

The UK's offering to EU citizens- A Lesson in Fairness and Generosity

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The British government's proposal on EU citizens' rights after Brexit

A full year after the EU referendum, the UK government has finally issued a seemingly detailed official [proposal](#) as offering to the Three Million non-UK EU citizens living in the UK.

These people have spent the year lobbying governments, parliaments and relevant organisations all over Europe in a desperate plea for clarity about their post-Brexit rights – as well as those of UK EU citizens living in [Europe](#).

Their uncertainty is the result of the UK's efforts to withdraw as a Member State from the European Union. Article 50 TEU - the legal mechanism for initiating the withdrawal process- was triggered in March 2017, which accelerated the run for paperwork qualifying the status of EU citizens living abroad under EU and/or UK law.

Permanent residence documentation (PR) is meant to evidence the individual's rights to reside in their host country permanently. The key lies in "evidence". The paperwork does not award any rights, it merely evidences it, comparable to a passport. In the UK, however, it is also an essential criterion for a successful application to British citizenship.

This highly anticipated paper has received immense criticism from politicians, lawyers, and citizens alike, be it in the UK or the EU, almost imminently after its birth. The "fair and generous offer" as it was dubbed by PM Theresa May, is allegedly falling short of the EU's proposal and continuing to use non-UK EU citizens here and UK-EU citizens living abroad as "bargaining chips".

A New "UK Settled Status"

The proposal seems to be starting off very generously, by offering all non-UK EU citizens the right to remain, provided they have been living in the country lawfully for a minimum of five years, which is the residency threshold in the existing permanent residency system briefly mentioned above.

While the PM promised a simpler system that doesn't involve much paperwork, she has not provided any clarity on how "lawfully" will be defined. The issue with the requirement of lawfulness in the current systems, stems from the added layer of complexity where non-UK EU citizens reside in the UK but are not economically active. This category includes students as much as stay at home parents and generally self-sufficient individuals, living in the UK.

EU law requires any such EU citizen to hold comprehensive sickness insurance in their host Member State, in order to ensure they are not to become a financial burden for the same.

The policy paper speaks to the PM's promise as the requirement of comprehensive sickness insurance is being dropped all together with the eventually newly established "settled status". This new form of permanent residency will require evidence of five years continuous residency in the UK, nothing more. Surely, non-UK EU citizens living in the UK were thrilled about this? Except they weren't.

Despite this seemingly legally sensible offering and finally some provision of clarity and certainty – particularly since we now know that family members yet to arrive in the UK will be included, those affected are right to remain wary. The new status, on paper, promises to be future proof, even after Brexit, but what about the system currently in place?

The policy paper proposes a voluntary registration for "settled status" up to a specific cut off point, yet to be agreed, after which it will become mandatory for all UK based non-UK EU citizens to register if they want to continue living and working in the UK. We have seen a rise in applications for documents under the current system and a surge in applications for British citizenship, following that. These EU citizens have spent money, time and tears on clarifying their status within the current legal framework and have now been told that, unless they use this paper to become British citizens before the ominous cut off point, they will be forced to jump through administrative hoops yet again. The policy paper promises a streamlined process, but it clearly states that those that hold PR now will have to re-apply under the current system. A fee waiver is not mentioned.

The frustration of non-UK EU citizens is understandable. After being left with no certainty over their future status, they have of course used the existing system to evidence their rights. The proposed "settled status", however, does not suggest to be evidential only. The right to reside in the UK will depend on the "settled status" being awarded. Similar to the existing system of 'indefinite leave to remain', will the status itself award non-UK EU citizens a right to remain in the UK? Once the UK ceases to be a Member State, all residential rights based on EU citizenship implode. The "settled status" steps into that hole and consequently all non-UK EU citizens seeking the right to remain, will have to apply for this specific status.

Benefits, pensions and healthcare

Following the uncertainty around residency rights, access to healthcare and pensions is among the greatest concerns for EU citizens living in the UK and equally for UK nationals living in the EU abroad.

The government's paper is envisaging protected access to UK pensions and also wants to "seek to protect" access to healthcare. It even goes so far as to say that it wants to have an agreement in place that is similar to the existing European health insurance card.

All of this sounds promising, but whether it survives negotiations and legislative process is another matter. It also gives the impression that somehow non-UK EU citizens will be treated unfavourably in comparison with British nationals resident in the UK. They will not

just have the same access, they will somehow evidence their connection, relation and/or economic activity to be worthy.

The mysterious cut-off point

The idea that there can be some kind of cut-off point to decide who does and doesn't qualify for residency rights also shows a lack of awareness of EU law, and consequently provides for the second legal crux. The UK seems to be under the impression that any time before the official end of its EU membership can be set as a cut off point. Only people entering the country before that time, it apparently believes, would automatically qualify for residency rights. [May's announcement](#) refers to any date between March 29 2017, when Article 50 TEU was triggered, and March 2019, when the two-year negotiation period would officially end.

But again, there is no legal way for the UK to limit free movement from the other Member States until it has left the union. There cannot be a legal cut-off point before March 29 2019, unless all EU Member States and their parliaments agree to change the law.

The Court of Justice

One legal crux of the policy paper and general negotiations alike, is the absurd obsession over the jurisdiction of the [Court of Justice of the European Union](#) (CJEU). The PM claims that EU law will no longer apply in the UK through the CJEU. Not only does it remain questionable whether the disconnection of EU citizen rights and the jurisdiction of the Court will survive and succeed during the negotiations; it is also questionable where the practical need for this lies. This seems mainly a point of principle about sovereignty. A political promise the government is adamant to keep, rather than legal necessity. The government argues that new UK laws will be passed to define EU citizen rights after Brexit, so the ties to the CJEU can be cut.

Theoretically, that's possible but it will be very difficult to completely leave the CJEU's jurisdiction. The court's case law is highly interwoven with the principles and rights also applying to EU citizens. In a way, even if the UK succeeds in passing matching domestic law, the CJEU could still arguably remain influential. We are, after all, talking about the status of EU citizens in the UK. What's more, the UK also seems to be overlooking the fact that British citizens living abroad are likely to remain subject to the CJEU jurisdiction.

The withdrawal agreement is also likely to be overseen by the EU institutions and even Norway and the other European Economic Area (EEA) countries have to apply the Court's rulings. It is difficult to imagine a legal arrangement that will completely disarm the EU jurisprudence. Besides, albeit populist reports claiming differently, the CJEU's jurisdiction is limited to where it has competence, so most of the UK's jurisprudence is and will continue to be completely unaffected.

Second class citizens?

When reading the policy paper, we cannot escape the notion that a new category of citizen is envisaged. One that will have no electoral rights, which non-UK EU citizens in the UK

currently hold for council elections, monitored access to benefits and limited legal means to challenge any infringement of their rights based on their status as EU citizens.

Not only will the UK differentiate between EU citizens and other international members of British society, it will also create subcategories for this group. There will be the “good” (economically active) and the “bad” (economically inactive). Access to benefits, healthcare and pensions is promised to the “good” while the economically inactive remain excluded.

How the status will be evidenced is also another matter. Is a system of ID cards going to be implemented? Will it apply only to a specific group within the UK’s population? Interestingly, it was [David Davis](#), the secretary of state for exiting the EU, who once resigned as shadow home secretary over the issue of ID cards, arguing they were intrusive.

The government is suggesting that people with “settled status” can move away from the UK for two years without losing their rights. This sounds reasonable, but is it realistic? European citizens are used to free movement. How will their border hopping be monitored? Will they be given a unique passport that they use like a loyalty card? When it’s full, will they need to stay put?

The government’s plan can be accepted as a starting point – so long as all the good things in it survive the legislative process. It’s not the worst possible offering, but it is far from being the best. Certainly some of these are practicalities that can be defined as we go along, but let’s not forget: 12 months of uncertainty is a long time for anybody looking to plan for their personal future. How much longer should EU citizens be expected to hold their breath?

This blogpost is based on a [series](#) of articles written by Anne Wesemann first published by [The Conversation](#).