

The Prospective Effects of Brexit on Freedom of Movement of UK and EU27 citizens

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The Prospective Effects of Brexit on Freedom of Movement of UK and EU27 citizens

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Structure

- **Brexit (abridged) timeline**
- **Brexit means Brexit (?)**
 - Revocability
 - Transition viz. extension
 - Withdrawal Agreement (WA)
 - Political Declaration: future relationship
- **Citizens' rights challenges after (if we) Brexit**
 - EU Citizenship: a fundamental status?
 - WA: UK citizens in the EU27
 - WA: EU27 citizens in the UK
 - UK citizens as former EU citizens (?)

Brexit (abridged) timeline

- 7 May 2015: David Cameron wins the GE on a manifesto promising a referendum
- 17 Dec 2015: Referendum act given royal ascent
- 19 Feb 2016: renegotiations concluded; referendum date announced
- 23 June 2016: the UK electorate votes by 51.89% to leave
- 24 June 2016: David Cameron resigns
- 13 July 2016: Theresa May becomes PM
- 29 March 2017: Article 50 notification served
- 29 March 2019 23h00 UK..?

Brexit means Brexit (?)

Article 50 TEU

2. A Member State which decides to withdraw **shall notify the European Council of its intention**

3. The Treaties shall cease to apply to the State in question **from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless** the European Council, in agreement with the Member State concerned, **unanimously decides to extend this period.**

Brexit means Brexit (?)

Revocability: *Wightman*

[75] where a MS has notified the EC..of its intention to withdraw from the EU, that article allows that MS — for as long as a withdrawal agreement concluded between that MS and the EU has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired — to revoke that notification unilaterally, in an **unequivocal and unconditional manner**, by a notice addressed to the EC in writing, after the MS concerned has taken the revocation decision **in accordance with its constitutional requirements**. The purpose of that revocation is to confirm the EU membership of the MS concerned under terms that are unchanged as regards its status as a MS, and that **revocation brings the withdrawal procedure to an end**.

Brexit means Brexit (?)

- Extension...but?
 - May 2019: next elections to the European Parliament
 - Dec 2020: end of the EU budgetary cycle
- Transition (or ‘implementation’) planned until December 2020?

ARTICLE 132

Extension of the transition period

1. Notwithstanding Article 126, the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to one or two years.*

What is the difference between the proposed transition and the backstop?		
	Transition	Backstop
Time-limit	Yes – until 31 December 2020 (or if extended to 31 December 2022). If new relationship is not ready by the end, the backstop comes into force.	No. The backstop is “intended” to be temporary, but applies “unless and until” it is superseded. Either party can apply to end the backstop, but this does not allow the UK to leave unilaterally.
Regulatory alignment on goods	Yes	Northern Ireland must align with existing rules and amendments to them. Great Britain can diverge or voluntarily align to minimise NI-GB regulatory barriers.
Regulatory alignment on services	Yes	No
Free movement of people	Yes	No
Level playing field	UK must adopt all new EU rules on level playing field issues	UK can diverge from EU social, employment, and environmental rules, but must maintain certain principles as a floor. UK aligns with future EU rules on state aid and competition.
Customs Union	Yes	Yes
Independent trade policy	No. The UK can negotiate but not implement trade agreements.	Limited. The UK would align with the EU on external tariffs and rules of origin. UK would mirror EU trade deals for goods but could strike independent or deeper deals covering services and investment.
Dispute settlement & ECJ jurisdiction	Direct ECJ jurisdiction. EU institutions and bodies continue to have authority to supervise and enforce UK compliance with EU laws.	No direct ECJ jurisdiction in Great Britain. The ECJ has direct jurisdiction in NI for some specific areas where NI implements EU law under the backstop. A UK-EU Joint Committee polices the wider functioning of the backstop. Disputes in some areas can be referred to arbitration. Only the ECJ can interpret matters of EU law.
Financial contributions	Yes.	No mandatory contribution to the EU budget. Voluntary contributions for participating in programmes.
Common Fisheries Policy	Yes.	No.
Common Agricultural Policy	Yes – until December 2020, but not if extended.	No.
Northern Ireland treated the same as Great Britain?	Yes.	No. Northern Ireland alone would remain aligned with EU goods regulation and the EU’s Customs Code.
UK Parliamentary supremacy	Parliament would have no scope to refuse new EU rules.	Parliament can refuse to align with new EU rules (with the exception of updates or amendments to certain existing regulations for NI, and state aid/competition rules).

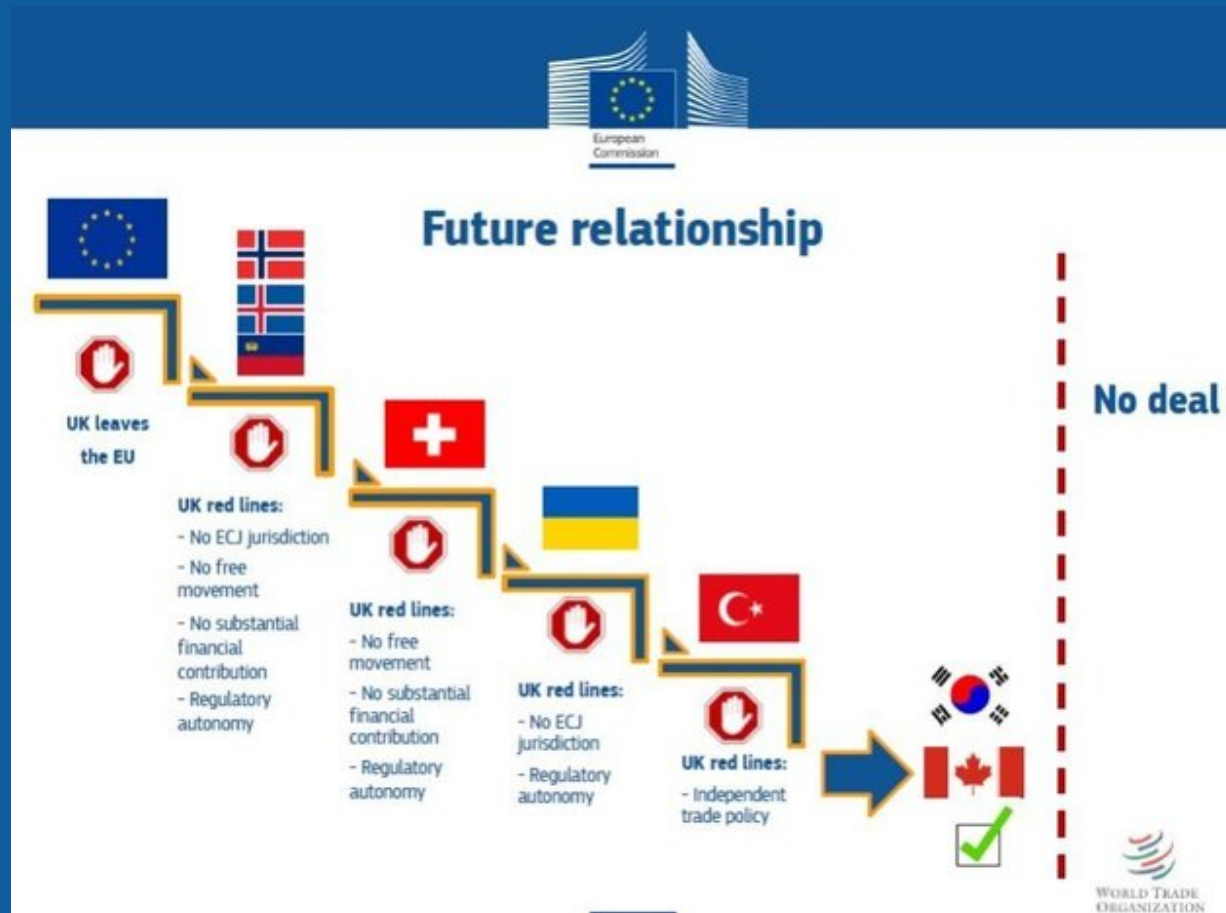
Withdrawal Agreement (WA)

- Financial settlement of outstanding obligations
- The Irish border
- Citizens' rights
- **UK:** Withdrawal Agreement & Implementation Bill to prevail over inconsistent/incompatible legislation.
- **EU27:** The Withdrawal Agreement will be binding upon the institutions of the Union and on its Member States from its entry into force pursuant to Article 216(2) TFEU.
- **Alas: 15 January 2019: defeated 432-202**

Political declaration

‘Political declaration setting out the framework for the future relationship between the EU and the UK’

Future relationship options (a-la Barnier)



EU citizenship

Article 20 TFEU (1)

Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.

Citizenship of the Union shall be additional to and not replace national citizenship

‘Union Citizenship is destined to be the fundamental status of nationals of the Member States’ (CJEU, *Chen*)

Whose (EU) citizenship rights?

- EU27 citizens in the UK
- UK citizens in the EU27 (*holding no other EU citizenship*)
- UK citizens in the UK (ditto)

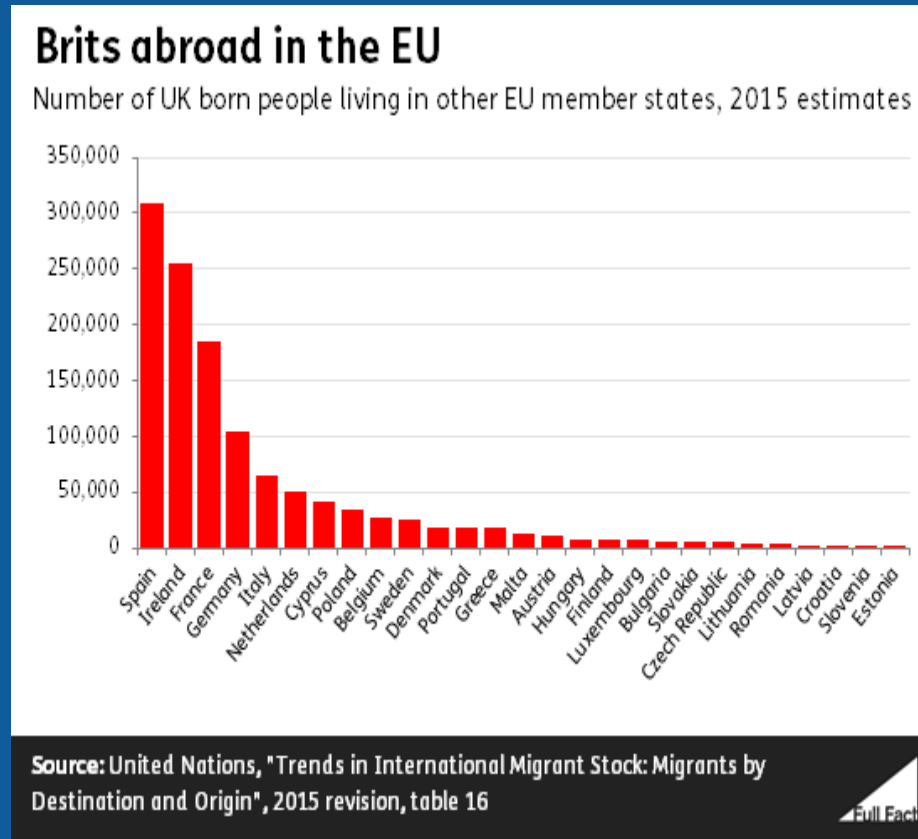
WA: personal scope

- **Union nationals who legally reside in the UK and UK nationals who legally reside in the EU27**, as well as their family members as defined by Directive 2004/38/EC who are legally resident in the host State by 31/12/2020 (end of transition)
- **Family members** who were not residing in the host State on 31/12/2020 will nevertheless be entitled to join a Union citizen or UK national right holder after 31/12/2020 for the life time of the right holder.
- **Family members**= spouse, the partner with whom the Union citizen has contracted a registered partnership, the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner, the dependent direct relatives in the ascending line and those of the spouse or partner, children born, or legally adopted, after the specified date, whether inside or outside the host State.

WA: personal scope

- The UK and EU27 Member States will facilitate entry and residence of partners in a **durable relationship** (Article 3(2)(b) of Directive 2004/38/EC) after the UK's withdrawal in accordance with national legislation if the partners did not reside in the host state on 31/12/2020, the relationship existed and was durable on 31/12/2020 and continues to exist at the point they wish to join the right holder
- **The right to be joined by family members not covered by the above provisions after the specified date will be subject to national law**, which may or may not allow for the Union/UK citizen to be joined by such members

UK citizens in the EU27



WA: mobility

- The WA does not guarantee intra-EU freedom of movement as per Article 21(a) TFEU: '[e]very citizen...shall have the right to move and reside freely within the territory of the Member States' .

WA: citizens' rights

Article 7 of Directive 2004/38/EC

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
 - (a) are workers or self-employed persons in the host Member State;
 - (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;
 - (c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and — have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence;
 - (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

UK citizens as former EU citizens

EU27 position

- UK citizens in the EU27 become **Third Country Nationals**
- Long Term Residents Directive (LTRD)
 - Article 4 + 14(1) LTRD: Five years of continuous residence and subject to satisfying additional criteria > right to reside in the territory of other MS
 - Article 11 LTRD: Substantive entitlements under EU law e.g. economic and social matters
 - Article 12 LTRD: enhanced protection against expulsion

WA: workers

‘[s]ubject 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 and the rights granted by Regulation (EU) No 492/2011’

WA: workers

- TFEU, art 45(3): permissible restrictions on free movement of workers on grounds of public policy, public security or public health. In cases of indirect discrimination or where restrictions are placed on market access, one may further rely on judicially-developed mandatory requirements in the public interest.
- TFEU, art 45(4): free movement of workers shall not apply to employment in the public service.
- Regulation (EU) 492/2011 also includes restrictions: for example, art 3(1) permits conditions relating to linguistic knowledge required by reason of the nature of the post to be filled. All the limitations adumbrated above should be read in the light of the CJEU's case law before the end of the transition period, as per the draft WA.

WA: workers

- (a) the right not to be discriminated against on grounds of nationality as regards employment, remuneration and other conditions of work and employment;
- (b) the right to take up and pursue an activity in accordance with the rules applicable to the nationals of the host State or the State of work;
- (c) the right to assistance afforded by the employment offices of the host State or the State of work as offered to own nationals;
- (d) the right to equal treatment in respect of conditions of employment and work, in particular as regards remuneration, dismissal and in case of unemployment, reinstatement or re-employment;
- (e) the right to tax and social advantages;
- (f) collective rights;
- (g) the rights and benefits accorded to national workers in matters of housing;
- (h) the right for their children to be admitted to the general educational, apprenticeship and vocational training courses under the same conditions as the nationals of the host State or the State of work, if such children are residing in the territory where the worker works.

WA: Self-employed

‘[s]ubject to the limitations set out in Articles 51 and 52 TFEU, 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.’

Political declaration: mobility

[50] Noting that the UK has decided that the principle of free movement of persons between the union and the UK will no longer apply...

[51] The mobility arrangements to be established will be based on nondiscrimination between the Union's MS and full reciprocity.

[52] In this context, the Parties aim to provide, through their domestic laws, for visa-free travel for short-term visits.

[53] The Parties agree to consider conditions for entry and stay for purposes such as research, study, training and youth exchanges.

[54] The Parties also agree to consider addressing social security coordination in the light of future movement of persons.

Political declaration: mobility

[55] In line with their applicable laws, the Parties will explore the **possibility to facilitate** the crossing of their respective borders for **legitimate travel**.

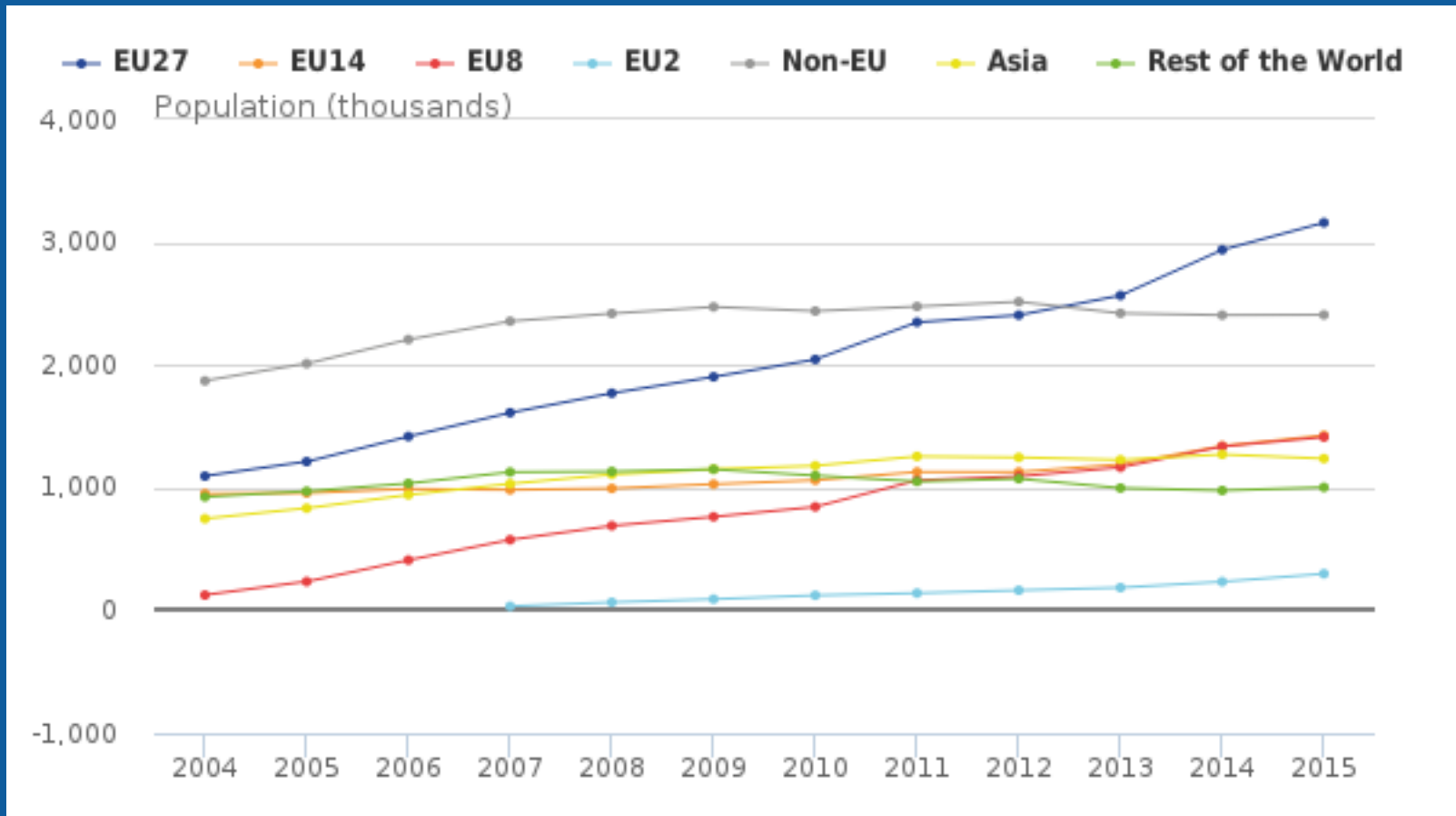
[56] Any provisions will be without prejudice to the **Common Travel Area** (CTA) arrangements as they apply between the UK and Ireland.

[57] The parties confirm their commitment to **existing international family law instruments** to which they are parties

[58] The parties will explore options for **judicial cooperation** in matrimonial, parental responsibility and other related matters.

[59] ...commitments on temporary entry and stay of natural persons for **business purposes** in defined areas.

Residents in the UK: by non-UK citizenship (ONS)



EU27 citizens in a former MS

- Remain EU citizens (as citizens of a MS)
- Having previously taken up residence on the basis of rights they enjoy under EU law and on the understanding that they will continue to enjoy those rights throughout their lives **will now be residing in a third country**
- **Acquisition of UK citizenship?** Austria, Czechia, Poland, Latvia, ND* (*likely to reform) do not permit plural citizenship

EU27 citizens in a former MS

ALL have to apply for settled status until 30/6/2021

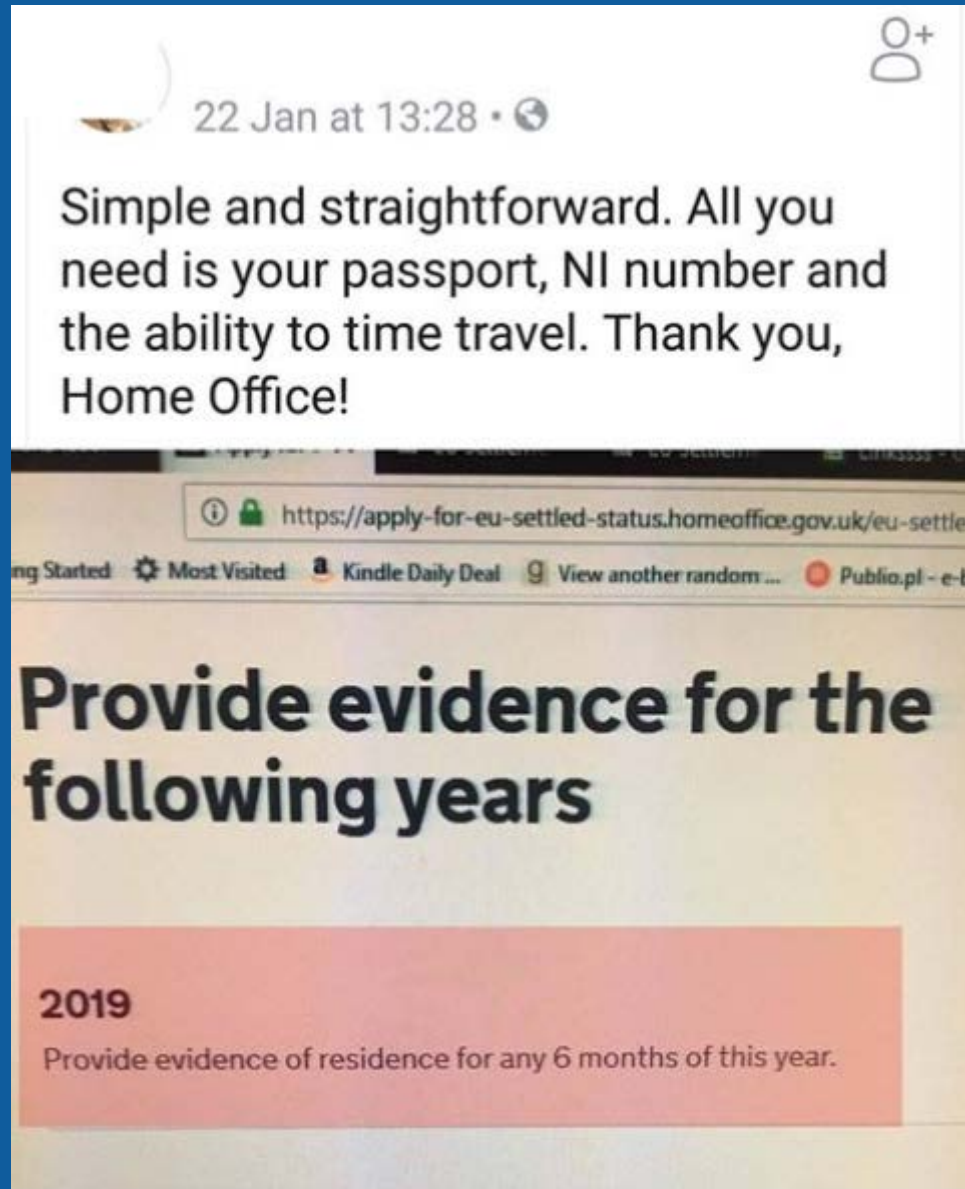
- Free if already holding PR; Otherwise (no more than) cost of a UK passport
- Current 'lawful residence' requirements (except CSI)
- **Systematic criminality checks** (including PR)
- Unclear whether documents will have to be surrendered
- Even if refusal/rejection rate for “settlement” is only a few percent=**potentially hundreds of thousands of people**

Settled status

(according to the Home Office)

EU citizens with settled status
will continue to have broadly the
same access to healthcare,
education, benefits and pensions

Settled status...



The image shows a social media post from January 22, 2019, at 13:28. The post text reads: "Simple and straightforward. All you need is your passport, NI number and the ability to time travel. Thank you, Home Office!" Below the post is a screenshot of a web browser showing the URL <https://apply-for-eu-settled-status.homeoffice.gov.uk/eu-settled>. The browser's address bar also shows several tabs: "ng Started", "Most Visited", "Kindle Daily Deal", "View another random ...", and "Publio.pl - e-b". The main content of the website is a heading: "Provide evidence for the following years". Below this heading is a red box containing the text: "2019 Provide evidence of residence for any 6 months of this year."

22 Jan at 13:28 • 🌐

Simple and straightforward. All you need is your passport, NI number and the ability to time travel. Thank you, Home Office!

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ng Started Most Visited Kindle Daily Deal View another random ... Publio.pl - e-b

Provide evidence for the following years

2019
Provide evidence of residence for any 6 months of this year.

Settled status

Judicial Review

- 8 years from the date of application of the citizens' rights part of the WA: ECJ jurisdiction; afterwards - due regard to relevant decisions
- The implementation and application of the citizens' rights section will be monitored in the EU27 by the European Commission and in the UK by an independent national authority

WA: residence & absences

- ‘[p]ersons who acquired the permanent residence rights in the host State under the Withdrawal Agreement can be absent from its territory for a period not exceeding five consecutive years without losing their residence right under the Withdrawal Agreement’
- ‘[a]ny restrictions on grounds of public policy or security related to conduct prior to the specified date of persons covered by the Withdrawal Agreement will be in accordance with Chapter VI of Directive 2004/38/EC.’
- ‘Any restrictions on grounds of public policy or security related to conduct after the specified date will be in accordance with national law.’

UK citizens as former EU citizens

- **Remedy? (1):** Acquisition of another EU citizenship
- **Remedy? (2):** Extension of **LTRD rights** to **all** UK citizens in the EU27 + **extension of free movement rights**
- **Remedy? (3):** retention of **EU citizenship rights** for UK citizens in the EU27, **opt-in for others** ('retaining European citizenship' registered ECI(2017)000005/Simpson) (+ **EP resolution 14 Dec 2017**)
- **Remedy? (4):** retention of **individual EU citizenship** by UK citizens (registered ECI(2007)000003 'flock Brexit'/Alvarado) (Dutch case)

Britons acquiring EU27 citizenship

UK citizens becoming citizens of EU countries				
EU member state	2014	2015	2016	2017
Austria	6	10	10	24
Belgium	110	127	506	1381
Czech Republic	3	2	5	26
Denmark	21	70	85	164
Estonia	0	0	0	0
France	279	320	439	1518
Germany	496	594	2702	7493
Greece	43	46	31	56
Hungary	4	3	11	29
Ireland	51	54	98	529
Luxembourg	63	74	128	366
Poland	0	6	5	7
Portugal	13	11	20	147
Romania	2	0	1	2
Slovakia	0	2	0	1
Spain	67	28	44	48
Sweden	436	453	940	1203
Total	1594	1800	5025	12994

UK citizens: German nationality?

- Voluntary acquisition of nationality of a non-EU MS ordinarily results in loss of German citizenship.
- The German government introduced draft legislation in the event of a 'disorderly Brexit' (no deal) which would allow German applicants whose applications for British nationality have not been decided by 30th March 2019 to retain their German nationality, even though the UK will no longer be an EU MS.
- Alternatively, should the WA be implemented, the *Acquis communautaire* will continue to apply in the UK: the *Brexit-Übergangsgesetz* (Brexit Transition Act stipulates that, for German Federal law purposes, the UK will be considered an EU MS during the transition period.



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