

# The End of Free Movement:

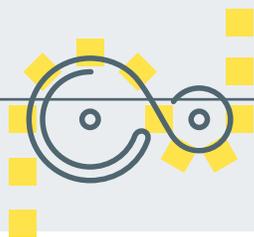
Maintaining Residence Rights  
in a Post-Brexit World

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# INTRODUCTION



On January 31, 2020, the United Kingdom (U.K.) officially left the European Union (EU) pursuant to the EU Withdrawal (“Brexit”) Agreement<sup>1</sup>. A so called “transition period” began on February 1, 2020 and will run until December 31, 2020 during which freedom of movement remains in place. In other words, U.K. nationals and their family members will still be able to study, live, and work in the EU as they currently do without additional authorization until the end of the transition period, at the earliest. The same applies to EU/EEA<sup>2</sup>/Swiss nationals and their families in the U.K. Until the transition period ends, travel rules for the U.K. and EU will also remain the same.

The transition period offers time for the U.K. and EU to reach new agreements regulating the future U.K.-EU relationship as of January 1, 2021<sup>3</sup>. After the end of the transition period, freedom of movement within the EU will no longer be applicable to U.K. nationals, and the U.K. will introduce a new immigration system that will apply to all EU/EEA/Swiss and non-EU/EEA/Swiss nationals. Irish nationals, however, will not be subject to U.K. immigration restrictions, or vice versa, as the current Common Travel Area arrangements will remain in place.



This backgrounder focuses on the approved measures regarding the **residence rights** of EU/EEA/Swiss nationals living in the U.K., and U.K. nationals living in one of the EU/EEA countries or Switzerland at the end of the transition period. Before the transition period ends, companies must prepare their business and employees in order to avoid disruptions in their work and residence status.

<sup>1</sup> With its withdrawal from the EU, the U.K. also left the European Economic Area (EEA), and as such, the three EEA States (Norway, Iceland, and Liechtenstein) have concluded their own Withdrawal Agreement with the U.K., often called the “EEA EFTA Separation Agreement.” Similarly, following the U.K.’s departure from the EU, the Agreement on the Free Movement of Persons (AFMP, also called FMOPA, Free Movement of Persons Agreement) with the EU will no longer apply between Switzerland and the U.K. Switzerland and the U.K. concluded a series of new bilateral agreements in different areas including residence rights (refer to the U.K.-Swiss Citizens’ Rights Agreement for more information).

<sup>2</sup> The European Economic Area (EEA) includes EU countries and also Iceland, Liechtenstein, and Norway. It allows them to be part of the EU’s single market. Switzerland is not an EU or EEA member but is part of the single market.

<sup>3</sup> The U.K. and EU are currently negotiating the details of the future of their trading relationship. A Free trade Agreement (FTA) between the EU and the U.K. will likely include key issues such as short-term mobility of workers covering provisions that are easements designed to make sending employees from one country to another to perform services easier (the so-called “Mode IV”). Discussions regarding this within the EU and U.K. are still ongoing, in particular, expanding the scope of permissible activities a ‘business visitor’ can carry out, potentially permitting them to work without a work permit or prior approval, creating a positive impact on businesses.

# RIGHT OF RESIDENCE<sup>4</sup>

## Who Is Protected?



**EU/EEA/Swiss citizens** who were **residing in the U.K.**, and **U.K. nationals** who were **residing in one of the EU/EEA Member States or Switzerland at the end of the transition period (December 31, 2020)**, where such residence is in accordance with EU law on freedom of movement or in accordance with the EEA Agreement or FMOPA with Switzerland.



**Family Members** who are granted rights under EU law or in accordance with the EEA Agreement or FMOPA with Switzerland (current spouses and registered partners, parents, grandparents, children, grandchildren, and a person in an existing durable relationship), who do not yet live in the same host country as the EU/EEA/Swiss citizen or the U.K. national will be able to join them in the future provided that certain conditions are met.<sup>5</sup>



**Children** are protected, wherever they are born or adopted, before or after the end of the transition period.



**Frontier workers<sup>6</sup>** and frontier self-employed persons are also protected in the countries where they work.

## No Physical Presence Requirement

- Not required to be physically present in the host country at the end of the transition period (December 31, 2020).
- Temporary absences are permitted but must be in accordance with residency and permanent residency rules.
- Protected classes who have not acquired permanent residence may continue living in the host country and acquire permanent residence rights after the end of the transition period.

<sup>4</sup> Withdrawal Agreement, Article 10; U.K.-Swiss Citizens' Rights Agreement, Article 10; U.K.-EEA EFTA Separation Agreement, Article 9; and European Commission presentation, "The EU-UK Withdrawal Agreement explained (slides)" available at [https://ec.europa.eu/info/sites/info/files/slides\\_the\\_wa\\_explained.pdf](https://ec.europa.eu/info/sites/info/files/slides_the_wa_explained.pdf)

<sup>5</sup> Family members who are not living in the U.K., EU/EEA, or Switzerland by the end of the transition period (December 31, 2020) will be able to join a EU/EEA/Swiss citizen in the U.K. or a U.K. national in the EU/EEA or Switzerland at any point in the future, as long as the relationship existed on December 31, 2020 and still exists when the person wishes to travel to the U.K., EU/EEA, or Switzerland (for example, someone seeking entry as spouse of a right holder in 2023 will be eligible if they were married to the right holder at the end of the transition period (December 31, 2020) and they are still married in 2023). Please note that under the U.K.-Swiss Citizens' Rights Agreement only, where a new relationship is formed after December 31, 2020, the future spouse or partner of an eligible Swiss/U.K. citizen will be able to join the Swiss/U.K. citizen in the U.K./Switzerland within a period of five years after the end of the transition period (December 31, 2020).

<sup>6</sup> Definition of 'frontier worker' available at [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_search/frontier-worker\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/frontier-worker_en)

# OVERVIEW OF APPROACHES

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Under Article 18 of the Withdrawal Agreement, each host country must choose between two administrative residence systems for verifying EU/EEA/Swiss or U.K. nationals' residence rights: 1) a **constitutive** residence system, or 2) a **declaratory** residence system. Understanding the two different legal approaches is important in order to ensure that businesses are prepared for the end of the transition period. They must understand how each country will implement the new rules and procedures, as it will impact business travel, assignees, and local hires.

Under the **constitutive** system, individuals can only acquire residence status by successfully applying through a mandatory registration process or application system. As the European Commission states in their guidance note<sup>7</sup>, only the national authorities may grant or deny the residence status and entitlements to its citizens in a constitutive residence scheme. Therefore, the application for residence status is *not automatically granted* but is instead subject to approval by authorities. So far, most of the countries have elected to follow the constitutive residence system.

Unlike the constitutive system, it is not mandatory for individuals to apply for the residence status in a **declaratory** residence system. "The residence status is granted directly on the beneficiaries by operation of the law and is not dependent upon having fulfilled administrative procedures."<sup>8</sup> However, countries that have opted for the "declaratory system" may implement an application procedure and decide to issue a new residence document with a statement that explicitly mentions that it has been issued in accordance with the Withdrawal Agreement. If an administrative procedure is implemented, it simply shows that the issued new residence document is proof of the U.K. national's status in the host country.

While both systems are intended to streamline the process for workers and their families to maintain their residence rights, the constitutive system entails a more detailed application procedure with strict deadlines<sup>9</sup> and longer wait times for adjudication of the new residence status. In many countries such as Austria and Germany, the projected processing times can be upwards of four to 12 weeks. Whereas in declaratory system countries, such as Ireland, there will likely be less or zero wait times, because there are no administrative steps required.

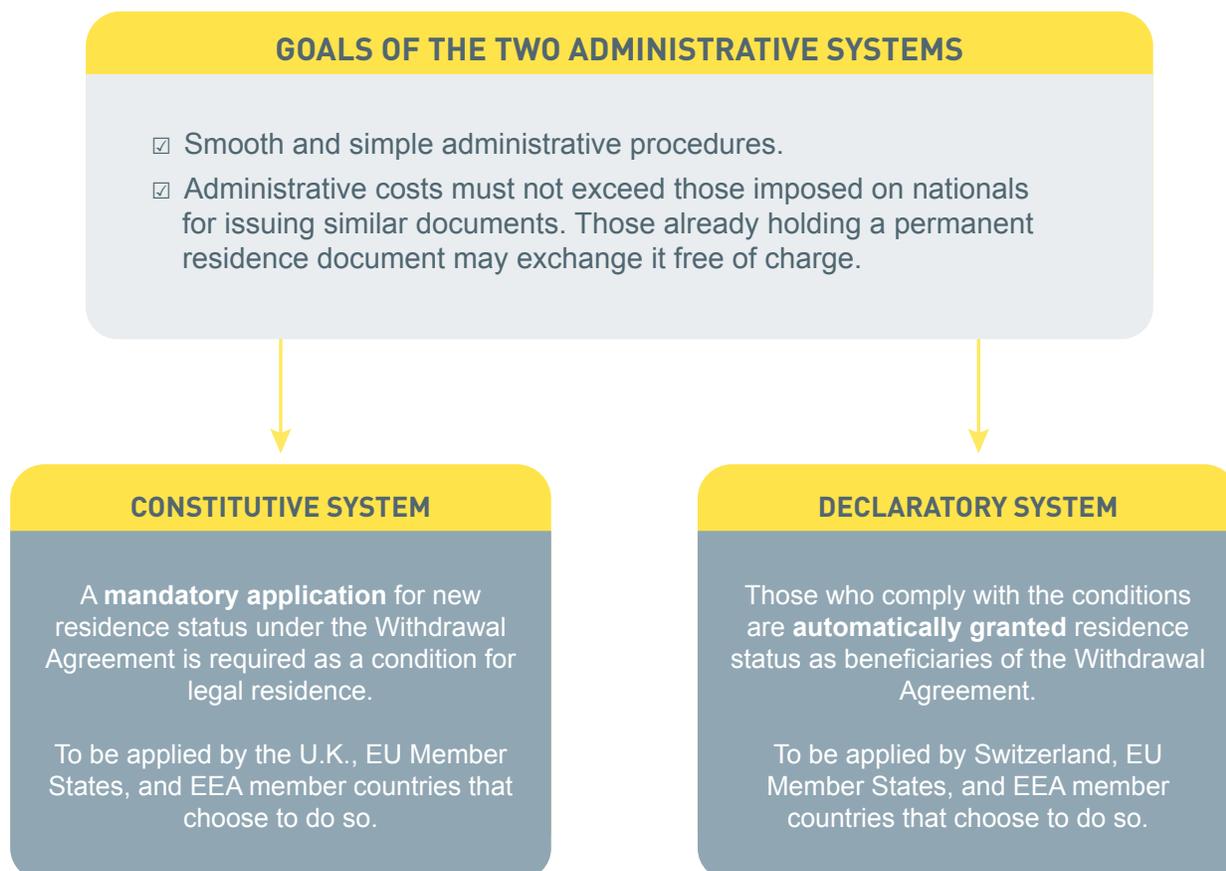
<sup>7</sup> European Commission, C(2020) 2939 final, [Brussels, 12.5.2020], Guidance Note relating to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Part two - Citizens' rights, [https://ec.europa.eu/info/publications/guidance-note-citizens-rights\\_en](https://ec.europa.eu/info/publications/guidance-note-citizens-rights_en)

<sup>8</sup> Ibid., 14.

<sup>9</sup> While the Withdrawal ("Brexit") Agreement [Article 18(1)(d)] prohibits competent authorities from automatically rejecting applications submitted after the expiry of the deadline and requests that they process such applications where there were "reasonable grounds for the failure to respect the deadline", it should be noted that out-of-time applications may result in an inability to acquire the new residence status to which the applicant would otherwise be entitled.

# OVERVIEW OF APPROACHES

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Please note that additional considerations outside of residence rights are not addressed in this document, including recognition of qualification<sup>10</sup>. In addition, each state has not fully implemented all measures, and existing requirements are also subject to change. We will provide additional updates as further information becomes available. The next section provides country-by-country overviews detailing each country's new processes and how companies can strategically plan for the upcoming changes.

<sup>10</sup> The Withdrawal Agreement also addresses the topic of recognition of professional qualifications as defined by the Recognition of Professional Qualifications Directive 2005/36/EC. The Agreement states that past decisions by the U.K. or EU Member States to recognize the professional qualifications of those covered by the Agreement will remain valid. In that sense, it confirms the right to practice and continue practicing the relevant profession or activities in the host state. Any pending recognition application will be processed domestically under the EU rules applicable when the application was made provided that it was submitted before the end of the transition period. After the end of the transition period, the EU Directive on the Recognition of Professional Qualifications will, in principle, no longer apply. If no other regulations have been agreed upon during the current period of EU-U.K. negotiations on the future relationship, the national regulations for professional qualifications from third countries will apply for the recognition of U.K. professional qualifications in an EU country and vice versa.



# SELECT A COUNTRY





## Business Visitors

U.K. nationals arriving after the end of the transition period (December 31, 2020) must enter under Schengen rules, including the 90-day/180-day rule.

### PERMISSIBLE BUSINESS ACTIVITIES

U.K. nationals entering under Schengen rules must limit their activities to those permitted for business visitors:

- Attending business meetings
- Attending a trade show or seminar/convention
- Touring a company facility
- Buying goods for sale outside the country

Passports should be valid for at least six months from the date of arrival and should not have been issued more than 10 years ago. This applies to passports issued by the U.K., Gibraltar, Guernsey, the Isle of Man, and Jersey.

Visa-free travel for U.K. nationals is subject to reciprocity – if the U.K. introduces a visa requirement for any EU or EEA country in the future, a Schengen Visa requirement would be imposed on the U.K. in return.

## Residence Rights

### IMPLEMENTATION OF RESIDENCE SYSTEM

Austria is implementing the **constitutive residence system**.

U.K. nationals and their family members may continue to travel to, live, and work in Austria without additional authorization until the end of the transition period, which will occur on December 31, 2020 at the earliest.

The “Brexit Accompanying Act” (“Brexit-Begleitgesetz”), which regulates the position of U.K. nationals who were already residing in Austria prior to the end of the transition period, has been passed in Austrian parliament. U.K. nationals and their eligible family members who are residing in, and have registered their EU right of residence in, Austria prior to the end of the transition period, will likely be required to apply to exchange their previous registration based on the right of residence in the EU for a right of residence under the Withdrawal (“Brexit”) Agreement. The details of this exchange/re-application process are still being negotiated.

# AUSTRIA

In the case of a No-Deal-Brexit (“hard Brexit”), U.K. nationals will be eligible to apply for the “Red-White-Red-Card Plus” without having to fulfill the prerequisites of having proof of accommodation, health insurance, and sufficient income. The application period is six months after the end of the transition period. U.K. nationals will be able to legally reside in Austria until a decision has been made on their application. Additionally, U.K. nationals and their family members who have been registered in Austria for more than five years prior to the end of the transition period may also still apply for the “long-term resident – EU” permit during the six-month period, if they have not already done so.

U.K. nationals residing in Austria who have not yet registered are advised to do so immediately. Appointments can take some time to obtain, though U.K. nationals may also make use of designated ‘walk-in’ hours in order to obtain their registration certificate immediately. Proof of accommodation and an employment contract/assignment letter are generally not required to obtain the registration certificate, though a birth certificate is required.

New U.K. nationals arriving after December 31, 2020 will be subject to domestic residence and employment regulations, meaning that those arriving to work in Austria will need to apply for a work and residence permit in order to be able to work and reside in Austria.

## Constitutive Procedure for New Residence Status Document Application

Authorities have not yet announced all the details of the application process and the practical steps that must be taken in order to apply for the new residence status document. Please contact your immigration representative for the most up-to-date information.

### New Residence Status Document

#### Documents required

In case of a hard Brexit, U.K. nationals residing in Austria for less than five years prior to the end of the transition period (December 31, 2020) will likely be required to present the following documents:

- Passport
- Recent photograph
- Birth registry (if applicable)
- Marriage certificate (if applicable)
- Completed application
- Pay slip
- Eventually, police clearance certificates will be required
- In some cases, additional documents are needed (i.e., for highly skilled workers, etc.); please contact your immigration representative for a list of specific documents depending on the situation/category

The details of the application procedure for U.K. citizens are still being negotiated; therefore, an application for a residence permit that will be valid after Brexit is not possible yet.

# AUSTRIA

## New Residence Status Document

<b>Date that application process opened or will open</b>	Information is not yet available, but the process will likely open once Brexit (and the type of Brexit) is definite.
<b>Application method</b>	In-person application at the local authority with an appointment, though this may change due to the ongoing COVID-19 pandemic.
<b>Deadline to submit application</b>	Six months after the end of the transition period; June 30, 2021 at the earliest (may be subject to change).
<b>Ability to continue working for employer if application has not been submitted by deadline</b>	To continue working, the application (including all necessary documents) must be submitted by the deadline. The application does not necessarily need to be approved within the deadline, and it is possible to continue working while the application is being processed.
<b>Estimated processing times</b>	Four to 12 weeks
<b>Retention of passport during application</b>	No
<b>Format</b>	Most likely a residence permit in the form of a residence card (the details of the application procedure are not yet available).

## Permanent Residence

For six months after the end of the transition period, U.K. nationals and their family members who have been registered in Austria for more than five years prior to the end of the transition period may still apply for the “long-term resident – EU” permit after verification of criminality and security checks, if they have not already done so. If this deadline is missed, residence may still be applied for, though not under privileged conditions (i.e., the laws for non-EU/EEA/Swiss nationals and Schengen residents will apply).

U.K. nationals and their family members who have not resided for five years in Austria may also apply for residence, most likely under favorable conditions, though the details regarding this are still being negotiated.

U.K. nationals with permanent residence status will most likely be able to maintain their permanent residency; however, it will probably be necessary to exchange their residence documents and/or reapply for a different residence status after the end of the transition period. Further details on this have not yet been announced by authorities.

# AUSTRIA

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## Criminality and Security Checks

In case of a hard Brexit, U.K. nationals and their eligible family members will likely be subject to criminality and security checks as part of an application for a new residence status document or when exchanging their permanent residence document for a new one. Security concerns, criminal conduct in relation to immigration, terrorist activities, etc., may prevent a U.K. national and their eligible family members from obtaining a new residence status document or exchanging a permanent residence document for a new one.

## Family Members

In case of a hard Brexit, non-EU/EEA/Swiss family members of U.K. nationals will also be eligible to apply for the “Red-White-Red-Card Plus,” provided the U.K. national was residing and registered in Austria before the end of the transition period. Their family members must join them in Austria by the end of the transition period.

Non-EU/EEA/Swiss family members of U.K. nationals arriving after the end of the transition period will be subject to domestic residence regulations.

## Actions for Employers and Employees

### EMPLOYERS

Companies in Austria should take the following actions in order to prepare for changes:

- Inform their employees regarding the upcoming legal changes and necessary steps.

### EMPLOYEES

U.K. employees and their family members should take the following actions in order to prepare for changes:

- U.K. nationals and their families are advised to file for their residence permit on time, most likely in the first half of 2021, and to keep updated on further legal developments.
- U.K. nationals residing in Austria who have yet to register are advised to do so immediately.

Please note that the requirements outlined in this country overview are subject to change. Future arrangements between the U.K. and EU27, the precise scope of which are not yet known, could also impact the guidance contained within this overview. We will provide additional updates as further information becomes available.

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The above is a short preview of the document. If you would like to see the full version (all 32 countries) or a specific country, please reach out to GCI Team at [GCITeam@balglobal.com](mailto:GCITeam@balglobal.com).

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