



GMS Flash Alert

Immigration Edition

2017-183 | December 12, 2017



United Kingdom – Update on Agreement between U.K. and EU in Brexit Deal

On 8 December 2017, the negotiators of the European Union (“EU”) and the United Kingdom released a joint report¹ to set out the progress made in the first phase of negotiations regarding the withdrawal of the U.K. from the European Union. The report explains where the parties have reached agreement in principle across the following three areas:

1. Protecting the rights of EU citizens in the U.K. and U.K. citizens in the EU;
2. Ireland and Northern Ireland / the Irish Border;
3. The methodology for the financial settlement.

However, the report caveats that “nothing is agreed until everything is agreed.” All commitments have been set out in detail in what will become the official Withdrawal Agreement at the end of the negotiation period in March 2019.

This GMS *Flash Alert* focuses on points 1 and 2 above.

WHY THIS MATTERS

The joint report is the clearest formulation yet of the rights of EU and U.K. nationals exercising rights under the EU’s free movement of persons Directive 2004/38/EC² in their respective host countries post-Brexit. It also provides more clarity on the rights of family members of affected persons and the role of the Court of Justice of the European Union (“CJEU”). (For prior coverage, see GMS [Flash Alert 2017-112](#) (28 June 2017).)

While there is little unexpected information in the report, it is a welcome advancement from the uncertainty that EU nationals and businesses in the U.K. have had to contend with since the U.K. voted to leave the EU on 23 June 2016.

Broadly speaking, EU nationals residing in the U.K., and U.K. nationals residing in the EU with their family members, on or before the date of withdrawal (currently assumed to be 29 March 2019, “the specified date” and two years after the U.K. triggered Article 50 of the Treaty on European Union³) are permitted to stay in their U.K. or EU host state. They will also

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continue to enjoy substantially the same rights and benefits as they currently do.⁴ Family members can also join at a later date, whether they are resident in an EU state at the specified date or not.

All commitments are fully reciprocal, i.e., apply to EU nationals residing in the U.K. and U.K. nationals residing in the European Union. For clarity, below we set out further details only mentioning EU nationals in the United Kingdom.

Key Commitments Agreed

EU Nationals

- The U.K. can require EU nationals to make an application to prove their right of residence. Only evidence which is strictly necessary and proportionate to determine status can be requested and the application process must be transparent, smooth, and streamlined. Those whose applications have been rejected will continue to have a right of appeal.
- EU nationals who have resided in the U.K. for five years at the specified date can apply for “settled status”⁵. Those with less than the required five years will have to apply for temporary residence and will be given the opportunity to build up five years to gain settled status.
- Those who hold a document certifying permanent residence issued under current EU law at the specified date will have that document converted to a new settled status document free of charge, subject to verification of identity, criminality and security check, and confirmation of ongoing residence.
- EU nationals will have at least two years from the specified date to obtain a status document. During this period they will enjoy the rights conferred by the Withdrawal Agreement. Status documents will be issued either free of charge, or for a charge not exceeding that imposed on U.K. nationals for the issuance of similar documents.
- If permanent residence is obtained in line with the requirements of the Withdrawal Agreement, the EU national can be absent from the U.K. for a maximum of five consecutive years before his or her permanent residence status is lost. This extends the current two-year period.
- Qualifications granted to EU nationals in an EU member state before the specified date will continue to be recognized by the U.K., provided they were approved before the specified date, or the process of recognition was commenced before the specified date.

Family Members

- Family members of any nationality who were not residing in the U.K. at the specified date are permitted to join the EU national at any time (including post Brexit) in line with current EU law, provided they meet certain conditions, such as being related to the EU national on the specified date and still being related at the point of application.

CJEU

- U.K. courts will preside over the enforcements of rights of EU citizens in the U.K., but will have due regard to decisions of the CJEU even after the specified date.⁶
- U.K. courts can refer cases where there is uncertainty to the CJEU for up to eight years after the withdrawal date.

- The U.K. government and the European Commission have the right to intervene in cases before the CJEU and U.K. courts and tribunals respectively.

Frontier Workers

- A U.K. or EU national pursuing genuine and effective work on the specified date as an employed or self-employed person in one or more EU states, while residing in another state, will be able to continue this arrangement for as long as he or she retains the status of a worker in the state of work.

European Health Insurance Card ("EHIC")

- The EHIC scheme will continue to apply to EU and U.K. nationals who are in an EU on the specified date. They will continue to be eligible for health-care reimbursement, as long as that stay, residence, or treatment continues. There is still some uncertainty as to the operation of the EHIC following the specified date.

Irish Border

- Both parties agree that the Good Friday Agreement⁷ (also known as the "Belfast Agreement") must be protected in all its parts.
- The U.K. reaffirms its commitment to the avoidance of a hard border, including any physical infrastructure or checks and controls.
- The U.K. reaffirms its commitment to preserving the integrity of its internal market and Northern Ireland's place within that in light of the U.K. leaving the EU's Internal Market and Customs Union.
- For the moment the U.K. will maintain full alignment with the rules of the EU's Internal Market and Customs Union which support cooperation between the Republic of Ireland and Northern Ireland, the all-island economy, and the Good Friday Agreement.
- The U.K. will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the U.K. unless they are compatible with the Good Friday Agreement and provided the Northern Ireland Executive and Assembly agree.
- The birth-right of all the people of Northern Ireland to choose to be Irish, British, or both, will continue to be recognised. Those who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland.
- The Common Travel Area⁸ and associated rights and privileges can continue to operate without affecting the Republic of Ireland's obligations under EU law, particularly with respect to free movement for EU citizens.

KPMG NOTE

Although the first phase of negotiations has shown an encouraging amount of progress in relation to the rights of EU nationals in the U.K., it must be remembered that the joint report only states relatively broad principles and commitments, and these mainly pertain to rights applicable to those EU nationals who benefit from the Withdrawal Agreement, i.e., who are residing in the U.K. on the specified date. We now know that the specified date will be the date of the official withdrawal of the U.K. from the European Union. It is also anticipated that all EU nationals in the U.K. will have to make an application to stay in the U.K. by 29 March 2021 at the latest.

KPMG NOTE (cont'd)

Exact details of how the commitments will be implemented “on the ground” are awaited, as are further provisions on posted workers and the rights of U.K. nationals who move after the specified date to take up residence in another EU member state. Very little is also currently still known regarding processes and requirements applicable to EU nationals who wish to enter the U.K. and reside here post-Brexit. It is anticipated that the second phase of the negotiations will deal with these matters. However, this means it is likely that no clear guidelines will become available for several months.

In effect, although the U.K. and the EU have made clear their support for EU nationals impacted by Brexit, there remains a considerable amount of uncertainty for EU nationals, their families, and their employers which is continuing to make it difficult to plan for even the short-term.

Employers that have not yet communicated the details and potential impact of these issues to their employees should start now. This communication could set out the issues to consider in making applications for permanent residence now in order to beat any later “rush” and administrative delay leading to further uncertainty for some employees.

FOOTNOTES:

- 1 See: https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en .
- 2 See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF> .
- 3 See: http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-d71826e6da6.0023.02/DOC_1&format=PDF . (Or see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228848/7310.pdf .)
- 4 See: <https://www.gov.uk/guidance/status-of-eu-nationals-in-the-uk-what-you-need-to-know> .
- 5 See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621847/60093_Cm9464_NSS_SDR_Print.pdf .
- 6 According to the joint report, the use of EU law concepts in the citizens’ rights portion of the final Withdrawal Agreement is to be interpreted in line with the case law of the CJEU by the specified date.
- 7 See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf .
- 8 See: <https://www.gov.uk/government/publications/common-travel-area-cta/common-travel-area-cta> .

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Contact us

For additional information or assistance, please contact your local GMS or People Services professional* or one of the following professionals with the KPMG International member firm in the United Kingdom.

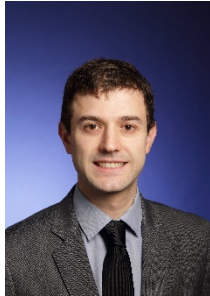
The KPMG Legal Services – Immigration Team has a wealth of experience in transactional, advisory, and compliance assurance services. We will be able to advise your business in relation to practical considerations in light of the above changes, as well as what this means for your long-term recruitment and compliance strategies.



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