJEU answered that both article 35 Citizens Directive and article 1 Protocol No 20 do not allow a Member State to require, as a measure of **general prevention**, family members of a Union citizen who are not nationals of a Member State and who hold a valid residence card, issued under article 10 Citizens Directive by the authorities of another Member State, to be in possession, pursuant to national law, of an entry permit, such as the EEA family permit, in order to be able to enter its territory.

According to article 18 WDA, **after** the **end** of the **transition period** the residence rights of EU citizens and their family members can be restricted because of their conduct on the basis of national legislation. This means that the restrictive approach by the CJEU on this matter, for instance regarding the definition of public order and abuse of rights, cannot be invoked anymore by EU citizens residing in the UK or UK nationals residing in one of the EU-27 Member States

#### 4.2. Supervision on the implementation and application of the Withdrawal Agreement

Part 1 of the WDA contains a **good faith provision** (article 4a WDA) which requires the parties "in full mutual respect and good faith to carry out the tasks which flow from the WDA." Part Six provides for the rules on the interpretation and application of the WDA and the procedure in case a dispute needs to be settled. It provides for the creation of **two institutions** for safeguarding a correct implementation of the WDA: a **UK Authority** and a Joint Committee. Article 152 of the WDA forms the legal basis for the establishment of an Authority in the UK which shall monitor the implementation and application of Part Two of the WDA. It will be given equivalent powers as those given to the Commission acting under the Treaties in order to ensure compliance with the WDA. The setup of this independent authority is to **help EU-27 citizens** enforce their rights. Union citizens and their family members can

246 COM(2008)840, 10 December 2003; COM(2009)313, 9 July 2009; COM(2014)604, 26 September 2014.

247 Guild, E., S. Peers & J. Tomkin (2014), *The EU Citizenship Directive. A commentary*, Oxford: Oxford University Press, p. 298-299.

248 CJEU 7 July 1992, C- 370/90, *Surinder Singh*, ECLI:EU:C:1992:296; CJEU 23 September 2003, C-109/01, *Akrich*, ECLI:EU:C:2003:491; CJEU 25 July 2008, C-127/08, *Metock*, ECLI:EU:C:2008:449.

249 CJEU 18 December 2014, C-202/13, *Sean McCarthy*, ECLI:EU:C:2014:2450.

file **complaints** to this Authority about non-compliance with Part two of the WDA by the UK administrative authorities. The Authority is competent to conduct inquiries and has the right to, following such complaints or an inquiry on its own initiative, **bring a legal action** before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking adequate remedy. Apart from this complaint procedure, citizens can also immediately **invoke their rights** before a court, with reference to the substantive rules in the WDA. UK nationals residing in one of the EU-27 Member States can file complaints to the European Commission or invoke their rights immediately before a national court. Article 33 obliges both parties to disseminate the rights and obligations of citizens as enshrined in Part II of the WDA, including through awareness-raising campaigns.

The second institutional arrangement is the setup of a **Joint Committee**, which consists of representatives of the Union and the UK and co-chaired by the two parties (article 157 WDA). This Committee is responsible for the **implementation and application** of the WDA. Both parties can refer any issue to the Joint Committee relating to the implementation, application and interpretation of the WDA. The Joint Committee has the power to adopt **decisions** in respect of all matters for which the WDA so provides, also on its own initiative. These decisions are binding on both parties and have the same legal effect as the Agreement. It is furthermore competent to make **recommendations** on any issue concerning the implementation, application and interpretation of the WDA. The Joint Committee will make its decisions and recommendations by mutual consent. In case of no consent, the rules on dispute settlement apply (see section 4.3). The Joint Committee may establish specialised committees in order to assist in the performance of its tasks. Article 158 WDA has already provided for **five specialised committees**, but the Committee is free to extend this number.

### 4.3. Judicial review and dispute settlement during the transition period

#### 4.3.1. Judicial review during the transition period

According to article 82 WDA, the CJEU shall continue to have jurisdiction for any proceedings brought before it by the UK or against the UK before the end of the transition period, including all the appeal stages. The CJEU will also continue its jurisdiction to give preliminary rulings on requests from courts and tribunals of the UK referred to it before the end of the transition period. During the transition period, a court or tribunal in the UK may also request for a **preliminary ruling** on the interpretation of the Treaties. Article 155 WDA provides that in pending cases before the courts or tribunals in the UK, the European Commission is allowed to submit written observations on the interpretation of the Agreement. If the court gives its permission, it can make oral observations. If one of the Member States requests for a preliminary ruling on the interpretation of the WDA, the UK will be notified and be entitled to participate in the procedure in the same way as the Member States (article 154 WDA).

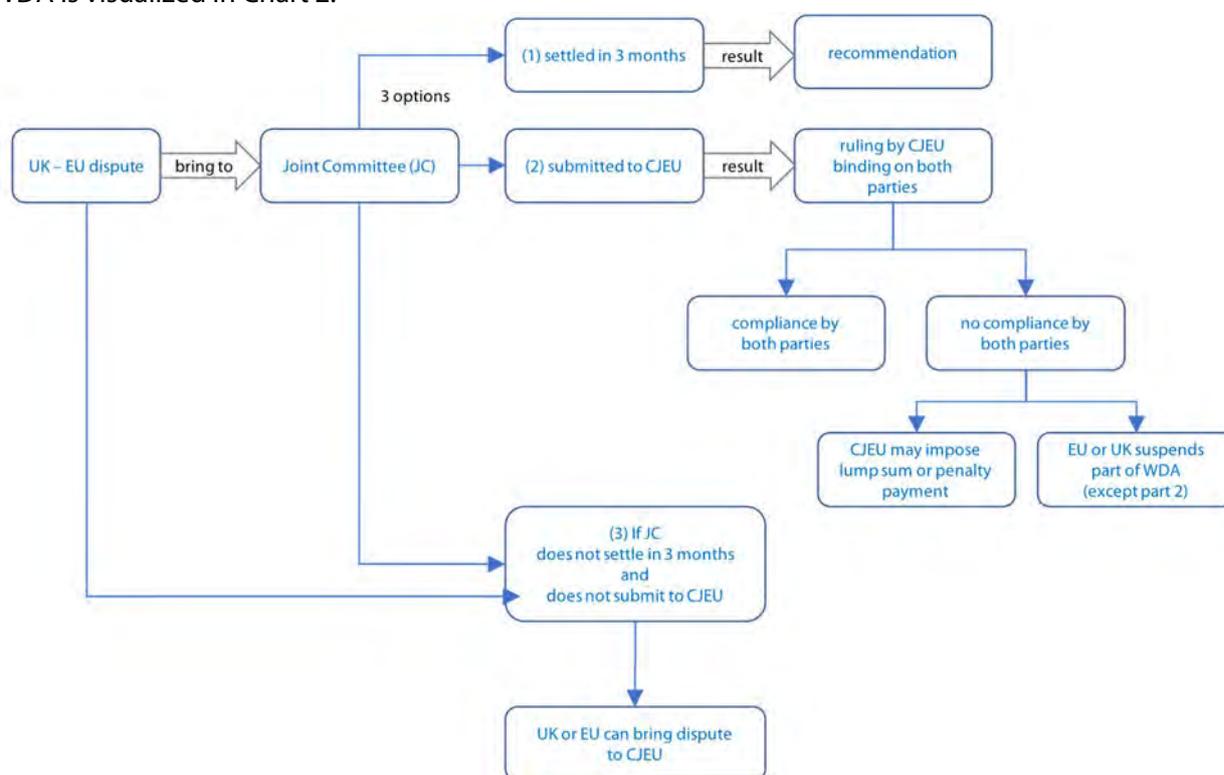
The Agreement arranges that if the **European Commission** or a **Member State** considers that the UK has **failed** to fulfil an **obligation** under the Treaties or part Four of the WDA before the end of the transition period, it can **bring the case before the CJEU**. Judgments and orders of the CJEU handed down both before and after the end of the transition period in those proceedings have binding force on and in the UK. With the aim to facilitate the consistent interpretation of the WDA, article 156 obliges the CJEU and the UK's highest courts to engage in a regular dialogue, analogous to the one which the CJEU pursues with the highest courts of the Member States. With regard to the Protocol on Ireland/Northern Ireland, the CJEU shall also have jurisdiction (article 11 of the Protocol).

#### 4.3.2. Dispute settlement related to the Withdrawal Agreement during the transition period

The rules on enforcement of the WDA and dispute settlement are provided for in Title III of the WDA. First of all, the Union and the UK promise to endeavour to agree on the interpretation and application of the WDA and make every attempt to achieve a mutually satisfactory resolution of any matter that might affect its operation (article 160 WDA). If nevertheless a dispute arises, both parties are bound by the procedures as laid down in the WDA.

Article 162 WDA provides that the Joint Committee has also the competence to settle disputes between the Union and the UK on the interpretation or application of the Agreement. It can settle a dispute through a **recommendation**, but it can also decide to **submit** the dispute between the Union and the UK before the **CJEU** for a ruling. This ruling will be binding on the Union and the UK. If the Joint Committee has neither settled the dispute between the Union and the UK within three months nor submitted the case to the CJEU, each of the two **parties** can **request** the **CJEU** for a ruling on the dispute. Article 163 WDA provides that if the Union or the UK considers that the other Party has not complied with the judgment of the CJEU in this procedure, it can bring the case before the CJEU, after giving the other Party the opportunity to submit its observations. If the CJEU rules that the other Party indeed did not comply with its judgment, it may impose a lump sum or a penalty payment. However, if the Party which considers the other Party not to comply with the judgment without bringing the case to the CJEU, it may suspend parts of the WDA (other than Part Two), on the condition that the suspension is proportionate. The suspension shall be subject to judicial review by the CJEU. Finally, article 163 (which is of general applicability, not limited to Part Two) provides for the CJEU to issue a lump sum or penalty payment order if a party fails to comply with its judgments.

The arrangements for the settlement of disputes over the interpretation and application of the WDA is visualized in Chart 2.



**Chart 2 Dispute Settlement**

Source: Adapted version of Figure 2 in: Dispute settlement under the withdrawal agreement) in Barnard, C. & S. Peers, '9. Governance arrangements', in: Menon, A. (2018), *The Brexit White Paper: what it must address*, London: The UK in a Changing Europe, p.22. Part Two of the WDA refers to citizens' rights.

#### 4.4. The role of the CJEU after the transition period

As a general rule, the **CJEU** will have **no jurisdiction** after the transition period, **except** for cases which were brought before the Court before the end of the transition period. However, Part Six of the WDA includes special jurisdiction for the CJEU to rule on issues regarding citizens' rights (Part Two of the WDA) following requests from courts in the UK for **eight years after the end of the transition period** (article 151 WDA). In respect of the rather complex matter of the issue of residence documents set out in articles 17 and 17(a) (which relates to the issue of residence documents sought during the transition period) appealed questions can only be referred to the CJEU 'where the case has commenced at first instance within eight years from the date from which article 17a applies'. This will be 31 December 2028.

According to article 152 WDA the **Commission**, as guarantor of the treaties, will no longer have the same power to review and bring infringement proceedings before the CJEU against the UK after Brexit as it does now. However, the **new Authority**, which is competent to undertake inquiries regarding correct application of Part 2 (including own initiatives) and to receive complaints from EU citizens and their families in respect of Part 2, has the right 'to bring a legal action before a competent court or tribunal in the UK in an appropriate judicial procedure with a view to seeking adequate remedy'. The Authority is to work closely with the Commission and within eight years after the end of the transition period the Joint Committee must assess the functioning of the Authority and if satisfied may abolish it.

#### 4.5. Judicial review and dispute resettlement: models for future cooperation arrangement

In order to map out an appropriate enforcement and dispute settlement mechanism for future EU-UK relations, one would first need to know the exact scope and contents of the future legal framework. At this point, it is not clear which elements will be converted in the future deep and special partnership agreement. The arrangements on judicial review and dispute settlement will ultimately depend on the partnership cooperation arrangement that the EU and the UK will decide upon for the post Brexit period. Where an international agreement concluded by the EU contains provisions that replicate EU law, the CJEU has consistently taken the view that no separate body should be granted jurisdiction to give definitive interpretations of those provisions. The **CJEU** held that it has to have the **full and final authority** on all matters of EU law. The majority of the bilateral agreements provide for a Joint Committee to oversee the functioning of the agreement in question. The **Joint Committees** serve as a platform for the exchange of information, for advice and for consultation, and play a key role should differences of opinion arise. Such a mechanism of **supervision** or **monitoring** contributes to the smooth implementation, application and functioning of the partnership agreement, which also helps to resolve issues before they escalate into formal disputes. Overseeing the proper functioning of the agreement is usually undertaken jointly by both parties or in some instances independent bodies are established to fulfil this function, as is the case with Free Trade Agreements. In many partnership arrangements between the EU and third countries, the CJEU has the competence to finally decide on the interpretation of the provisions in the partnership arrangements, like the EEC-Turkey Association Agreement, the Euro-Mediterranean Agreements and the Cotonou Agreement.

If the future arrangement between the EU and the UK will mirror any existing model, it is likely that the enforcement and dispute settlement mechanism of that model will be adopted as well. Chapter three has presented an overview of existing partnership arrangements between the EU and third countries, which may serve as a model for the new partnership arrangement between the EU and the UK. This subsection will therefore provide an overview of the relevant provisions on judicial review and dispute settlement of different models. For each model, the advantages and disadvantages will be

mapped, given the preferences and interests of both parties. As a prominent role of the CJEU in the future cooperation is contested in the UK, special attention will be paid to the role and functioning of the **EFTA Court**.

#### 4.5.1. The EFTA-EEA model

##### *EFTA*

The European Free Trade Association (EFTA) was founded in 1960 through the **EFTA** Convention by seven states: Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. States who joined the EC, left the EFTA. The current members are Iceland, Liechtenstein, Norway and Switzerland. This trade agreement is based on the **intergovernmental model**. The EFTA Council meets at ambassadorial level eight times a year and at ministerial level twice a year. It is advised on the one hand by the EFTA Parliamentary Committee, including a number of parliamentarians in the four Member States, and the EFTA Consultative Committee, a forum for trade unions and employers' associations. The EFTA secretariat, which supports the EFTA Council, also negotiates free trade agreements with non-EU countries.

##### *EEA*

**Three** of the four **EFTA Member States** (all but Switzerland, which instead has a series of bilateral agreements with the EU) are also members of the **EEA** (the European Economic Area). The agreement creating the EEA entered into force on 1 January 1994 and brings together the EU Member States plus Iceland, Liechtenstein and Norway in a single market, referred to as the "**Internal Market**". It effectively allows those EFTA states to participate in the EU's Internal Market, whilst in turn contributing to the EU. The EFTA States within the EEA are given the opportunity to **express** their **views** on **EU legislation**, but **cannot vote** on it. Under the EEA Agreement, relevant EU law applies in the EEA as well. The relevant areas **include** the **four freedoms** (the free movement of goods, services, persons and capital), albeit **without** the concept of **Union Citizenship** (see Chapter 3).<sup>250</sup> Furthermore, the EEA Agreement includes competition and state aid rules, and also so-called "horizontal policies", such as consumer protection, company law, environment, gender equality, health and safety and labour law. The EEA Agreement does not cover common agriculture and fisheries policies (although it does contain provisions on trade in agricultural and fish products), customs union, common trade policy, common foreign and security policy, justice and home affairs, direct and indirect taxation and monetary union. To join the EEA, it is necessary first to join EFTA. However, the reverse is not true. The **UK** could, like **Switzerland**, be a **member of EFTA without** being a **member of the EEA**.

Whereas the EU is a supranational organisation and the EFTA is based on the intergovernmental model, the EEA agreement has a **hybrid character**, consisting of supranational and intergovernmental aspects. There are two pillars in the EEA agreement: (1) the **EEA pillar** and (2) the **EU pillar**, whereas the joint EEA bodies are situated in between. The EFTA States within the EEA have not transferred any legislative competences to the joint EEA bodies and they are also unable, constitutionally, to accept decisions made by the EU institutions directly. To cater for this situation, the EEA Agreement established EEA-EFTA bodies to match those on the EU side.

The two-pillar structure covers the decision-making procedure: in the EEA pillar all decisions are taken by consensus, as opposed to the EU pillar where decisions related to EEA legislation are normally taken by majority vote. The EEA Joint Committee is responsible for the ongoing management of the EEA Agreement and for decisions concerning the incorporation of EU legislation into the EEA

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250 See also the EFTA Court judgment of 26 July 2016. Case E-28/15, *Jabbi*.

Agreement. Its decisions are taken by consensus. Chart 2 shows that the EEA model is reflected in mechanisms of the WDA for the settlement of disputes over the interpretation and application of the WDA. In addition, the structure encompasses supervision and judicial control. The EFTA Surveillance Authority (ESA), based in Brussels, ensures that the EFTA States within the EEA fulfil their obligations under the EEA Agreement. In addition to general surveillance of compliance, ESA has powers in relation to competition, state aid and public procurement, reflecting the extended competences of the European Commission in these fields within the EU. The EEA Agreement foresees close cooperation between ESA and the European Commission. It can bring cases to the EFTA court, which rules on the interpretation of the EEA agreement.

#### *Jurisdiction EFTA Court*

The EFTA Court deals with **infringement actions** brought against an EEA EFTA State with regard to the implementation, application or interpretation of EEA law, gives **advisory opinions** to courts in the EFTA States within the EEA on the interpretation of EEA rules, and is competent for the settlement of disputes between two or more EFTA States within the EEA. It also hears **appeals** concerning **decisions** taken by **ESA**. This two-pillar system of surveillance and judicial control, with the EFTA Court on the one hand and the Court of Justice on the other hand, was endorsed by the CJEU in its Opinion 1/92 and later reaffirmed in the Judgment of the General Court of the European Union in the Opel Austria case.<sup>251</sup>

Courts in the three EFTA States within the EEA may make references to the EFTA Court on the interpretation of the EEA Agreement. The procedure for making a preliminary reference to the EFTA Court is laid down in article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA). According to this provision, the EFTA Court has jurisdiction to give advisory opinions on the interpretation of the EEA agreement. The EFTA Court has also the competence to interpret the Protocols to the EEA Agreement, unless another result clearly follows from the provisions of the Agreement.<sup>252</sup> The **EFTA Court lacks jurisdiction** over the application or interpretation of the different **bilateral Free Trade Agreements**, which still exist between the EFTA States and the EU. According to article 107 and Protocol 24 to the EEA Agreement, an EFTA State that is party to the EEA Agreement can decide that its courts may make references for preliminary rulings to the CJEU. Since none of these states has taken such a decision, the courts in these three EFTA States cannot refer preliminary questions to the CJEU. On the other hand, courts in the EU Member States can make preliminary references to the CJEU in relation to the EEA Agreement under the normal rules in article 267 TFEU.<sup>253</sup>

#### *EFTA and CJEU compared*

The jurisdiction of the EFTA Court largely corresponds to the jurisdiction of the CJEU, but there are some important **differences**.<sup>254</sup> First, there is **no mandatory reference** for the **highest national courts**. The EFTA Court considers this lacking obligation as an expression of the more partner-like relationship between the national courts of last instance and the EFTA Court.<sup>255</sup> Second, the **rulings** of the **EFTA Court** are merely **advisory** to the **national court**, due to the unwillingness of the EFTA States to provide the EFTA Court with the competence to give binding interpretations of the EEA Agreement.

251 CJEU 10 April 1992, Opinion 1/92; and CJEU 22 January 1977, T-115/94, *Opel Austria*, para. 108.

252 CJEU 12 December 2003, E-2/03, *Asgeirsson*, EFTA Court Report 185.

253 M. Broberg and N. Fenger, "Preliminary References to the European Court of Justice", second edition, 2014, Oxford: University Press, page 10.

254 Art. 105 and 106 EEA; art. 3(2) SCA.

255 EFTA 28 September 2012, E-18/11, *Irish Bank Resolution Corporation*, EFTA Court Report 592.

In practice however, national courts which ask for an opinion comply with the rulings. If not, they might run the risk of an infringement procedure lodged by the EFTA Surveillance Authority.<sup>256</sup> However, the principles of **direct effect** and **primacy of EU law** over **national law** are not part of EEA law, and the EFTA Court has refused to include them in the EEA legal order. The third difference is that the jurisdiction of the **EFTA Court** does **not** cover questions of **secondary legislation** or acts. The EFTA Court interprets 'EEA Agreement' as including the Agreement and its Protocols and Annexes, as well as the acts referred to in those instruments.<sup>257</sup> The EEA Agreement itself is constantly updated with the introduction of new EU legislation. Since 1994, more than 5000 new legal acts have been incorporated into the Agreement either as Annexes or Protocols. However, this possibility of extending its jurisdiction has its limits, as it does not include the validity of secondary EU law that is incorporated into the EEA Agreement, which covers a substantial part of the protection of individual rights. This exclusion follows logically from the 'two-pillar' system, where it is decided that the Court of Justice has the exclusive jurisdiction over EU legislation.

The case law in both pillars must develop in a **homogeneous** way. As a rule, the **EFTA Court follows** relevant **CJEU case law**. Article 105 of the EEA Agreement requires that the parties will seek 'as uniform an interpretation as possible' of the provisions of the Agreement and requires that the case law of both the CJEU and the EFTA Court be kept under constant review. Responsibility for addressing any **divergence in approach** between the CJEU and the EFTA Court falls to the **EEA Joint Committee**. The EFTA States within the EEA have given further effect to this by providing, in article 3 of the Surveillance and Court Agreement that the EFTA Court should 'pay due account' to relevant CJEU decisions that arise after the signature of the EEA agreement. This implies that the EFTA Court is supposed to follow relevant CJEU case law, or at least not contradict it. It has occasionally adjusted its case law to later CJEU jurisprudence (for example in the area of state alcohol monopolies). On the other hand, the CJEU is free to follow EFTA Court case law. In practice, there is a judicial dialogue between the Courts, expressing mutual respect. The EFTA court is also located in Luxembourg.

The **Presidents** of both the **EFTA Court** and the **CJEU** have stressed that there is no need to reinvent the wheel and **suggested** the **EFTA Court as a way out for the UK**. In order to ensure a homogeneous interpretation of continued application of EU law in the UK, national courts could ask this new EFTA-like body for a preliminary ruling when questions on the interpretation of EU law arise (article 151 WDA), after the eight years in which they can still submit references to the CJEU. This is especially important now that according to article 4(5) WDA, the UK authorities will take due regard to the case law handed down after the transition period. Considering the risk of two Courts interpreting rules identical to EU law, which is solved in the EFTA framework by the two-pillar model, it is important that this model would respect the CJEU's exclusive jurisdiction. Convergence could be promoted by enabling such judicial body to ask preliminary questions to the CJEU.

#### 4.5.2. Other legal frameworks

##### *The EC-Switzerland Agreement*

Despite not being a member of EEA, the EFTA state Switzerland has close relations with the European Union on the political, economic and cultural levels. Switzerland's economic and trade relations with the **EU** are mainly governed through a series of **bilateral agreements** where **Switzerland** has agreed to take over certain aspects of EU legislation in exchange for **accessing** part of the **EU's single market**.

256 M. Broberg & N. Fenger, *Preliminary References to the European Court of Justice*, 2<sup>nd</sup> ed., 2014, Oxford: University Press, Chapter 1 para. 4.1.

257 EFTA 9 October 2002, E-6/01, *CIBA*, EFTA Court Report 281.

Disputes between the EU and Switzerland are handled at a political level by a Joint Committee. There are no provisions on judicial oversight. According to Gehring, the absence of independent judicial oversight had in reality only increased the indirect authority of the CJEU: "It is basically impossible for the Swiss side to get any change negotiated in the Joint Committee, because the Commission officials feel legally bound by the definitive judgment of the Court of Justice."<sup>258</sup> The bilateral agreement on migration only provides for acceptance of the existing CJEU case law, but not for later case law. In practice, the Swiss Federal Court explicitly takes into account later CJEU rulings as well. In February 2014, a majority of the Swiss **electorate** voted in favour of a legislative initiative that would result in an **amendment** of the Swiss **Constitution** introducing a **restriction** of free movement for EU citizens, which would contradict the free movement rules as provided for in the EC-Swiss bilateral agreement on migration. Since this **referendum**, the EU has requested a **new agreement** that includes an **automatic update** of rules to match the EU and **acceptance of the jurisdiction** of the CJEU.

#### *EEC-Turkey Association Agreement*

The EU-Turkey relations are governed by the EEC-Turkey Association Agreement of 1963 and its Additional Protocol of 1970, supplemented with a number of Decisions, amongst which 2/76, 1/80 and 3/80. The CJEU has competence to interpret the provisions of the agreement and its secondary legislation. Regarding dispute resolution, Article 25(2) of the Association Agreement provides that the **Association Council** can decide by **consensus** to **bring a dispute** before the **CJEU**. This has never happened until now, because both Parties (the EU and Turkey) have to agree. Turkey is not allowed to participate in cases on the Association Agreement before the CJEU as there is no treaty provision providing for such participation. Arbitration and compliance proceedings are not considered. The Agreement only mentions and does not specify which necessary measures must be taken to comply with the rulings.

#### *Partnership and Cooperation Agreements*

The initial Euro-Mediterranean Agreements barely regulated the subject of dispute settlement. The rules were similar in each Agreement, according to which the Association Council, formed by the parties, aims to solve the disputes with binding decisions. The rules applicable to disputes concerning trade provisions of Euro-Mediterranean Agreements therefore relied mainly on a diplomatic approach which could be easily blocked by the party against which the complaints were lodged. For this reason, the creation of a dispute settlement mechanism was considered, applicable to trade disputes based on streamlined and effective procedures within firm time limits, and modelled on the dispute settlement mechanisms of the most recent agreements concluded by the European Union and on the World Trade Organisation (WTO) Dispute Settlement Understanding. The agreement in the framework of the European Neighbourhood Policy to elaborate rules of procedure for dispute settlement, has led to the **ratification of Protocols** with each of the existing **Euro-Mediterranean Agreements**.<sup>259</sup>

The provisions of these protocols **apply** with respect to any difference or **dispute** concerning the interpretation and application of the **trade provisions**. If this difference or dispute has been referred to the Association Council, and the Council has failed to settle it through consultations or mediation, the complaining Party can request for the establishment of an **arbitration panel**, whose interpretation on the issue will bind all Parties.

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258 European Union Committee, Brexit: the options for trade, 5<sup>th</sup> Report, Session 2016-17, HL Paper 72, para. 144.

259 See for instance the Protocols between the EU and Egypt, *OJ* 2011, L 138/3; with Tunisia, *OJ* 2010, L 40/76; with Jordan, *OJ* 2011, L 177/1.

### Stabilisation Agreements

The Stabilisation and Association Agreements with the Balkans (SAAs) aim to foster respect for democratic principles and to reinforce the links of this region with the EC single market. These Agreements intend to create a Free Trade Area in the areas of competition, state aid and intellectual property, allowing the economies of the region to begin to integrate with that of the EU. The SAAs dispute settlement provisions are designed under one model, in which the **Stabilisation and Association Council** is the **sole** instance that solves **disputes** between the Parties and its decisions are **binding**. There are Committees and the possibility of subcommittees plus Parliamentary Committees. There is **no possibility** of **arbitration** and the Parties are allowed to use appropriate measures if one of them fails to fulfil an obligation under the Agreement.

### Free Trade Agreements

The World Trade Organisation (**WTO**) has a Dispute Settlement Body (made up of all the members of the WTO) decides on disputes between members relating to WTO agreements. The Dispute Settlement Mechanism provides for a **simple judicial panel** (influenced by arbitration), which aims to resolve disputes by common agreement before triggering the full process of arbitration. Where the panel can make recommendations, an **Appellate Body** can **uphold, modify** or **reverse** the **decisions** reached by the panel. In addition, there are procedures that survey the implementation of recommendations and rulings (or compliance proceedings) and the regulation of compensation and retaliatory measures. The decisions of the panel and Appellate Body are used as valuable interpretations for future cases. This dispute settlement system has often been considered responsible for the success of the WTO. Its strengths are the **compulsory jurisdiction** of the **Dispute Settlement Body**, the final character of the decisions of the panel or Appellate Body, the decision-making process under negative consensus (no possibility to block the decision making) and its **detailed** and **pre-established procedures**<sup>260</sup>. It has therefore served as an **example** for Dispute Settlement Understandings in other Agreements.

The **Cotonou Agreement** between African, Caribbean and Pacific countries and the EU, which replaced the Lomé Convention, is formed by five pillars.<sup>261</sup> It was concluded for a twenty-year period from 2000 to 2020 and entered into force in 2003. Its mechanism for the settlement of disputes includes the option for a multi-party dispute. After the consultation procedure, **arbitration** is possible, though the outcome is **not binding** and rules for compliance are lacking. Arbitration procedures of the Permanent Court of Arbitration for International Organisations and States are optional.

The CETA Joint Committee established under the EU-Canada Comprehensive Economic and Trade Agreement (**CETA**) supervises the implementation and application of the agreement. If necessary, the parties can refer disputes to an ad hoc arbitration panel. States also retain the right to take action within the WTO framework, including WTO dispute settlement proceedings. In addition, **CETA**, but also the agreement with Vietnam, **EUVFTA**, envisages the formation of a **permanent multilateral** forum for **investor-state dispute resolution (ICS)**. The ICS proposals can be seen as a response to criticisms of the current ISDS system. The ICS provisions have been excluded from CETA's provisional application, as they will be the subject of a **referral** to the **CJEU** to determine compatibility with EU law.<sup>262</sup>

260 Ramírez Robles, E. (2006), 'Political & Quasi-Adjudicative Dispute Settlement Models in EU Free Trade Agreements. Is adjudication a trend or is it just another model?', *Revista Electrónica de Estudios Internacionales* no 12, p. 22-25.

261 These pillars are: political dimension, increased participation, new economic and trade partnerships, cooperation focusing on poverty reduction and financial cooperation.

262 See Opinion 1/17, Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU. In its Opinion 2/15, the CJEU declared that the EU did have no exclusive competence to conclude the

The North American Free Trade Agreement (**NAFTA**), main settlement procedure provides that the governments' concerned aim to resolve any potential **disputes** amicably, but if that is not possible, the agreement provides for **panel procedures**.

Within **Mercosur**, disputes are resolved in the first instance politically. However, if a political solution is not forthcoming the dispute can be submitted to an **ad hoc arbitration** tribunal. Decisions of the tribunal may be appealed on a point of law to a **Permanent Review Tribunal**.

#### 4.5.3. The UK position of July 2018

In July 2018, the UK Prime Minister presented her vision on the way forward in a white paper, as agreed by the UK government at **Chequers**.<sup>263</sup> According to the Prime Minister in her foreword, this proposal would ensure that the UK leaves the EU, without leaving Europe.<sup>264</sup> In its White Paper, the UK government explains that its proposed institutional structure draws on precedents from other international agreements, like CETA, the EU-Ukraine Association Agreement, the North American Free Trade Agreement, ASEAN as well as the current proposals for the relationship between the EU and Switzerland.<sup>265</sup> The UK cabinet suggests that the UK's proposal would likely to take the form of an **Association Agreement** between the **UK** and the **EU**, comprising a set of legally binding agreements (such as a core Free Trade Agreement) as well as **instruments** with a mere **political nature**, like on internal security. The institutional framework should be given political direction by a **Governing Body** and safeguard its technical and administrative functions through a **Joint Committee**.

The Joint Committee should ensure compliance with a common 'rulebook' on areas of EU law (the text suggests that these rules respect the interpretation by the CJEU) and consistent interpretation of its rules, but also facilitate the resolution of possible disputes. While recognising the importance of citizens and businesses having confidence in the rules which affect them, the White Paper emphasises that the common rules should be interpreted consistently. With this aim, the UK courts would commit to take due regard to relevant CJEU case law, however without being able to make preliminary references to the CJEU. The Joint Committee would be tasked to monitor the interpretation by both UK courts and the CJEU, and to 'act' if necessary to preserve consistency.<sup>266</sup> Regarding the preferred options for a dispute settlement, the UK government mentions an **independent arbitration panel**, including members from both parties but also experts, to which either party can refer a dispute.<sup>267</sup> A decision of this panel should be binding on the parties. Regarding the **interpretation** of a **common rulebook**, the government **recognises** that **only** the **CJEU** can **bind the EU** on the **interpretation of EU law**. In cases where EU law has been recognised by the UK as a matter of international law, a reference for interpretation to the CJEU could be asked from either the Joint Committee by mutual consent of both parties, or from the arbitration panel. It is then up to the referring instances to resolve the dispute in conformity with CJEU's interpretation. The UK government explicitly states that this dispute mechanism would be separate to existing mechanisms for resolving disputes in international agreements. It is up to the parties to decide on which route to take

EUSFTA (with Sri Lanka), due to the ISDS system, CJEU 16 May 2017, ECLI:EU:C:2017:376. In March 2018, the CJEU declared the ISDS mechanism in the bilateral investment treaty between the Netherlands and Slovakia as incompatible with EU law, see: CJEU 6 March 2018, C-284/16, *Achmea*, ECLI:EU:C:2018:158.

263 *The future relationship between the United Kingdom and the European Union*, HM Government, July 2018, Cm 9593.

264 See for an analysis of the recent proposals the blog: Barnard & Leinarte, *EU/UK Dispute resolution post-Brexit in the light of the White Paper*, EU Law Analysis (16 August 2018), <eulawanalysis.blogspot.com/>.

265 *The future relationship between the United Kingdom and the European Union*, HM Government, July 2018, Cm 9593, Par. 4.2, no. 8.

266 *The future relationship between the United Kingdom and the European Union*, HM Government, July 2018, Cm 9593, para. 4.4.2, no 34.

267 *The future relationship between the United Kingdom and the European Union*, HM Government, July 2018, Cm 9593, para. 4.5.1.

## 5. Conclusions and Recommendations

### 5.1. The Withdrawal Agreement as a safeguard for existing rights?

The Withdrawal Agreement (WDA) provides for a continuation of existing free movement rights, and for the procedural safeguards on compliance with those rules. However, we see some serious **shortcomings**. One of them is that the personal scope is limited to persons who reside outside their home country. This **limitation** implies that UK nationals who returned to their home country will no longer be able to rely on the case law of the CJEU that preserves their free movement rights after return to the UK (for instance the influential *Surinder Singh* and subsequent case law; see section 4.1.2). Additionally, as the situation of UK nationals on their own territory is perceived as an internal situation, and the *Zambrano* and subsequent case law are left out of the WDA, UK nationals (mostly **children**) will not be able anymore to acquire a derived residence right for their third country national family members on which they are dependent.

As long as UK nationals and EU citizens reside in a host state, not only the rights derived from the Citizens Directive, but also the rights derived from article 20 and 21 TFEU remain applicable. Regarding the latter, the **CJEU** case law has given meaning to the **rights of Union citizens** in certain situations, even if they fall outside the scope of the Citizens Directive. An example is the *Lounes*-judgment about EU citizens who have acquired the nationality of their host state. Although article 35 WDA ensures **life-long protection**, this protection is in principle **limited** to case law handed down before the end of the transition period (except for pending cases as described in article 82 and 83 WDA). Subsequent case law only needs to be taken due regard to by the UK government. As the CJEU case law on article 20 and 21 TFEU is still evolving, divergent case law and insecurity for EU citizens is to be expected.

According to article 18 WDA, **after the end of the transition period** the residence rights of EU citizens and their family members can be restricted because of their conduct on the basis of national legislation. This means that the restrictive approach by the CJEU on this matter, for instance the **definition of public order** and abuse of rights, cannot be invoked anymore by EU citizens residing in the UK and UK nationals residing in one of the EU-27 Member States.

Another shortcoming is that the WDA includes **no provision** on the right of **UK nationals to move** from one Member State to another. In case of a no deal Brexit, UK nationals will have the same rights as other third country nationals. This means that UK nationals having a residence permit in one Member State, will be entitled to the right of entry and circulation up to **three months** in the whole Schengen area. After that period, those UK nationals will only be entitled to work, study or live in other Member States on the basis of the limited provisions on intra-EU mobility in the directives on regular migration of third-country nationals, as discussed in section 2.3.1.

The WDA was drafted as an essential element of a **soft Brexit**, but its parts on citizens' rights could, on another legal basis, serve as a useful model in case of a no deal, i.e. a **hard Brexit**. In that case the text could be incorporated in UK law in order to honour the promises of the UK Prime Minister that the rights of EU citizens in the UK would be respected. It could be used as a model for a special EU instrument protecting the privileged rights of UK nationals in the (other) 27 Member States. In case of a no deal Brexit, the WDA provisions on citizens' rights and their judicial protection and monitoring could also be used in a separate EU-UK agreement dealing solely with the issue of EU citizens' rights in the UK and UK nationals rights in the (other) 27 Member States.

## 5.2. Social Security

Social security coordination has always been an important instrument to stimulate free movement of workers and persons. In the future relationship between the EU and the UK a **new arrangement** to guarantee this has to be made. As shown in chapter 3 the existing agreements provide a range of options between continuing full coordination to a very limited form of coordination. If there is no deal after the transition period UK nationals either in a cross-border situation between two or more EU Member States (excluding Denmark) or just working and residing in a single Member State will stay in a more advantageous position based on Regulation 1231/2010 and the various EU migration Directives than EU citizens who are in a cross-border situation in which the UK is involved or who work and reside exclusively in the UK. A special category consists of the estimated 23,000-30,000 **cross-border workers** between Northern Ireland and Ireland. For situations where mobility starts after 31 December 2020 this will lead to uncertainty regarding applicable legislation, export of benefits, aggregation of periods of time and equal treatment. The UK could seek to secure bilateral social security agreements on reciprocal rights with individual EU or EFTA states, but negotiations could be difficult and protracted. And it is questionable whether the EU would be interested in such an approach. The coordination rules set down in a bilateral agreement may differ from the EU coordination rules in a range of aspects. A **complicating factor** will be that when an EU Member State concludes a bilateral agreement with a third country, the fundamental **principle of equal treatment** requires that Member State to grant nationals of other Member States the same advantages as those which its own nationals enjoy under that agreement.

## 5.3. The role of the CJEU

The WDA makes it clear that even if there is **no agreement** on the future relationship of the UK and the EU regarding movement of persons, the **caselaw** of the **CJEU** will continue to **apply**. The WDA sets out an **eight-year period** following the end of the transition period (31 December 2020) during which UK courts will still be entitled to make references to the CJEU on the correct interpretation of free movement of persons and citizens' rights as contained in the WDA. The UK courts will continue to be bound by the CJEU jurisprudence over that period. Afterwards, it is up to the **UK Authority** to bring a legal action before a UK court or tribunal, with a view to ensure compliance with Part 2 of the WDA. In order to ensure an adequate remedy, it could be worth considering to establish an EFTA-like body for UK courts to turn to with questions on the interpretation of EU law after the transitional period of eight years.

Concerning a suitable mechanism for **dispute settlement** in the future partnership, it is noted that a number of agreements of relevance in this context, such as the EFTA/EEA or the Association Agreement between the EU and Turkey, grant an important role to the CJEU. The **EFTA court** is independent, but is bound to align its interpretation with the CJEU's case law. Dispute settlement mechanisms established in many other agreements between the EU and a third country or multilateral agreements between the EU and third countries provide for the possibility of an arbitration procedure, sometimes followed by the option of appealing at an appellate body. These practices show that it is not necessarily the CJEU having direct jurisdiction over a dispute between the EU and the UK on the interpretation or application of the future partnership agreement. This may accommodate the UK's position. However, as the UK government rightly notes in its paper on enforcement and dispute settlements, there are limitations to the matters on which the EU can subject itself to the binding decisions of an arbitration panel. An **arbitration panel** cannot adjudicate on matters of interpretation of EU law so as to bind the EU and its Member States. After all, the CJEU remains the only instance competent to interpret EU law. It is clear that the position of the CJEU will to a large extent depend on

the nature of the EU-UK relations. The closer these relations will be, the stronger and more inevitable its role will remain, including its influence in the UK's domestic system.

#### 5.4. Future cooperation on mobility and migration

This report has given an overview of the **possible** future cooperation **models** between the EU and the UK, focussed on their implications for the rights of UK nationals in the EU and EU citizens in the UK. The eventual decisions on the future cooperation and citizens' rights will however strongly depend on the capability to accommodate the preferences and objections of both parties. Below, their positions regarding movement of persons are summarised. The positions and dilemmas regarding the Irish border are separately addressed.

##### 5.4.1. The EU position

Firstly, what is the EU's position on movement of persons? '**Schengen**' is really now the starting place for the EU on movement of persons. Any state, which is a party to the Schengen arrangements of border control and free movement of persons, is considered to be a reliable partner with whom free movement of persons for more than short stays should be possible to negotiate. All third countries, which are parties to the Schengen arrangements also enjoy full free movement of persons in all six categories (as mentioned in section 3.2-3.7). As a result, the scope of the **non-discrimination** on grounds of nationality provisions is very wide. Thereafter, the historical nature of many of the EU's agreements with third countries means that the provisions are somewhat uneven. However, where the EU anticipates closer cooperation or even accession someday, as in respect of Turkey and the Western Balkan states, the scope of the provisions tends to be wider. This then also determines the scope of application of the non-discrimination provisions (nationality). Thereafter, the base line of **GATS** (General Agreement on Trade in Services) commitments is usually the foundation on which other arrangements may be contemplated. For instance, in **CETA** (Comprehensive Economic and Trade Agreement between EU and Canada), the default position of everything being opted-out unless specifically opted in (bound unbound) is reversed. An **EFTA-like** dispute settlement mechanism would satisfy the ambition of the UK government to leave the **CJEU** jurisdiction but at the same time would keep the autonomy of the EU's legal order intact.

##### 5.4.2. The UK position

Secondly, it is very difficult at this time to determine what the **UK government's position** is on free movement of persons. There is certainly no appetite to join the Schengen border control free arrangements. If there is a consistent position which the UK government appears to pursue (both with the EU and the rest of the world) it is that it wants to prevent the arrival and residence in the UK of any non-UK national who is not wealthy and highly qualified (the only exception is for refugees). Thus, if the UK were to be open to retaining categories for **economically inactive** persons (and **students**) it would be likely to seek a much higher financial threshold than exists under EU law. The same is likely to be the case for **workers**. Establishment is also subject to a high investment **threshold** (£ 200,000) and employment creation. Students are required to have substantial funds and pay high differential fees (i.e. the overseas student fee). The UK might be willing to reach a CETA type agreement on services provision, not least as it is already bound by CETA. But it is worth noting that the UK entered a reservation to CETA based on Protocol 21; its opt out on **AFSJ** (Area of Freedom, Security and Justice) because the agreement foresees some liberalisation in the movement of natural persons for service provision.

The **distance** between these two **positions** is **enormous**. It also does not assist that growth forecasts for the UK economy are being revised downwards which may encourage the idea that the UK

does not actually need economic migration. However, it is also worth noting that first quarter 2017 growth rates of the EU, according to the OECD were 0.4% (against the UK's 0.3%) and 0.6% for Germany (and many other Central and Eastern European states). 15 Member States have unemployment rates under 6%; Ireland is at 5.9% and dropping, and the Czech Republic at 2.2%. It may not be wise to over-estimate the desire among a substantial number of Member States to stimulate economic migration of their citizens to the UK which has benefited from its ability to attract young, well-educated and motivated workers from other Member States.

#### 5.4.3. Irish border

Thirdly, there is the **Ireland** – UK border conundrum. The UK Government announced very early in the Brexit negotiations that it will not treat Irish nationals living in the UK as EU citizens after Brexit. Instead, it will continue to treat them as exempt from border control under the Ireland Act 1949. This means that Irish nationals seeking to cross the Irish-UK border after Brexit will not be subject to UK border controls. There is no such guarantee for their third country national family members or for any other EU citizens under the **1949 Act**. Whether Ireland would wish to apply border controls at its land border with the UK is unknown but seems unlikely. Under the **Common Travel Area**, there should be no border controls between the UK and Ireland. This has been transposed in the UK law through the immigration rules which recognise admission to Ireland (or the Channel Islands and Isle of Man which are also parties) as valid for **control free movement** into the UK. In general, the Common Travel Area Agreement would mean that **EU citizens** and third country nationals moving from Ireland to the UK **should not be subject to border controls**. As long as Ireland does not seek to join the Schengen border control free area, there should be no particular problem from the UK's side about movement of persons from Ireland to the UK.

#### 5.5. Looking ahead

The first priority of the EU as regards **migration** and **mobility rights** in the Brexit context is to secure, in a durable manner, the rights of EU citizens and UK nationals who have exercised free movement rights and invested their lives in the territory of the other party. The WDA provides a good basis to achieve this objective. It guarantees work and residence rights and the entitlement to non-discrimination on grounds of nationality for UK nationals and EU citizens who have exercised their free movement rights in accordance with EU law. They will be **covered for life** as long as they continue to meet certain conditions. **UK nationals** living in **EU** Member States will continue to enjoy **free movement** rights as long as they arrive and start exercising free movement rights **before** the end of the transition period (1 January 2021).

The negotiations on the WDA did not extend to UK nationals resident in the UK or returning there. As a result, **some rights**, which these persons currently have, **will fall away** and are not protected by the WDA. After Brexit, UK nationals will **only have** the right to reside, work and study in the Member State where they are resident, and **not enjoy free movement** to another Member State. After Brexit, EU citizens residing in the UK will be able to enforce their rights in a complaint procedure with an **independent UK authority**, which is also competent to initiate inquiries and legal actions. Citizens' rights referred to in the WDA can also be **invoked** before a **national court**.

The **future relationship** of the EU and the UK regarding mobility and migration after the end of the transition period (assuming that the WDA is signed and ratified) can take one of a number of **forms**. Depending on the willingness of the parties, a very close relationship could be negotiated such as that of the **EEA** Agreement or the **EC-Swiss** Agreement. This 'closest cooperation' depends on the principle to participate in the Schengen area of no borders control. If there is no aspiration for such a privileged

relationship, a more distant option of virtually no rights of mobility or migration, i.e. the **EU-Canada Agreement** could be negotiated.

In case of a no-deal Brexit, the measures on Regular Migration (see section 1.2), Borders & Visas (section 1.3), together with Irregular Migration (section 1.4) form the **basic set** of EU rules determining the **legal status of UK nationals** and their family members in the **EU-27**. The EU migration and asylum measures to which the UK did **opt-in** provide an indication of the issues where the UK might be willing to conclude an **agreement** with the EU-27 in a separate agreement after Brexit.

The setup of a **Joint Committee** regarding the implementation and application of the WDA could be immediately accompanied with the establishment of a **specialised committee on citizens' rights**, in order to assist the Joint Committee in further defining the meaning of the rights and the scope of the WDA, and to propose decisions and recommendations regarding procedural and practical arrangements.

The **Independent UK Authority** is meant to ensure compliance and support EU citizens in invoking their rights, should look for ways to offer extensive information on the free movement rights and the case-law of the CJEU in a transparent, comprehensible and accessible way. The availability of accessible legal advice in individual cases will be necessary to invoke the rights under the WDA.

The WDA provides for judicial overview until eight years after the end of the transition period. Bearing in mind that questions of interpretation of the WDA and EU law will remain, and that a **uniform interpretation** is crucial to the legal certainty of all citizens, the parties may consider a provision for this in the form of an **EFTA-Court like body**.

## ANNEXES

**Table 1 CJEU case law on free movement**

<b>date</b>	<b>case number</b>	<b>name</b>	<b>ECLI</b>	<b>Dir 2004/38</b>
10 July 2008	C-33/07	<i>Jipa</i>	ECLI:EU:C:2008:396	art. 4+27
23 February 2010	C-480/08	<i>Teixeira</i>	ECLI:EU:C:2010:83	art. 12
7 October 2010	C-162/09	<i>Lassal</i>	ECLI:EU:C:2010:592	art. 16
5 May 2011	C-434/09	<i>McCarthy</i>	ECLI:EU:C:2011:277	art. 3(1)
21 July 2011	C-325/09	<i>Dias</i>	ECLI:EU:C:2011:498	art. 16
5 September 2011	C-83/11	<i>Rahman a.o.</i>	ECLI:EU:C:2012:519	art. 3(2)
6 September 2012	C-147+148/11	<i>Czop &amp; Punakova</i>	ECLI:EU:C:2012:538	art. 16
8 May 2013	C-529/11	<i>Alarape &amp; Tijani</i>	ECLI:EU:C:2013:290	art. 16-18
4 June 2013	C-300/11	<i>Z.Z.</i>	ECLI:EU:C:2013:363	art. 30(2)
16 January 2014	C-378/12	<i>Onuekwere</i>	ECLI:EU:C:2014:13	art. 16
16 January 2014	C-400/12	<i>M.G.</i>	ECLI:EU:C:2014:9	art. 28(3)(a)
19 June 2014	C-507/12	<i>Saint Prix</i>	ECLI:EU:C:2014:2007	art. 7(3)
10 July 2014	C-244/13	<i>Ogieriakhi</i>	ECLI:EU:C:2014:2068	art. 16(2)
18 December 2014	C-202/13	<i>Sean McCarthy a.o.</i>	ECLI:EU:C:2014:2450	art. 10+35
14 June 2016	C-308/14	<i>Com. vs UK</i>	ECLI:EU:C:2016:436	art. 7+14+24
30 June 2016	C-115/15	<i>N.A.</i>	ECLI:EU:C:2016:487	art. 13(2)
13 September 2016	C-304/14	<i>C.S.</i>	ECLI:EU:C:2016:674	art. 3
14 November 2017	C-165/16	<i>Lounes</i>	ECLI:EU:C:2017:862	art. 3+7+16
17 April 2018	C-316+424/16	<i>B. &amp; Vomero</i>	ECLI:EU:C:2018:256	art. 28(3)(a)
12 July 2018	C-89/17	<i>Banger</i>	ECLI:EU:C:2018:570	art. 3(2)+15(1)
13 September 2018	C-618/16	<i>Rafal Prefeta</i>	ECLI:EU:C:2018:719.	art. 7(3)
(pending case)	C-93/18	<i>Bajratari</i>	-	art. 7(1)(b)
(pending case)	C-129/18	<i>SM</i>	-	art. 2(2)

Source: Centre for Migration Law, Radboud University: quarterly CJEU overview <[www.ru.nl/law/cmr/documentation/cmr-newsletters/](http://www.ru.nl/law/cmr/documentation/cmr-newsletters/)>

This table contains references to all relevant cases on preliminary questions by courts in the UK or an infringement procedure against the UK on free movement issues.

**Table 2 British Citizens in 2017 (estimate)**

Residing in the UK	59,700,000	
Residing in other EU Member States	1,300,000	(of which 900,000 LTR)
Residing in the EFTA	58,000	
Residing elsewhere	3,500,000	

Source: Full Fact (UK); Office for National Statistics (UK); Eurostat; United Nations Statistics.

**Table 3 British Citizens residing in- or outside the UK in 2017 (estimate)**

Residing in the UK	59,700,000	
Residing in other EU Member States	1,300,000	
of which residing		
in Austria	10,000	
in Belgium	23,000	
in Bulgaria	4,000	
in Croatia	*	(< 1000)
in Cyprus	24,000	
in Czech Republic	6,000	
in Denmark	18,000	
in Estonia	*	(< 1000)
in Finland	5,000	
in France	153,000	
in Germany	96,000	
in Greece	16,000	
in Hungary	3,000	
in Ireland	107,000	
in Italy	27,000	
in Latvia	*	(< 1000)
in Lithuania	*	(< 1000)
in Luxemburg	6,000	
in Malta	7,000	
in Poland	2,000	
in Portugal	19,000	
in Romania	2,000	
in Slovakia	2,000	
in Slovenia	*	(< 1000)
in Spain	293,000	
in Sweden	20,000	
in The Netherlands	45,000	
Residing in EFTA states	58,000	
of which residing		
in Switzerland	41,000	
in Norway	16,000	
in Iceland	1,000	
in Liechtenstein	*	(< 1000)

Residing elsewhere	3,500,000
of which residing	
in Australia	1,300,000
in USA	715,000
in Canada	607,000
in New Zealand	265,000
in South Africa	319,000
in United Arab Emirates	19,000
in Bangladesh	33,000
in Saudi Arabia	31,000
in China	27,000
in Japan	15,000
in Indonesia	30,000
in Bangladesh	33,000
in Israel	22,000
in Indonesia	30,000
in Turkey	19,000
in Chile	18,000

Source: Full Fact (UK); Office for National Statistics (UK); Eurostat; United Nations Statistics.

**Table 4 Non-British Citizens resident in the United Kingdom in 2017 (estimate)**

European Union citizens residing in the UK	3,813,000
of which citizens:	
from Austria	18,000
from Belgium	25,000
from Bulgaria	86,000
from Croatia	6,000
from Cyprus	19,000
from Czech Republic	49,000
from Denmark	32,000
from Estonia	10,000
from Finland	16,000
from France	181,000
from Germany	154,000
from Greece	70,000
from Hungary	98,000
from Ireland	350,000
from Italy	297,000
from Latvia	117,000
from Lithuania	199,000
from Luxembourg	1,000
from Malta	9,000
from Poland	1,021,000
from Portugal	235,000
from Romania	411,000
from Slovakia	82,000
from Slovenia	5,000
from Spain	182,000
from Sweden	43,000
from The Netherlands	97,000
EFTA citizens residing in the UK	29,000
of which citizens:	
from Switzerland	14,000
from Norway	12,000
from Iceland	3,000
from Liechtenstein	* (< 1000)

Third country nationals (TCN) residing in the UK	2,400,000
of which citizens:	
from Afghanistan	40,000
from Albania	26,000
from Algeria	15,000
from Australia	87,000
from Bangladesh	84,000
from Brazil	40,000
from Canada	55,000
from China	147,000
from Columbia	14,000
from Ecuador	4,000
from Egypt	11,000
from Eritrea	11,000
from Ethiopia	11,000
from Gambia	10,000
from Ghana	42,000
from India	346,000
from Iran	28,000
from Iraq	35,000
from Jamaica	28,000
from Japan	35,000
from Kenya	15,000
from Libya	12,000
from Malaysia	44,000
from Mauritius	10,000
from Nepal	45,000
from New Zealand	39,000
from Nigeria	102,000
from Pakistan	188,000
from Philippines	61,000
from Russia	35,000
from Saudi Arabia	21,000
from Sierra Leone	12,000
from South Africa	72,000
from Sri Lanka	48,000
from Syria	23,000
from Thailand	25,000
from Turkey	46,000
from USA	133,000
from Venezuela	10,000
from Zimbabwe	50,000
from other nations (with < 10.000 citizens in UK)	340,000

Source: Eurostat; Office for National Statistics (ONS); United Nations Statistics.

**Table 5 Naturalisations**

Naturalisation of:	2013	2014	2015	2016	2017
TCN to EU citizenship	873,279	784,753	727,207	863,341	*
EFTA national to EU citizenship	29,257	29,571	29,809	32,320	*
EU citizen to another EU citizenship	98,473	95,663	104,860	120,149	*
EU citizen to UK National	17,602	10,066	12,962	17,188	*
UK National to EU citizenship**	2,115	2,305	2,478	6,555	*
UK National to Swedish nationality	295	436	453	978	*
UK National to Swiss nationality	327	433	617	708	*
UK National to German nationality	440	496	594	2,702	7,493

Source: Eurostat; Destatis (Statistisches Bundesamt; German Federal Statistical Office)

\* not yet known

\*\* These figures underrepresent the number of UK nationals who recently acquired another EU citizenship since a substantial number of UK nationals have activated another EU citizenship which they acquired by birth and descent (for instance British-Irish).

**Table 6 Blue Cards issued**

Blue Card issued in:	2012	2013	2014	2015	2016	2017
Austria	124	108	128	140	163	177
Belgium		5	19	19	31	37
Bulgaria	15	14	21	61	115	121
Croatia		10	9	32	32	29
Czech Republic	62	72	104	181	194	*
Estonia	16	12	15	19	22	14
Finland	2	5	4	15	33	74
France	126	371	604	657	750	1,032
Germany	2,584	11,580	12,108	14,620	17,630	20,541
Hungary	1	4	5	15	5	9
Italy	6	87	165	237	254	301
Latvia	17	10	32	87	112	201
Lithuania		26	92	128	127	144
Luxembourg	183	236	262	336	636	*
Malta		4	2		12	11
Netherlands	1	3	8	20	42	58
Poland	2	16	46	369	673	471
Portugal	2	4	3		1	*
Romania	46	71	190	140	92	*
Slovakia	7	8	6	7	4	8
Slovenia	9	3	8	15	19	22
Spain	461	313	39	4	21	28
Sweden		2		2	11	*
Percentage of all Blue Cards Issued in Germany	71%	89%	87%	85%	84%	88%

Source: Eurostat; UK, Ireland and Denmark have opted out; Cyprus and Greece have not yet issued a Blue Card

\* not yet known

See also Table 7 and Graph 7

**Table 7 Comparison of Blue Cards and First Permits issued to highly skilled TCN (in 2015)**

Member State	Blue Card	First permits to Highly Skilled (other)
Austria	140	1173
Belgium	19	2679
Bulgaria	61	0
Croatia	32	0
Czech Republic	181	45
Estonia	19	0
Finland	15	959
France	657	2552
Germany	14,620	11
Hungary	15	0
Italy	237	1006
Latvia	87	143
Lithuania	128	0
Luxembourg	336	0
Malta	0	0
Netherlands	20	7909
Poland	369	570
Portugal	*	896
Romania	140	140
Slovakia	7	0
Slovenia	15	0
Spain	4	2547
Sweden	2	4527

Source: Eurostat; UK, Ireland and Denmark have opted out.

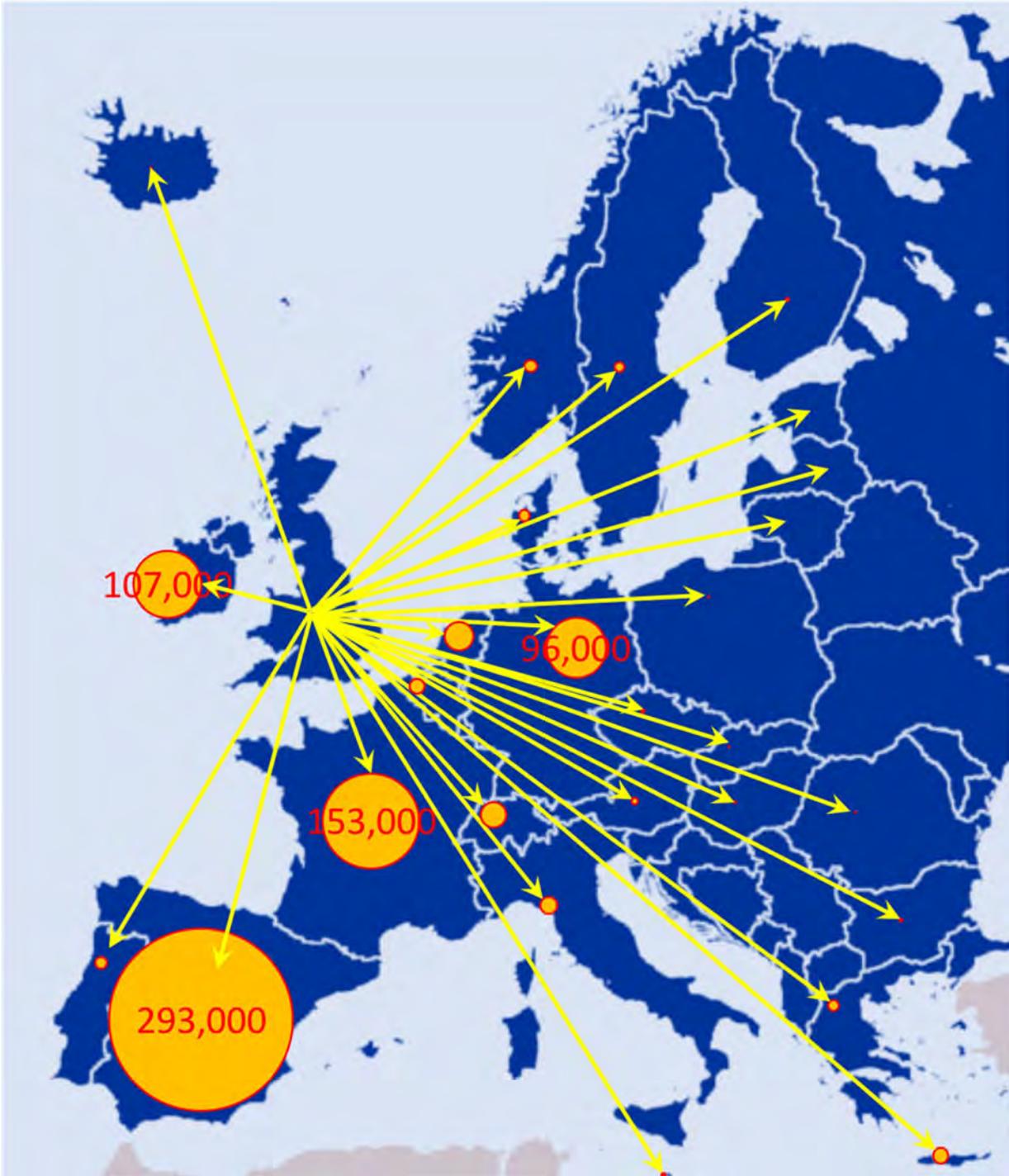
This table also appeared in a slightly different order in 'Revision of the Blue Card Directive, Briefing EU legislation in Progress, 2nd edition 12 December 2017

<[www.europarl.europa.eu/RegData/etudes/BRIE/2017/603942/EPRS\\_BRI\(2017\)603942\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603942/EPRS_BRI(2017)603942_EN.pdf)>.

\* unknown

See also Table 6 and Graph 7

Map 1 British citizens (1.3 million) residing outside the UK in EU or EFTA Member States

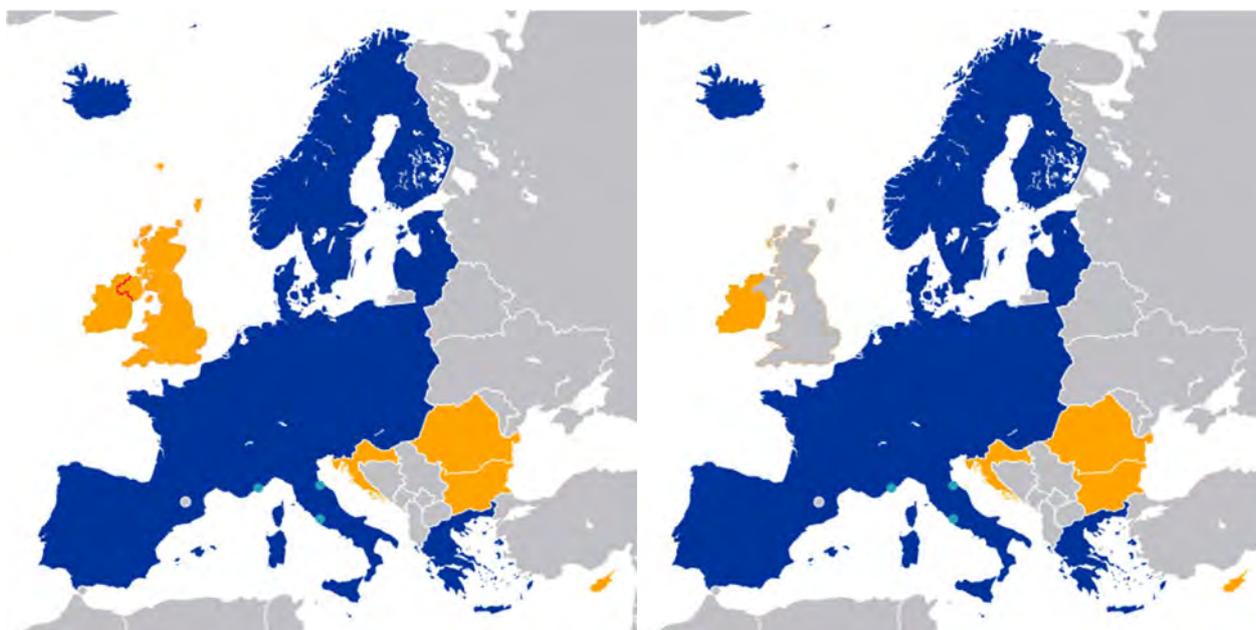


Source: Eurostat; Centre for Migration Law, Radboud University

**Map 2 EU citizens (3.8 million) residing in the UK**



Source: Eurostat; Centre for Migration Law, Radboud University

**Map 3 Schengen area: before and after Brexit**

Source: Adjusted version of version by Rob984 - Derived from File: Schengen Area.svg

The map on the left shows the current situation: EU Member States Ireland, UK, Croatia, Bulgaria, Romania and Cyprus are outside the Schengen area.

The map on the right shows the situation after Brexit: EU Member State Ireland is still outside the Schengen area but the UK (including Northern Ireland) is transformed into a Third Country.

**Blue:** Schengen Area (22 EU Member States plus 4 EFTA countries).

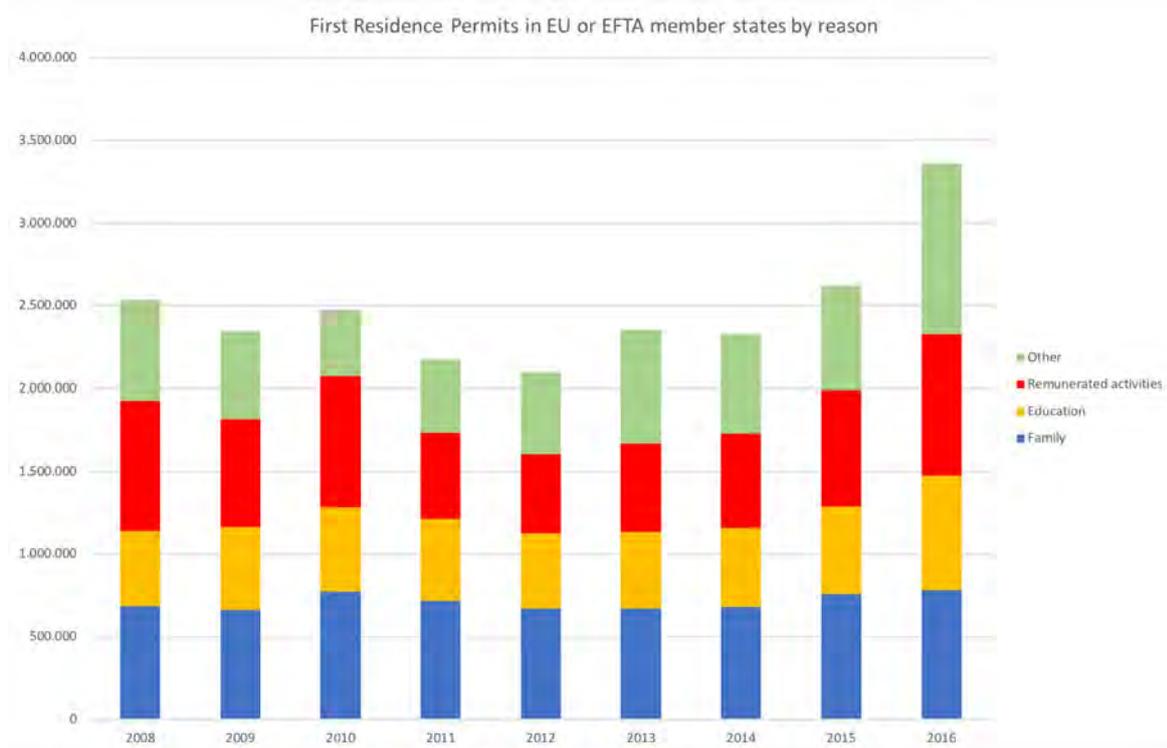
**Dots** The blue 'dots' refer to Monaco, Vatican City and San Marino. These countries do not participate in Schengen but have agreements with France and Italy respectively on Free Movement of Persons, thus realising the absence of border control between these small countries and the neighbouring EU Member State (France and Italy).

The grey 'dot' refers to Andorra that does not participate in Schengen. There are border controls between Andorra and France and Spain.

**Orange:** EU Members States UK, Ireland, Bulgaria, Romania, Croatia, Cyprus not participating in Schengen. Ireland and UK are not obliged to participate in Schengen (Protocol 19 and 20 TFEU).

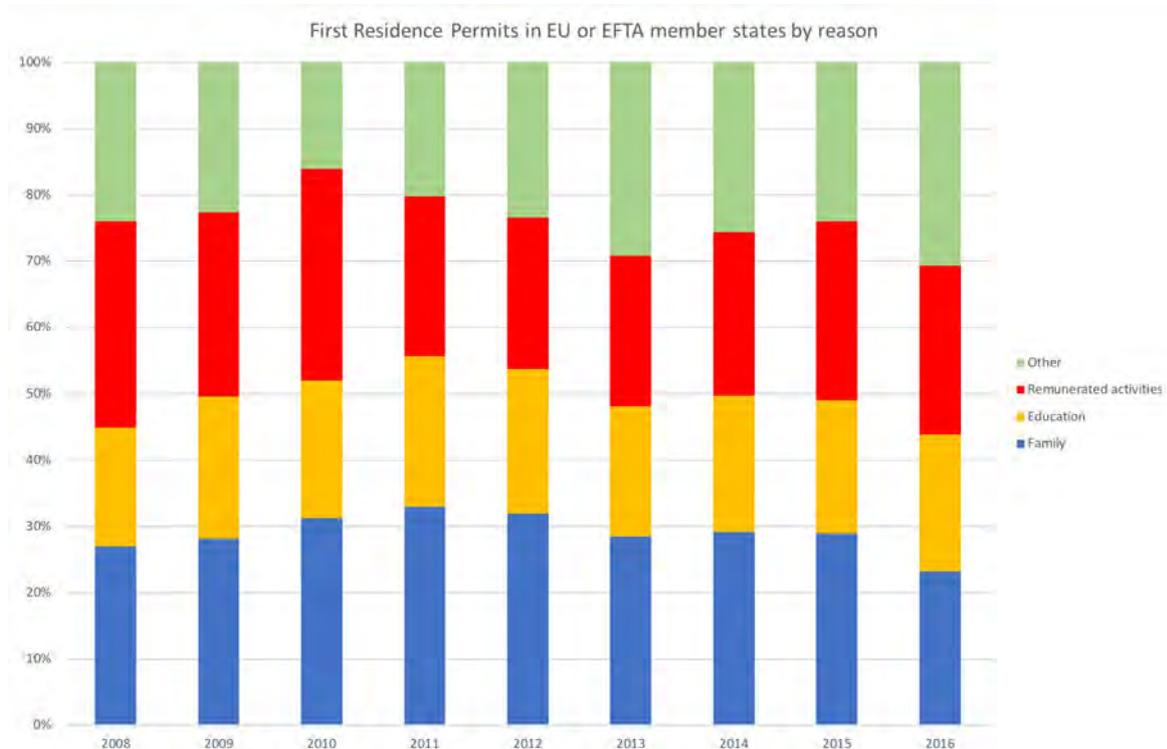
As far as there are comparisons between the post-Brexit situation of Ireland (an EU Member State outside Schengen) and its border with Northern Ireland, the current situation of other EU Member States also outside Schengen bordering with Third Countries might be interesting, i.e. Bulgaria, Croatia, and Romania.

**Graph 1 First Residence permits in EU/EFTA (absolute)**



Source: Eurostat

**Graph 2 First Residence Permits in EU/EFTA (relative)**

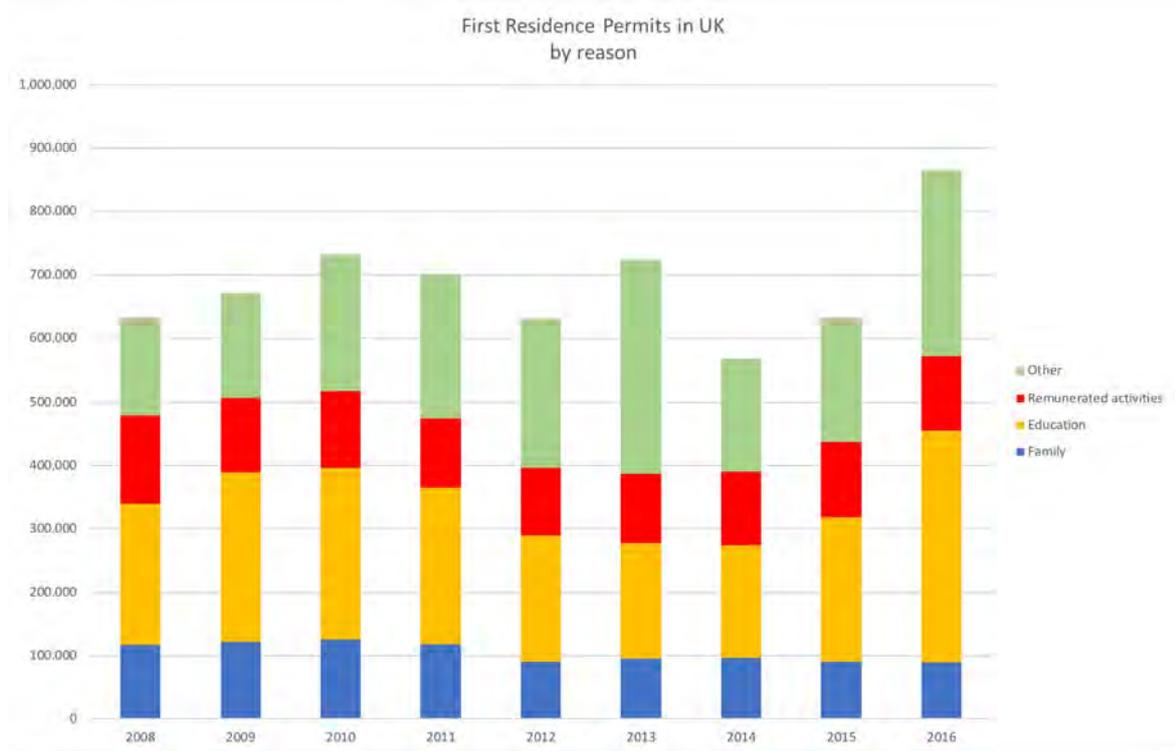


Source: Eurostat

As far as first residence permits are issued to TCNs in the EU, there is a stable and almost equal distribution by reasons of (1) remunerated activities, (2) education, (3) family and (4) other reasons (Graph 1 and Graph 2).

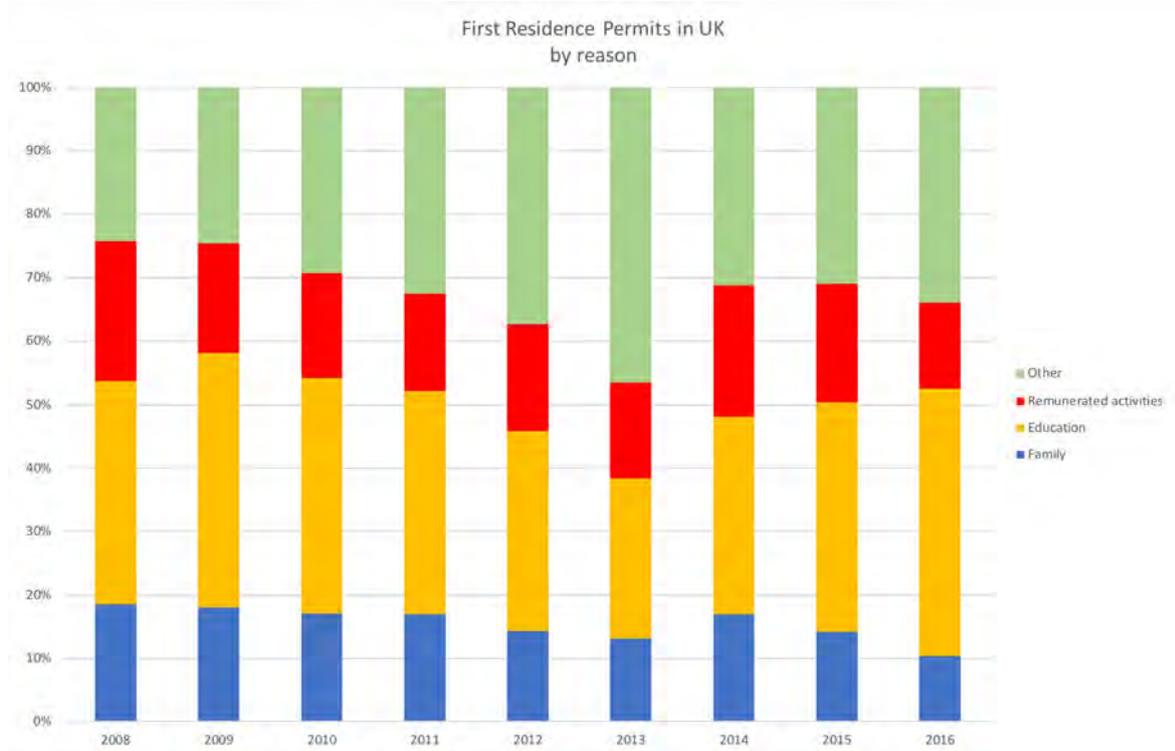
The situation in the same period (last decade) in the UK shows a different picture. As Graph 3 and Graph 4 illustrate, the UK issues relatively far *more* first residence permits to students and far *less* permits for remunerated activities or family (reunification) reasons. The remaining 'other' category such as diplomats or pensioners is more or less the same compare to the EU as a whole.

**Graph 3 First Residence Permits in UK (absolute)**



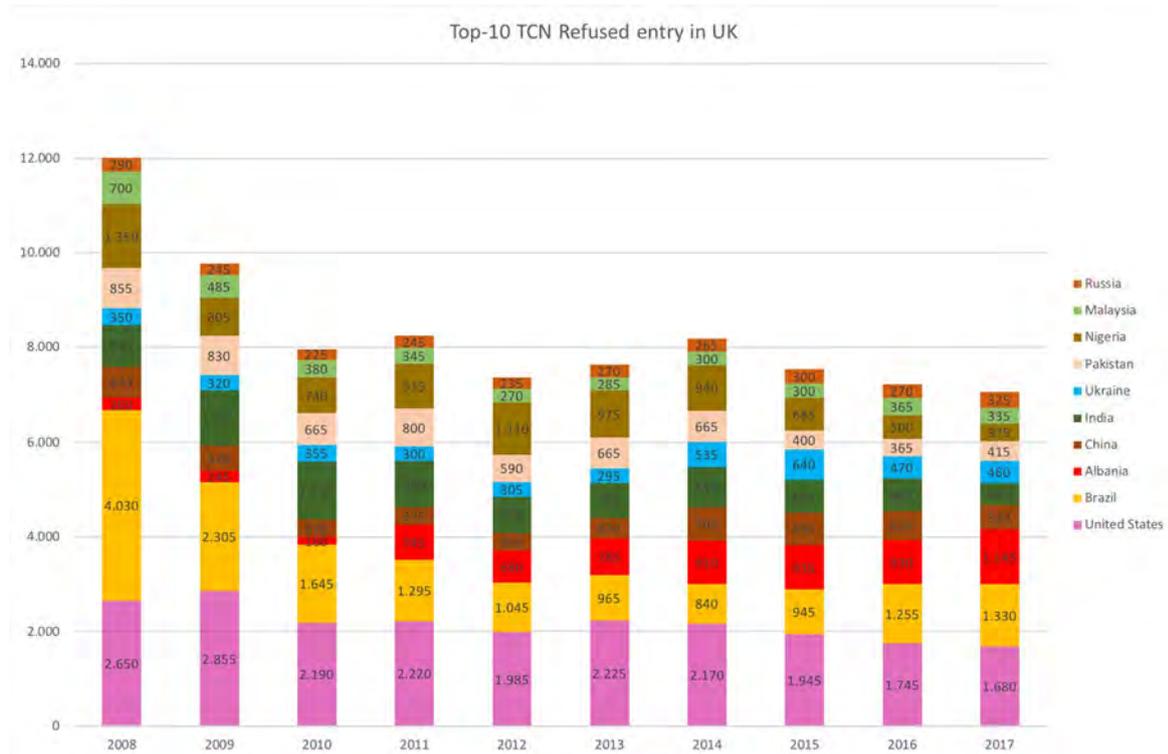
Source: Eurostat

**Graph 4 First Residence Permits in UK (relative)**



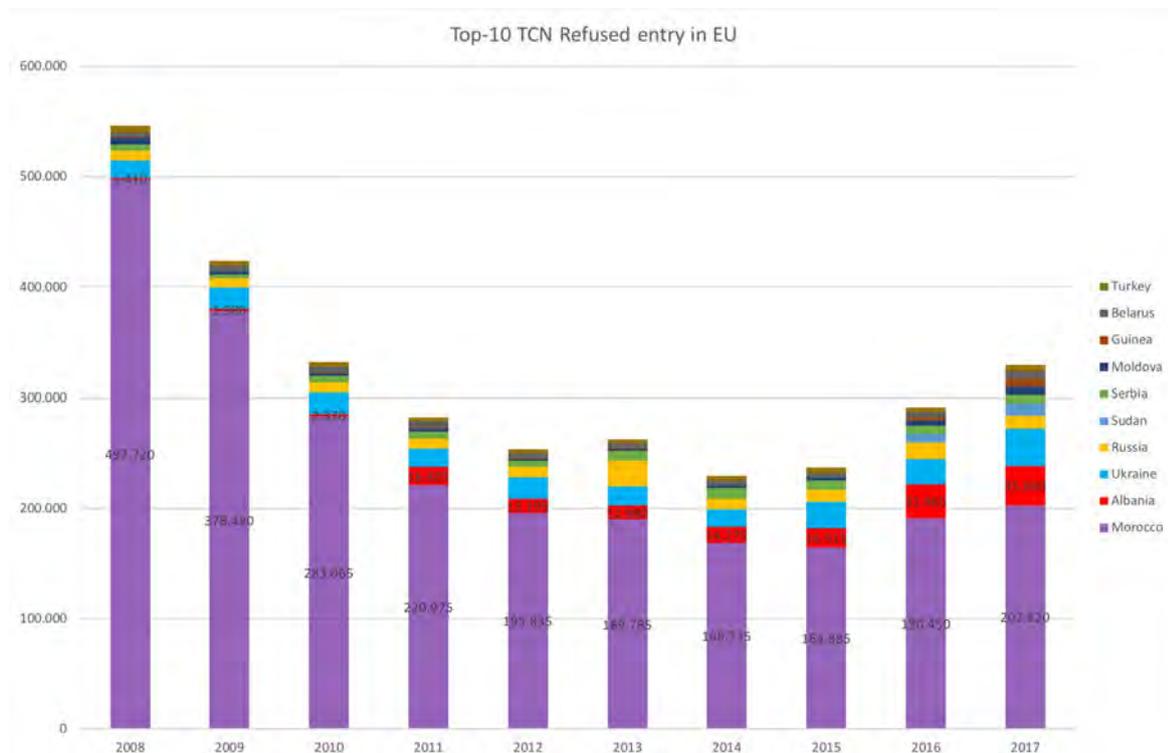
Source: Eurostat

**Graph 5 Top 10 TCN Refused entry in UK**



Source: Eurostat

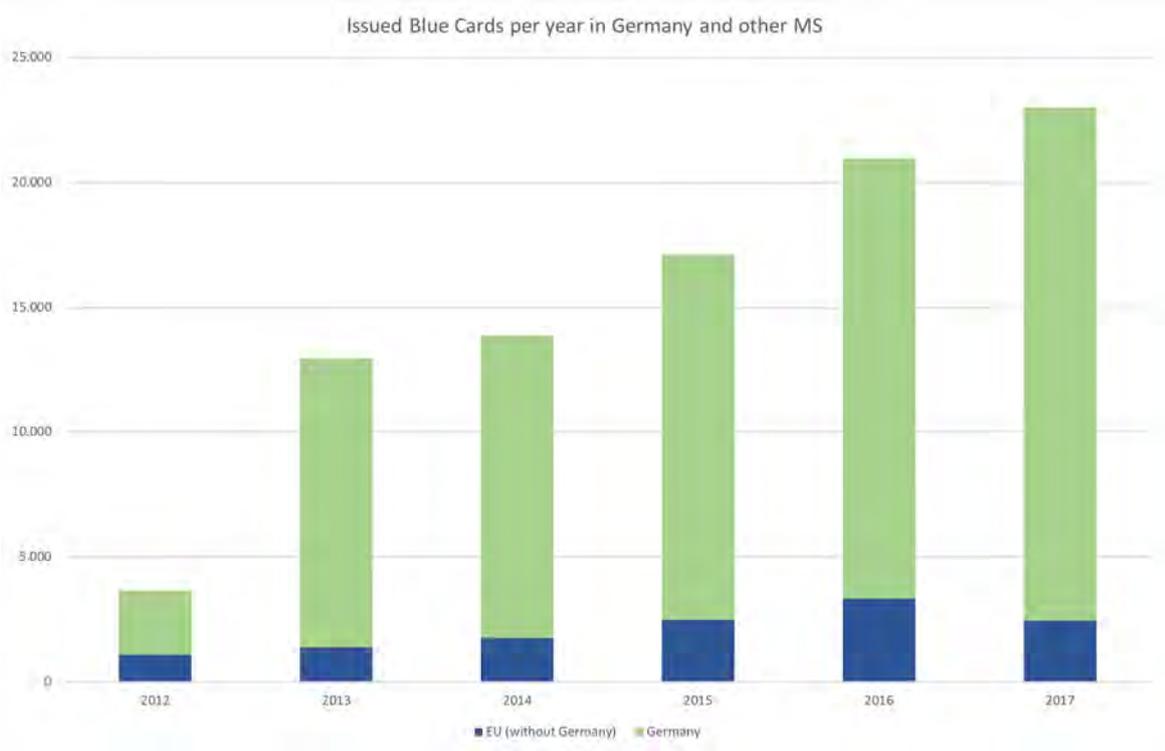
**Graph 6 Top 10 TCN refused entry in EU**



Source: Eurostat

There is a remarkable difference between the nationalities of persons refused entry in the EU as a whole and those refused entry in the UK.

**Graph 7 Blue Cards Issued**



Source: Eurostat  
See also Table 6 and Table 7.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at the request of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), focuses on the future relationship between the UK and the EU following the UK's withdrawal from the EU in the field of migration (excluding asylum), including future movement of EU citizens and UK nationals between the EU and UK. Moreover, it investigates the role of the Court of Justice of the EU.

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