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II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES
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EUROPEAN COMMISSION

COMMISSION NOTICE

**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

(2020/C 173/01)

This Guidance Note is purely informative and does not supplement or complete 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.

While this Guidance Note has been prepared by staff of the European Commission, the views contained in the Guidance Note should not be interpreted as stating an official position of the European Commission.

The overall objective of Part Two of 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 (the Agreement) is to safeguard citizens' rights derived from European Union (EU) law exercised by European Union citizens residing or working in the United Kingdom of Great Britain and Northern Ireland (UK) and by UK nationals residing or working in the EU and their respective family members by the end of the transition period provided for in the Agreement, and to provide for effective, enforceable and non-discriminatory guarantees for this purpose.

1. TITLE I – GENERAL PROVISIONS

Articles 9, 10 and 11 of the Agreement jointly determine the personal and territorial scope for the purposes of the application of Title II of Part Two of the Agreement on rights and obligations relating to residence, residence documents, workers and self-employed persons and on professional qualifications (Title III on social security coordination has its own personal scope).

The beneficiaries of Title II of the Agreement consist of EU citizens and UK nationals having exercised the right to reside or work in accordance with Union law before the end of the transition period and continuing to do so after that period as well as their respective family members.

The definitions of an EU citizen and UK national are set out in Article 2(c) and (d) of the Agreement.

References to Union free movement rights or rules in this Guidance Note include rights under: Articles 21, 45 and 49 of the Treaty on the Functioning of the European Union (TFEU); Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38/EC); and Regulation (EU) No 492/2011 on freedom of movement for workers within the Union (Regulation (EU) No 492/2011).

1.1. Article 9 – Definitions

1.1.1. Article 9(a): Family members

1.1.1.1. Article 9(a)(i): ‘Core’ family members

The ‘core’ family members are defined by reference to Article 2(2) of Directive 2004/38/EC. This provision also applies with respect to family members of employed and self-employed workers, including frontier workers (Joined Cases C-401/15 to C-403/15 *Depesme and Kerrou*).

As is the case under Union law, family members of EU citizens *in principle* do not enjoy an independent right to move and reside freely (unless they are EU citizens themselves or have acquired an independent right of residence as result of their relationship with an EU citizen, the source of their free movement rights). In the same vein, family members do not enjoy rights under the Agreement without these rights being derived from the right holder – a person falling under Article 10(1) (a) to (d) of the Agreement.

The only exception are family members falling under Article 10(1)(f) who reside in the host State ‘*independently*’ at the end of the transition period as their right of residence under Union law at that moment was no longer conditional on continuing to be a family member of an EU citizen currently exercising Treaty rights in the host State.

1.1.1.2. Article 9(a)(ii): Third country national carers of a dependent EU citizen

The Court of Justice of the European Union (CJEU) has recognised that, in certain situations, other persons should also have a right of residence, in particular where the presence of such persons is actually required in order for EU citizens to be able to enjoy the right of residence under Union law.

The most relevant example is that of a minor mobile EU citizen with a non-EU parent. While the right of residence of the EU citizen is evident under Union law, the parent on whom the EU citizen is dependent does not fall within the scope of Article 2(2)(d) of Directive 2004/38/EC, applying to parents who are dependent on the EU citizen (here it is the other way around). The CJEU ruled in Case C-200/02 *Chen* that such parent has the right of residence in the host State in order to underpin the right of residence of the minor EU child.

Article 9(a)(ii) goes beyond reference to primary carers used by the CJEU in *Chen* (where only residence of the child’s mother was at stake) and is drafted in a more open manner also to allow covering persons other than primary carers (for example, also minor siblings who share the primary carer(s) with the minor EU citizen).

1.1.2. Article 9(b): Frontier workers

Frontier workers are persons falling under the CJEU’s definition of ‘workers’ who, at the same time, do not reside under the condition set out in Article 13 of the Agreement, in the State in which they are ‘workers’.

Both frontier workers in employed (Article 45 TFEU) and self-employed (Article 49 TFEU) capacity are covered (see Case C-363/89 *Roux* and the guidance for Articles 24 and 25).

1.1.2.1. Definition of an employed or a self-employed worker

Neither Union primary nor secondary legislation gives a definition of the term ‘worker’ or ‘self-employed person’.

According to the CJEU’s jurisprudence, the notion of ‘worker’ has, for the purposes of freedom of movement in the Union, a specific meaning (for example, Case C-66/85 *Lawrie-Blum*) and must be given a broad interpretation (Case C-139/85 *Kempf*).

It is not possible to apply diverging national definitions (e.g. a definition of worker in domestic labour law) that would be more restrictive.

The CJEU has defined an employed ‘worker’ as ‘a person who undertakes genuine and effective work for which he is paid under the direction of someone else, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary’ (Cases C-138/02 *Collins*, C-456/02 *Trojani* or C-46/12 *LN*).

The essential features of an employment relationship are that:

- for a certain period of time a person performs services (see for example Cases C-139/85 *Kempf*, C-344/87 *Bettray*, C-171/88 *Rinner-Kühn*, C-1/97 *Birden*, C-102/88 *Ruzius-Wilbrink*)
- for and under the direction of another person (Cases C-152/73 *Sotgiu*, C-196/87 *Steymann*, C-344/87 *Bettray*, C-151/04 *Nadin*)
- in return for which he or she receives remuneration (see for example Cases C-196/87 *Steymann*, C-344/87 *Bettray*, C-27/91 *Hostellerie Le Manoir*, C-270/13, *Haralambidis*).

The condition of a subordination link distinguishes ‘workers’ from ‘self-employed persons’. Work in a relationship of subordination is characterised by the employer determining the choice of activity, remuneration and working conditions (Case C-268/99 *Jany*).

1.1.3. Article 9(c): The host State

This provision distinguishes between EU citizens and UK nationals. The host State is defined differently for both groups.

For UK nationals, the host State is the EU Member State as defined in Article 2 (b) of the Agreement in which they are exercising their right of residence under Union free movement rules. The UK cannot become the host State under the Agreement for UK nationals – this means that UK nationals who have resided in the UK before the end of the transition period in accordance with rights under Union law (as beneficiaries of the case law based on judgments of the CJEU in Cases C-34/09, *Ruiz Zambrano* or C-370/90, *Singh*) do not become beneficiaries of the Agreement in their personal capacity.

For EU citizens, the host State is the UK as defined in Article 3(1) of the Agreement. EU citizens do not become beneficiaries of the Agreement in their personal capacity in any EU Member State, regardless of whether it is the Member State of their nationality or not.

1.1.3.1. Having ‘exercised there their right of residence in accordance with Union law’

The exercise of the right of residence means that an EU citizen or a UK national lawfully resides in the host State in accordance with Union free movement law before the end of the transition period.

All possible situations where the right of residence stems from Union free movement rules are covered.

This includes right of residence, irrespective of whether it is a permanent right of residence, irrespective of its duration (e.g. an arrival in the host State one week before the end of the transition period and residing there as a job-seeker under Article 45 TFEU is sufficient) and irrespective of the capacity in which these rights are exercised (as a worker, self-employed person, student, job-seekers, etc.).

It is sufficient that the right of residence was exercised in accordance with the conditions Union law attaches to the right of residence (Case C-162/09 *Lassal* or Joined Cases C-424 and 425/10 *Ziolkowski and Szeja*).

Possession of a residence document is not a prerequisite for lawful residence in accordance with Union law because under Union law the right of residence is conferred directly on EU citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures (Recital 11 of Directive 2004/38/EC). On the other hand, the possession of a residence document issued under Union law does not, in itself, make the residence to be in accordance with Union law (Case C-325/09 *Dias*).

1.1.3.2. ‘Before the end of the transition period and continue to reside there thereafter’

These notions, that should be read together, incorporate a time stamp that requires that residence in accordance with Union law qualifies for the purposes of Part Two of the Agreement only when such residence is ‘continuous’ at the end of the transition period (31 December 2020).

Rules on continuity of residence are further covered in Article 11 of the Agreement.

Historical periods of residence that have lapsed before the end of the transition period (for example, residence between 1980 and 2001) or periods of residence that commence only after the end of the transition period do not qualify.

1.1.4. Article 9(d): State of work

The State of work is only relevant for the purposes of identifying the territorial scope of the rights of frontier workers.

Persons who reside in the State in which they work are not considered as frontier workers.

1.1.5. Article 9(e): Rights of custody

The expression 'Rights of custody' is defined by reference to Article 2(9) of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the Brussels IIa Regulation).

This provision covers rights of custody acquired by judgment, by operation of law or by an agreement having legal effect.

1.2. Article 10 – Personal scope

1.2.1. EU citizens and UK nationals: Paragraph (1)(a) to (d)

The definition of EU citizens and UK nationals are set out in Article 2 (c) and (d) of the Agreement

Particular guidance has been given by the CJEU in jurisprudence concerning the rights of dual nationals. This jurisprudence is important in order to determine in which cases a dual national is covered by the Agreement, and in which cases dual nationality leads to a purely internal situation.

Dual EU/EU nationals (e.g. a person holding both Czech and Slovak nationality) or EU/non-EU nationals (e.g. a person holding both Czech and Japanese nationality) residing in the UK at the end of the transition period are clearly covered by the personal scope of the Agreement as EU citizens.

Dual EU/UK nationals, whether by birth or by naturalisation, are covered by the Agreement if, by the end of the transition period, they have exercised free movement residence rights in the host State of which they hold nationality (Case C-165/16 *Lounes*). Dual EU/UK nationals, whether by birth or by naturalisation, are also covered by the Agreement if, by the end of the transition period, they have exercised free movement residence rights in a Member State other than that of which the person holds nationality (this is without prejudice to the rights they have as mobile EU citizens under Union law on free movement of EU citizens).

Dual EU/UK nationals who acquired nationality of the host State even after the end of the transition period are covered by the Agreement by analogy with Case C-165/16 *Lounes*.

Dual EU/UK nationals **who have never exercised their free movement rights** under Articles 21, 45 or 49 TFEU (as in the Case C-434/09 *McCarthy*) are not covered by the Agreement.

1.2.2. Out of scope

1.2.2.1. Posted workers

People relying solely on rights deriving from Article 56 TFEU are not covered by the Agreement (see also the guidance on Article 30(1)(e) of Title III of the Agreement).

The Agreement does not confer any entitlement to posted workers to remain in the host State after the end of the transition period.

1.2.2.2. EU citizenship rights: Case C-34/09 Ruiz Zambrano

EU citizens and UK nationals whose rights in the host State at the end of the transition period are based on the fact that they were citizens of the Union as defined in Article 20 TFEU fall outside the scope of the Agreement.

Consequently, their family members also fall outside the scope of the Agreement and will be subject to rules in force in the host State.

1.2.2.3. Returning EU citizens' and UK nationals' right to family reunification: Case C-370/90 Singh

EU citizens and UK nationals covered by this line of case law fall outside the scope of the Agreement. Consequently, their family members also fall outside the scope of the Agreement. The residence status of family members of UK nationals returning to the UK or of EU citizens returning to the Member State of which they are nationals will be regulated by UK or EU law respectively.

1.2.3. Article 10(1)–(4): Family members

Paragraphs 1 to 4 of Article 10 set out which persons fall within the scope of the Agreement by virtue of their family ties with the right holder (a person falling under any provision of Article 10(1)(a) to (d) of the Agreement).

On the basis of Directive 2004/38/EC, the Agreement distinguishes between two categories of 'family members' – 'core' family members (defined in Article 9(a) of the Agreement and corresponding to Article 2(2) of Directive 2004/38/EC) and 'extended' family members (falling under Article 10(2) to (5) of the Agreement and corresponding to Article 3(2) of Directive 2004/38/EC).

1.2.3.1. Article 10(1)(e)(i): 'Core' family members residing in the host State

This provision covers 'core' family members (defined in Article 9(a) of the Agreement) who have resided in the host State at the end of the transition period in their capacity as family members of an EU citizen exercising Union free movement rights in the host State.

1.2.3.2. Article 10(1)(e)(ii): 'Core' family members residing outside the host State

The family members covered by point (e)(ii) of Article 10(1) have not moved to the host State before the end of the transition period. They can join the right holder in the host State at any point in time after the end of the transition period.

The family members in question shall be directly related (i.e. falling within the scope of Article 2(2) of Directive 2004/38/EC as a spouse, registered partner, or direct relatives in the ascending line) to the right holder at the end of the transition period. Direct descendants born before the end of the transition period are also covered by point (e)(ii) of Article 10(1) of the Agreement, while direct descendants born after the end of the transition period are covered by point (e)(iii) of Article 10(1) of the Agreement.

Moreover, the family member in question shall comply with the conditions of Article 2(2) of Directive 2004/38/EC at the time they seek residence in the host State under the Agreement.

This means, for example, that someone seeking entry as spouse of a right holder in 2025 will be eligible under the Agreement if he/she was married to the right holder at the end of the transition period and is still married in 2025.

A child of a right holder, who was under 21 years of age at the end of the transition period, will be eligible to join the right holder under the Agreement if he/she continues to be the child of a right holder when seeking to join the right holder in the host State and is still under 21 years of age or dependent on the right holder.

A parent of a right holder will be eligible to join the right holder under the Agreement if he/she is dependent on the right holder when seeking to join the right holder in the host State.

1.2.3.3. Article 10(1)(e)(iii): Future children

Persons who are born to, or adopted by, the right holder after the end of the transition period are protected by point (e)(iii) of Article 10(1) of the Agreement.

In order to be eligible to join the right holder in the host State, those future children will have to meet the conditions of Article 2(2)(c) of Directive 2004/38/EC when seeking to join the right holder in the host State, namely be under the age of 21, or be dependants.

Paragraph (1)(e)(iii) of Article 10(1) of the Agreement applies in any of the following situations:

- (a) both parents are right holders: no formal requirement for parents to have sole or joint rights of custody of the child;
- (b) one parent is a right holder and the other one is national of the host State (e.g. a Polish-UK couple residing in Poland): no formal requirement for parents to have sole or joint rights of custody of the child (this provision does not require that the non-right holder parent is resident in the host State);
- (c) one parent is a right holder (this provision covers all situations in which the child has only one parent which is a right holder, except when the parent has lost the custody of the child. It covers families with two parents, for instance a child born from a right holder married after the end of the transition period with an EU citizen who is not a beneficiary of the agreement, and families with single parents or cases where the non-right holder parent does not reside in the host State or has no right of residence there): requirement for the right holder parent to have sole or joint rights of custody of the child.

Children born before the end of the transition period but recognised as children (for example, when the right holder recognises paternity of the child) only after the end of the transition period are to be treated under Article 10(1)(e)(i) or (ii), depending on the place of residence of children at the end of the transition period.

1.2.3.4. Article 10(1)(f): Family members who have acquired an independent right to reside in the host State

This provision covers 'core' family members (defined in Article 9(a) of the Agreement) who:

- (a) at some point in time before the end of the transition period, resided in the host State in their capacity of being family members of an EU citizen exercising Union free movement rights there;
- (b) later, but still before the end of the transition period, acquired a right of residence under Union free movement law that is no longer dependent on being a family member of an EU citizen exercising Union free movement rights in the host State (for example under Articles 13(2) or 16(2) of Directive 2004/38/EC);
- (c) retain that independent right at the end of the transition period.

The specific situation of persons falling under Article 10(1)(f) is the reason why Part Two of the Agreement does not replicate the requirement of Article 3(1) of Directive 2004/38/EC that those family members should 'accompany or join' the right holder in the host State.

1.2.3.5. Article 10(2): 'Extended' family members already residing in host State

Article 10(2) of the Agreement covers 'extended' family members (corresponding to Article 3(2) of Directive 2004/38/EC) who have resided in the host State by the end of the transition period by virtue of their relation to an EU citizen exercising Union free movement rights there. The duration of that residence is immaterial.

The Union free movement right of residence in the host State of such persons presupposes that they were issued with a residence document by the host State acting in accordance with its national legislation.

The Union free movement right of residence of such persons in the host State, recognised by the host State acting in accordance with its national legislation, is evidenced by the issuance of a residence document.

1.2.3.6. Article 10(3): 'Extended' family members with pending application

'Extended' family members (corresponding to Article 3(2) of Directive 2004/38/EC) who lodged an application under Article 3(2) of Directive 2004/38/EC to join the right holder in the host State before the end of the transition period but whose applications (either for entry visa or residence document) have been outstanding at the end of the transition period are protected the same way as under Union free movement rules.

Their applications should be considered in accordance with the procedure set out in Article 3(2) of Directive 2004/38/EC. A positive decision on the application means that such persons should be considered as persons falling under Article 10(2) of the Agreement.

1.2.3.7. Article 10(4): Partners in a durable relationship

Partners in a durable relationship (persons falling within Article 3(2)(b) of Directive 2004/38/EC) of the right holder but who resided outside the host State at the end of the transition period are beneficiaries of the Agreement.

This category covers all other long-term ‘durable’ partnerships, both opposite-sex and same-sex relationships. The requirement of durability of the relationship must be assessed in the light of the objective of the Directive to maintain the unity of the family in a broad sense (see Recital 6 to Directive 2004/38/EC).

Such persons would have to be in a durable relationship at the end of the transition period and still be in a durable relationship at the time they seek residence in the host State under the Agreement.

This provision also covers those persons who were in a durable relationship at the end of the transition period and are married to the right holder at the time they seek residence in the host State under the Agreement.

Their applications should be considered in accordance with the procedure set out in Article 3(2) of Directive 2004/38/EC. A positive decision on an application means that such persons should be considered as persons falling under Article 10(2).

1.2.4. *Article 10(5): Examination by the host State*

The host State should undertake an extensive examination of the personal circumstances when assessing the application for entry or residence by the family member falling under paragraphs (3) and (4) of Article 10 of the Agreement in accordance with its national legislation. Any decision refusing the application should be fully reasoned.

1.3. **Article 11 – Continuity of residence**

Article 11 ensures that persons who are temporarily absent from the territory of the host State at the moment of the end of the transition period, under the condition of ‘continuity’ are still considered as lawfully residents and consequently protected by the Agreement. This is consistent with Articles 9 and 10 of the Agreement which refer to the ‘right of residence in the host State’ and not to ‘presence in the host State’.

Concretely, it means that a person who already has a permanent right to reside will lose it if absent for more than five years (second paragraph of Article 11, referring to the five-year rule of Article 15(3) of the Agreement). Those who did not yet reside for five years can only be absent for maximum 6 months a year (first paragraph of Article 11, referring to continuity of residence rules under Article 15(2) of the Agreement, which mirrors Article 16(3) of Directive 2004/38/EC).

See further detail in Article 15(2) and (3) of the Agreement on the conditions of continuity.

As an example, EU citizens who acquired the right of permanent residence in the host State in accordance with Directive 2004/38/EC and left the host State four years before the end of the transition period are to be considered as ‘exercising their right of residence in accordance with Union law’(even if they do no longer have the right of permanent residence under Directive 2004/38/EC) at the end of the transition period because they have not been absent for a period exceeding five consecutive years. They are eligible for the new permanent residence status in the host State, provided they apply within the deadline set out in the first subparagraph of Article 18(1) (b) of the Agreement.

1.3.1. *Past periods of residence*

Previous periods of lawful residence in the host State, followed by an absence longer than allowed, are not taken into account.

For example, an EU citizen who has lived for 20 years in the UK between 1990 and 2010 and then left the UK is not considered as residing in the UK for the purposes of the Agreement. Such an EU citizen has voluntarily left the UK and remained outside the UK ever since so there is no existing residence right under the Agreement.

1.3.2. *Past periods of residence, followed by a longer absence and then return to the host State before the end of the transition period*

A person who has been absent for more than five years in the past, but who returns to the host State before the end of the transition period, starts building up periods of lawful residence from scratch upon return to the host State before the end of the transition period.

1.4. **Article 12 – Non-discrimination**

Article 12 of the Agreement fully mirrors Article 18 TFEU and ensures that discrimination on grounds of nationality is prohibited, when:

- (a) it is within the scope of Part Two of the Agreement – but without prejudice to any special provisions contained in Part Two (such as Article 23(2)); and

(b) it is against the beneficiaries of the Agreement.

This includes, for example, the right of students to the same tuition fees as nationals of the host State.

2. TITLE II – RIGHTS AND OBLIGATIONS

CHAPTER 1 – RIGHTS RELATED TO RESIDENCE, RESIDENCE DOCUMENTS

2.1. **Article 13 – Residence rights**

2.1.1. *Scope*

Paragraphs 1 to 3 of Article 13 lay down the main substantive conditions that underpin the right of residence in the host State for EU citizens, UK nationals and their respective family members, irrespective of their nationality.

These conditions to obtain residence rights essentially replicate the conditions Union free movement rules set with respect to residence rights.

EU citizens, UK nationals and their respective family members irrespective of their nationality, who acquired the right of permanent residence before the end of the transition period, should not be subject to pre-permanent residence requirements, such as those in Article 7 of Directive 2004/38/EC.

There is no discretion in the application of relevant rules, unless in favour of the person in question (see also Article 38 of the Agreement).

2.2. **Article 14 – Right of exit and of entry**

2.2.1. *Article 14(1): Entry and exit with a valid national identity card or passport*

Under Articles 4(1) and 5(1) of Directive 2004/38/EC, all EU citizens have the right to leave one Member State and enter another Member State irrespective of whether they are nationals of those Member States or their residents.

The right of beneficiaries of the Agreement to be absent as set out in Article 15 of the Agreement and the right to continue working as a frontier worker as set out in Articles 24 and 25 of the Agreement imply the right to leave the host State or, respectively, the State of work and to return there.

As is the case of Directive 2004/38/EC, Article 14(1) of the Agreement requires a valid passport or national identity card for the purpose of exercising entry and exit rights. No other conditions can be attached under domestic law (such as that the travel document must have a certain future validity). Where the right to enter or to leave can be attested by different travel documents, the choice lies with the beneficiary of the Agreement.

As regards the use of national identity cards as travel documents, the second subparagraph of Article 14(1) authorises the host States to decide that, after five years following the end of the transition period, national identity cards can be accepted only if they include a chip compliant with the applicable International Civil Aviation Organisation standards related to biometric identification (as per ICAO standards Doc 9303).

This decision should be duly published in good time, as per Article 37 of the Agreement, to allow beneficiaries of the Agreement to apply for a compliant national identity card or a valid passport.

2.2.2. *Article 14(2): Holders of documents issued under the Agreement*

EU citizens, UK nationals, their family members and other persons resident in the host State in accordance with the Agreement will have the right to cross the borders of the host State under the conditions set out in Article 14(1) of the Agreement where they provide evidence of being a beneficiary of the Agreement.

Holders of documents issued under Article 18 and 26 of the Agreement will therefore be exempted from any exit or entry visa or equivalent formality (in the sense of Article 4(2) and the second indent of Article 5(1) of Directive 2004/38/EC; e.g. electronic travel authorisation).

2.2.3. *Article 14(3): Entry visas and charging for out-of-country residence applications*

Article 14(3) of the Agreement replicates the entry visa facilities Directive 2004/38/EC grants to family members of mobile EU citizens in recognition of the fact that the right of EU citizens to move and reside freely should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality (see Recital 5 to Directive 2004/38/EC).

While short-term entry visas covered by Article 14(3) should be issued free of charge, the Agreement does not prevent the host State from offering an additional choice to family members to apply from abroad for a new residence status to be obtained pursuant to Article 18. In this case, the choice between the entry visa and the residence document lies with the beneficiary of the Agreement. In such case, the application can be subject to a charge applicable to issuance of residence documents evidencing the residence status.

2.3. **Article 15 – Right of permanent residence**

2.3.1. *Article 15(1): Eligibility*

Article 15 of the Agreement mirrors Article 16 of Directive 2004/38/EC concerning eligibility for the right of permanent residence.

Persons who are not eligible to acquire right of permanent residence under Directive 2004/38/EC are not eligible to acquire permanent residence status under the Agreement. This has the following consequences:

- (a) residence that is in accordance with Union free movement rules but not in accordance with the conditions of Directive 2004/38/EC (note that Article 13 of the Agreement refers back to Directive 2004/38/EC) does not count for the purposes of the right of permanent residence (Case C-529/11 *Alarape and Tijani*);
- (b) holding a valid residence document does not make the residence legal for the purposes of acquisition of right of permanent residence (Case C-325/09 *Dias*);
- (c) a period of imprisonment before the right of permanent residence is acquired restarts the clock and a new period of five continuous years of residence has to be accumulated (Case C- 378/12 *Onuekwere*).

By the same token, persons who are eligible to acquire the right of permanent residence under Directive 2004/38/EC are eligible to acquire permanent residence status under the Agreement. This has the following consequences:

- (a) legal residence means residence in accordance with the conditions of Directive 2004/38/EC (Joined Cases C-424 & 425/10 *Ziolkowski and Szeja*) and its predecessors (Case C-162/09 *Lassal*);
- (b) the qualifying period of residence does not have to be immediately preceding the moment when the right of permanent residence is claimed (Case C-162/09 *Lassal*);
- (c) residence before accession of one's country to the EU can count under certain circumstances (Joined Cases C-424 & 425/10 *Ziolkowski and Szeja*).

Reference to periods of work in accordance with Union free movement rules in Articles 15(1) and 16 of the Agreement refers to periods of employment in the sense of Article 17 of Directive 2004/38/EC.

2.3.2. *Article 15(2): Residence for less than five years*

As regards continuity of non-permanent residence, Article 15(2) of the Agreement refers to continuity of residence being determined in accordance with Article 16(3) and Article 21 of Directive 2004/38/EC.

While Article 16(3) of Directive 2004/38/EC is designed for the purposes of checking the continuity of lawful residence for the purposes of acquiring the right of permanent residence, the same rules apply to residence under the Agreement generally – beneficiaries of the Agreement can be absent for some time without breaking the continuity of their right of residence in the host State.

This means that continuity of residence is not affected by the following temporary absences:

- (1) absences (NB: plural) not exceeding a total of six months a year;
- (2) absences (NB: plural) of a longer duration for compulsory military service (there is no time limit); or

- (3) by one absence (NB: singular) of a maximum of twelve consecutive months for important reasons, such as (NB: the list is not exhaustive):
- (a) pregnancy and childbirth;
 - (b) serious illness;
 - (c) study or vocational training; or
 - (d) a posting abroad.

As an example, EU citizens who arrived to the host State four years before the end of the transition period, worked there and were posted abroad by their employer eight months before the end of the transition period (point 3(d) above) still retain their right of residence at the end of the transition period under Union law on free movement of EU citizens for the purposes of the Agreement, and are eligible for the new residence status in the host State, provided they return back to the host State before their absence exceeds twelve consecutive months.

This also means that continuity of residence is broken by any expulsion decision lawfully enforced against the person concerned (essentially, that right of residence has been terminated as such by any expulsion decision duly enforced against the person concerned).

A period of imprisonment before the right of permanent residence is acquired restarts the clock and a new period of five years of continuous lawful residence has to be accumulated (Case C- 378/12 *Onuekwere*).

2.3.3. Article 15(3): Residence for more than five years

Article 15(3) of the Agreement provides that the right of permanent residence should be lost only through absence from the host State for a period exceeding five consecutive years (see guidance on Article 11 with respect to beneficiaries who are absent at the moment of the end of the transition period).

The right of permanent residence under the Agreement can also be lost through an expulsion decision lawfully taken on grounds of Article 20 of the Agreement. A period of imprisonment after the right of permanent residence has been acquired does not affect the right of permanent residence (Case C-145/09 *Tsakouridis*).

The right of permanent residence acquired before the end of the transition period to which Article 11 of the Agreement refers should be understood as right of permanent residence under Union law (Articles 16(1) or (2) of Directive 2004/38/EC) that determines whether one is eligible to become beneficiary of the Agreement (it should not be understood as referring to the right of permanent residence acquired under the Agreement).

To reflect the specific context of the Agreement (under which it is not possible to simply re-exercise the right to move and reside freely even after the loss of previous right of permanent residence), Article 11 of the Agreement goes beyond the rule on the allowed two-year absence for loss of right of permanent residence under Directive 2004/38/EC (Article 16(4) of Directive 2004/38/EC) by providing for a maximum absence of five consecutive years. This extension of absence periods from two to five years (as compared to the rules under Directive 2004/38/EC) allows the persons concerned to keep their right of permanent residence under the Agreement when returning to the host State after a period of absence of up to five consecutive years.

As an example, EU citizens who acquired the right of permanent residence in the host State under the conditions set out in the Agreement by the end of the transition period and who leave the host State six years after the end of the transition period for a period of four years (e.g. for a professional posting abroad) can still return in the host State and keep their right of permanent residence and all attached rights under the Agreement.

2.4. Article 16 – Accumulation of periods

Article 16 of the Agreement complements Article 15 by covering the situation where the beneficiaries of the Agreement have not yet acquired the right of permanent residence before the end of the transition period. The period of legal residence in accordance with Union free movement rules that a person has before the end of the transition period will be counted for the completion of the period of residence of 5 years necessary to acquire the right of permanent residence. Article 16 confers on such beneficiaries the right to acquire permanent residence status later (after accumulating the sufficient period of legal residence).

2.5. Article 17 – Status and changes

2.5.1. Article 17(1): Changing the status

The first part of Article 17(1) provides that EU citizens and UK nationals who have the right of residence in the host State in accordance with Article 13(1) of the Agreement can change their status and remain beneficiaries of the Agreement.

Their residence right (permanent/non-permanent) under the Agreement is not affected when they change their status (i.e. the provision of Union law on free movement of EU citizens on which their right of residence is based), as long as their residence is in accordance with the conditions of Article 13(1) of the Agreement (and, via it, Union law on free movement of EU citizens). It is also possible to hold multiple statuses (e.g., a student who is simultaneously a worker).

Change of the status does not attract any consequences (such as issuance of a new residence document) and does not have to be reported to national authorities.

The list of 'statuses' in Article 17(1) (student, worker, self-employed person and economically inactive person) is illustrative, not exhaustive.

While Article 17(1) also applies to beneficiaries of the Agreement who have acquired permanent residence status under the Agreement, such persons are unlikely to find any effective protection in this provision, given that their residence status is no longer conditional and cannot become conditional again (see the difference between residence based on Article 7 of Directive 2004/38/EC and permanent residence based on Articles 16 or 17 of Directive 2004/38/EC).

2.5.1.1. Specific situation of family members

Family members who have the right of residence in the host State in accordance with Article 13(2) or (3) of the Agreement can also change their status and remain beneficiaries of the Agreement.

However, the second sentence of Article 17(1) expressly prevents them from becoming right holders (i.e., persons referred to in Article 10(1)(a) to (d) of the Agreement). In practice, this means that they have no autonomous right under the Agreement to be joined by their own family members.

This limitation applies only with regard to those persons whose residence status under the Agreement is *exclusively* derived from their being family members of right holders. EU citizens and UK nationals who reside in the host State at the end of the transition period, both as family members and, at the same time, as right holders (for example, the 20 year-old Austrian son of an Austrian worker who also works in the UK) are not covered by the second part of Article 17(1) and, consequently, they enjoy all the rights right holders enjoy.

2.5.2. Article 17(2): A child who is no longer dependent

As under Union law on free movement of EU citizens, family members of beneficiaries of the Agreement whose residence status is derived from their being dependent on the right holder do not cease to be covered by the Agreement when they cease to be dependent, for example by making use of their rights under Article 22 to take up employment or self-employment in the host State.

Article 17(2) provides that such family members maintain the same rights even when they cease to be dependent, irrespective of the mode of loss of dependency.

By the same token, family members of beneficiaries of the Agreement whose residence status is derived from their being under 21 years of age remain covered by the Agreement when they become 21 years.

2.6. Article 18 – Issuance of residence documents

In a departure from the fundamental principles of Union free movement rules, Article 18 obliges the host State to make a choice – either to operate a constitutive residence scheme (Article 18(1)), or a declaratory residence scheme (Article 18(4)).

In a declaratory residence scheme (as per Directive 2004/38/EC), the residence status is conferred directly on the beneficiaries by operation of the law and is not dependent upon their having fulfilled administrative procedures. In other words, the 'source' of the residence status and the entitlements stemming thereof is the fact of meeting the conditions Union law attaches to the right of residence – no decision of national authorities is needed to have the status, although there may be an obligation to apply for a residence document attesting the status.

In a constitutive residence scheme, beneficiaries acquire residence status only if they make an application for the status and the application is granted. In other words, the 'source' of the residence status and entitlements stemming thereof is the decision of national authorities granting the status.

2.6.1. First subparagraph of Article 18(1): Constitutive status

Article 18(1) stipulates that the host State has the choice to operate a constitutive residence scheme.

In accordance with the last subparagraph of the introductory phrase of Article 18(1), a person who files an application must comply with the conditions set out in Title II of Part Two of the Agreement, in order to be granted the new residence status.

2.6.1.1. Residence document

Where the applicant complies with the conditions set out in Title II, Article 18(1) requires the host State to issue a residence document evidencing the new residence status. It does not provide for the format of the residence document; but paragraph (1)(q) of Article 18 requires that the residence document includes a statement that it has been issued in accordance with the Agreement (so that their holders can be distinguished as beneficiaries of the Agreement).

2.6.1.2. Digital or paper form

Article 18(1) makes it possible for the host State to issue the residence document in a digital form. This essentially means that the residence status is primarily recorded in a database operated by national authorities and that beneficiaries of the Agreement are given means of accessing and verifying their status and sharing the status with interested parties.

2.6.2. Article 18(1)(a): The purpose of the application

The competent authorities should take a decision as to whether an applicant is entitled to the new residence status under Article 18(1) upon having assessed whether the conditions under Article 18(1) are fulfilled.

2.6.3. Article 18(1)(b): Deadlines for and certificate of application

2.6.3.1. Deadlines

Applications for the new residence status under Article 18(1) should be made at the latest **within the deadline set by the host State, which must not be shorter than six months as from the end of the transition period** – unless Article 18(1)(c) applies (see below). This deadline will need to apply to all beneficiaries of the Agreement who were lawfully residing in the host State at the time of the end of the transition period, including persons who are temporarily absent at that moment as per Article 15(2) and (3) of the Agreement.

Family members and partners in a durable relationship who wish to join an EU citizen or UK national beneficiary of the Agreement after the end of the transition period should apply for the new residence status **within three months of their arrival, or, within six months as from the end of the transition period, whichever is later.**

2.6.3.2. Certificate of application

A certificate of application should be issued immediately after the competent authority has received the application. That certificate is to be distinguished from the new residence document, and the national authorities are obliged under the Agreement to help the applicant completing the application in order to receive the certificate of application.

Once a person files an application within the deadlines set out in Article 18(1)(b) (last subparagraph of the introductory phrase of Article 18(1)), the competent authority should take the following steps:

- (1) the competent authority issues immediately a certificate of application (last subparagraph of Article 18(1)(b));
- (2) the competent authority checks that the application is complete. If that is not the case (for example, where the identity has not been proved or, in the event payment of a fee is requested upon making application, the relevant fee has not been paid), the competent authority helps the applicant to avoid any errors or omissions in the application (Article 18(1)(o)), before it takes a decision to refuse the submitted application;
- (3) where the application is complete, the competent authority checks that the applicant is entitled to the residence rights set out in Title II;
- (4) where the application is well founded, the competent authority issues the new residence document (Article 18(1)(b)).

A decision to refuse an application is subject to judicial and, where appropriate, administrative redress in accordance with Article 18(1)(r).

An applicant is deemed to enjoy the right of residence under the Agreement until the competent authority has taken a final decision as per Article 18(3).

2.6.3.3. Certificate of application

Issuance of the certificate of application confirms that:

- (a) the application has been successfully made;
- (b) the applicant has complied with the obligation to apply for a new residence status;
- (c) the applicant is deemed to have all rights under the Agreement until the final decision on the application is made (Article 18(3)).

Article 18(1)(b) does not harmonise the format of the certificate of application, it merely requires that it should be issued (digital form is acceptable as well).

2.6.3.4. Out-of-country applications

Applications for the new residence status may also be made from abroad, for example by persons who are temporarily absent but considered as lawful residents in the host State (see guidance to Article 15(2) and (3) of the Agreement).

Out-of-country applications can also be made by family members who are not yet residing in the host State (see guidance to Article 10(1)(e)(ii) and (iii), 10(1)(3) and (4) of the Agreement).

2.6.4. Article 18(1)(c): Technical problems and the notification thereof

Article 18(1)(c) concerns the situation where applications for the new residence status are impossible due to technical problems of the application system of the host State.

In such a situation, if the technical problems occur in the UK, it is for the UK authorities to make a notification to the Union in accordance with the applicable rules. If the technical problems occur in an EU Member State, it is for the Union (as a party to the Agreement) to make the notification to the UK in accordance with the applicable rules. The deadline to submit an application for a new residence status will be automatically prolonged by one year when a notification provided for by this paragraph is made.

If the host State makes such notification, it must publish it. The host State must also provide appropriate public information for the persons concerned in good time, because it affects their legal situation in the host State.

The effects of Article 18(1)(c) are not deployed if no notification is made, even if technical problems exist.

In this respect, Article 5 of the Agreement regarding good faith is particularly relevant, for example to assess whether the technical problems are sufficiently serious to trigger the notification procedure or are strictly temporary (for example, a Distributed Denial of Service (DDoS) attack on servers running the on-line application procedure, a civil service strike ...). In case of strictly temporary problems, it may be more appropriate to prolong the application deadline via domestic law or assure the affected persons that their out-of-time applications will be accepted under Article 18(1)(d).

2.6.5. Article 18(1)(d): Applications beyond deadline

A failure to submit an application for a new residence status within the deadline can have serious consequences in a constitutive residence scheme operated under Article 18(1). It can result in an inability to acquire the new residence status to which the applicant would otherwise be entitled.

Paragraph 1(d) of Article 18 prohibits competent authorities from automatically rejecting applications lodged after the expiry of the deadline and requests them to process such applications where there were 'reasonable grounds' for the failure to respect the deadline. Such applications should be processed in accordance with the other provisions of Article 18(1).

The decision by the competent authorities to allow an application submitted (or to be submitted) beyond the deadline should be made upon an assessment of all the circumstances and reasons for not respecting the deadline.

The 'reasonable grounds' test establishes a safeguard that 'softens' the hard edge of failing to submit an application within the deadline that will ensure that out-of-time applications are treated in a proportionate manner.

2.6.6. *Article 18(1)(g): Fees for the issuance of the residence document*

Fees may be charged as per Article 25(2) of Directive 2004/38/EC for the issuance of the residence document concerned.

This means that those fees cannot exceed those imposed on the nationals of the host State for the issuing of similar documents.

2.6.7. *Article 18(1)(h): Possession of a permanent residence document*

Paragraph 1(h) of Article 18 applies only when the applicant holds a valid permanent residence document, not when he or she holds a permanent residence status but no document to that effect. Persons holding the permanent residence status but not the permanent residence document will have to lodge their applications via the standard procedure under Article 18(1).

A permanent residence document includes documents issued under Directive 2004/38/EC and any similar domestic immigration documents, such as the UK Indefinite Leave to Remain.

2.6.8. *Article 18(1)(i): National identity cards*

EU citizens and UK nationals seeking to establish their nationality and identity can rely on their valid national identity cards even if such identity cards are no longer accepted as travel documents under Article 14(1) of the Agreement.

As is the case for Directive 2004/38/EC, paragraph 1(i) of Article 18 only requires is that the travel document is valid. No other conditions can be attached under domestic law (such as that the travel document must have a certain future validity).

2.6.9. *Article 18(1)(j): Supporting documents in copies*

Article 18(1)(j) does not preclude national authorities, where objectively justified, from requiring, in specific cases, that certain supporting documents be provided in original form when there is 'reasonable doubt as to their authenticity'.

2.6.10. *Article 18(1)(k) to (m): List of supporting documents*

Articles 8(3), (5) and 10(2) of Directive 2004/38/EC provide for an exhaustive list of supporting documents (see also Recital 14 to Directive 2004/38/EC) the host Member State can require EU citizens and their family members to present with their applications for a registration certificate issued under Article 8(2) of Directive 2004/38/EC, or a residence card issued under Article 10(1) of Directive 2004/38/EC.

However, Directive 2004/38/EC does not lay down such an exhaustive list of supporting documents with respect to all possible situations (such as residence documents issued to workers retaining worker status or to family members retaining right of residence under Articles 12 or 13 of Directive 2004/38/EC) or for other residence documents issued under Directive 2004/38/EC (document certifying permanent residence issued under Article 19(1) of Directive 2004/38/EC or permanent residence card issued under Article 20 of Directive 2004/38/EC).

Article 18(1)(k) to (n) of the Agreement replicates Directive 2004/38/EC's approach to supporting documents. Where Directive 2004/38/EC provides for an exhaustive list of supporting documents, so does the Agreement.

Paragraph 1(k) of Article 18 of the Agreement applies with respect to right holders residing in the host State at the end of the transition period. It is based on Article 8(3) of Directive 2004/38/EC.

With respect to point 1(k)(iii) of Article 18 of the Agreement, 'establishment accredited or financed by the host State' corresponds to the first indent of Article 7(1)(c) of Directive 2004/38/EC.

Paragraph 1(l) of Article 18 of the Agreement applies with respect to family members of right holders (including 'extended' family members) who have already resided in the host State at the end of the transition period. It is based on Articles 8(5) and 10(2) of Directive 2004/38/EC and it is adjusted to the fact that family members concerned are already resident in the host State and do not enter it from abroad.

Paragraph 1(m) of Article 18 of the Agreement applies with respect to family members of right holders who have not resided in the host State at the end of the transition period. It is based on Articles 8(5) and 10(2) of Directive 2004/38/EC.

Paragraph 1(n) of Article 18 of the Agreement serves as a catch-all provision covering all cases where paragraphs 1(k) to (m) do not apply. It builds on the principle of Directive 2004/38/EC that administrative practices constituting an undue obstacle to the exercise of the right of residence should be avoided. Beneficiaries can only be asked to provide evidence that they meet the conditions, including evidence of residence, but nothing more.

As an example: children born to two right holders after the end of the transition period merely need to show that they are children of the right holders. Consequently, they would need to present the following documents with their applications:

- *a valid passport (or identity card, if they are EU citizens) to establish their identity;*
- *a proof of family ties with their parents (for example a birth certificate) to establish their family ties with ‘the source’ of their rights;*
- *a proof that their parents are right holders (for example, their residence documents issued under the Agreement) to establish that their ‘source’ of rights are two right holders; and*
- *[if they are over 21 years of age when they apply] a proof that they are dependent on the right holders.*

The choice of which supporting document to present lies with applicants – the host State cannot oblige them to present particular documents and refuse to accept applications supported by other documents.

2.6.11. Article 18(1)(o): Help to applicants

Paragraph 1(o) of Article 18 of the Agreement ensures that the competent authorities help the applicants with the handling of the application and the documents required. Applicants must be given the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions (for example where identity has not been proved or, in the event payment of a fee is requested upon making the application, the relevant fee has not been paid) in their applications. This is an important safeguard in a constitutive residence scheme because otherwise, after the end of the transition period, applicants will not be entitled to apply again under the Agreement.

When applying paragraph 1(o), the host State should pay particular attention to vulnerable citizens (for example elderly, non-digital or persons in care/institutions).

2.6.12. Article 18(1)(p): Criminality checks

Article 18(1)(p) authorises the host State operating a new constitutive scheme to carry out systematic criminal record checks.

Such systematic checks have been accepted in the Agreement, given its unique context.

Applicants may be required to self-declare those past criminal convictions that still appear in their criminal record in accordance with the law of the State of conviction at the time of the application. Spent convictions should not be part of that self-declaration. The State of conviction can be any country in the world.

Making an untruthful declaration does not, *in itself*, make any rights under the Agreement void and null – it can nevertheless have consequences under public policy or fraud rules. The burden of proof in such cases lies with national authorities. The host State may also lay down provisions on proportionate sanctions applicable to untruthful declarations.

Paragraph 1(p) of Article 18 does not prevent the host State from checking its own criminal record databases, even systematically.

Checks of criminal record databases of other States can be requested, but only if that is considered essential and in accordance with the procedure set out in Article 27(3) of Directive 2004/38/EC that requires that such enquiries are not made as a matter of routine.

Criminality and security checks under paragraph 1(p) of Article 18 correspond to checks on grounds of public policy or public security carried out in accordance with Chapter VI of Directive 2004/38/EC for the purpose of restricting the rights in accordance with Article 20(1) of the Agreement.

Any restrictive measures taken on the grounds of criminality and security checks under paragraph 1(p) of Article 18 must comply with the rules laid down in Article 18(1)(r), and Articles 20 and 21 of the Agreement.

2.6.13. *Article 18(1)(q): Statement on the new residence document*

The only format requirement under the Agreement is that the new residence document includes a statement showing that the legal basis for the rights of the document holder is the Agreement.

2.6.14. *Article 18(1)(r): Redress procedure*

Paragraph 1(r) of Article 18 ensures that any decision taken for the purposes of an application for the new residence status as per Article 18(1)(a) can be contested by the person in question under redress procedures examining both the legality of the decision and the facts and circumstances leading to it.

2.6.15. *Article 18(2): Deemed residence rights*

Without prejudice to the restrictions set out in Article 20 of the Agreement, no restrictive measures can be applied by the authorities of the host State or any economic or non-economic operator in the host State until the end of the deadline for applications for the new residence status set out in Article 18(1)(b).

2.6.16. *Article 18(3): Deemed right to reside until final decision is taken*

Without prejudice to the restrictions set out in Article 20 of the Agreement, no restrictive measures can be applied by the authorities of the host State or any economic or non-economic operator in the host State until the final decision on the application is made as per Article 18(1)(a).

This safeguard ensures that the applicant's status is protected until:

- (a) national authorities decide on the application (safeguard against administrative delays);
- (b) national courts decide on the appeal (safeguard against wrong decisions and judicial delays).

2.6.17. *Article 18(4): Declaratory procedure*

Paragraph 4 of Article 18 of the Agreement mirrors Article 25(1) of Directive 2004/38/EC as it allows the host States to continue operating the declaratory scheme, i.e. not making the new residence document a condition for lawful residence in the host State.

If the host State decides to do so, the rules set out in Directive 2004/38/EC, such as deadlines, fees, supporting documents and residence documents to be issued apply.

Those eligible for a new residence status **should have the right to receive, upon application, a residence document** (which may be in a digital form) that includes a statement that it has been issued in accordance with the Agreement.

2.7. ***Article 19 – Issuance of residence documents during the transition period***

2.7.1. *Article 19(1): Applications during the transition period*

It follows from Article 127 of the Agreement that the Union free movement rules continue to apply until the end of the transition period.

However, applications for the new constituent of rights residence document under Article 18(1), and for the declaratory residence document under Article 18(4), can be made already during the transition period (Articles 19 and 185 of the Agreement).

The decision to operate such a voluntary application of the scheme for the new residence status under Article 18(1) does not affect the application of Union free movement rules.

An application for the new residence status under Article 18(1) of the Agreement during the transition period will not prevent the applicants from applying simultaneously for a residence document under Directive 2004/38/EC.

Similarly, the decision to operate a voluntary scheme does not absolve the host State from its obligations under Union free movement rules, such as to decide on pending applications or to process new applications.

2.7.1.1. Deferred competence of the CJEU

Pursuant to Article 158(1) of the Agreement, the eight-year period during which UK courts and tribunals can request a preliminary ruling from the CJEU with respect to decisions on applications made pursuant to Articles 18(1) or (4) or 19, commences from the date from which Article 19 applies (i.e. 1.2.2020).

While the administrative application procedure under Article 18 may be 'moved ahead' in time and become applicable, other provisions of the Agreement on which the administrative application procedure relies (such as those related to the personal and territorial scope of Article 9 to 11) or which it deploys or triggers (such as all the procedural safeguards against restrictive decisions or conditions for retaining the new residence status) are not yet in force.

This necessitates certain adjustments without which Article 19 would be deprived of any useful effect. These adjustments may require host States opting to operate the voluntary scheme under Article 19 to faithfully replicate all the necessary but not yet applicable provisions of Part Two of the Agreement in domestic legislation to give them effect for the purposes of application of the voluntary scheme.

Article 131 of the Agreement ensures that during the transition period, the Union institutions will retain the powers conferred upon them by Union law in relation to the UK as regards the interpretation and application of Article 19. The CJEU will retain its full jurisdiction, too.

2.7.2. Article 19(2): Effect of granting or refusing the application

Lodging an application under the voluntary constitutive scheme may be desirable for applicants to acquire legal certainty about their status as soon as possible, despite the postponed entry into effect of the decision (since a favourable decision cannot be withdrawn before the end of the transition period as per Article 19(3)).

It follows from paragraph 2 of Article 19 that decisions – both positive and negative – taken under the procedure set out in Article 18(1), the constitutive scheme, will have no effect until after the end of the transition period, i.e. such decisions will be valid but their legal effects will be postponed, given that the applicants will enjoy parallel free movement rights.

Similarly, a refusal of an application made under the procedure set out in Article 18(1) can warn the applicant that certain changes may be needed to qualify for the new residence status – such changes can be effected until the end of the transition period, and the person can re-apply as set out in paragraph 4 of Article 19.

A residence document granted under Article 18(4) becomes immediately valid and applicable (after all, it only has declaratory effects). It does not affect parallel free movement rights of the applicants. Similarly, while refusal of an application under the voluntary declaratory scheme becomes immediately valid, it does not affect parallel Union free movement rights of the applicants.

2.7.3. Article 19(3): No withdrawal of granted residence status during the transition period

Paragraph 3 of Article 19 precludes the host State from withdrawing the residence status that it granted under the voluntary constitutive scheme before the end of the transition period. It can only do so on grounds of public policy, public security or public health or abuse or fraud in accordance with the rules of Directive 2004/38/EC that are applicable in parallel.

This provision serves to assure applicants that there is no risk in applying early during the transition period because the application, once granted, cannot be reviewed on administrative grounds (i.e., those related to the conditions attached to the right of residence).

In the scheme under Article 18(4) (declaratory procedure), it remains open to national authorities to withdraw the issued residence documents or status but this, on its own, does not affect the right of residence of the person concerned.

2.7.4. Article 19(4): Re-applications

Paragraph 4 of Article 19 ensures that applicants refused the new residence status under Article 18(1) before the end of the transition period may reapply within the deadline set out in Article 18(1)(b).

The right to apply again during the transition period is covered by the redress procedures set out in Article 18(1)(r).

2.7.5. Article 19(5): Redress

All applicants enjoy all the redress rights as set out in Chapter VI of Directive 2004/38/EC.

2.8. Article 20 – Restrictions on the right of residence

Article 20 covers all persons exercising their rights under Title II of Part Two – this means it also covers, for example, frontier workers, family members or ‘extended’ family members.

2.8.1. What is conduct?

Paragraphs 1 and 2 of Article 20 are triggered by the conduct of persons concerned. The notion of conduct under the Agreement is based on Chapter VI of Directive 2004/38/EC (for more details, see the Commission’s guidelines for better transposition and application of Directive 2004/38/EC – COM(2009)313 final, Section 3.2).

2.8.2. Conduct before and conduct after the end of the transition period

Paragraphs 1 and 2 of Article 20 set out two different regimes that regulate the way in which conduct representing a genuine, present and sufficiently serious threat to public policy or public security is to be treated, depending on whether the conduct occurred before or after the end of the transition period.

Paragraph 1 of Article 20 establishes a clear obligation (‘shall be considered’) to apply Chapter VI of Directive 2004/38/EC to certain facts, while paragraph 2 of Article 20 authorises the application of national immigration rules to facts occurring after the end of the transition period.

Therefore, paragraphs 1 and 2 of Article 20 intend to separate the actions that occurred before and after the end of the transition period. National immigration rules should not be applied, even in part, to actions that are governed by paragraph 1 of Article 20 of the Agreement. However, any decision on restricting the right of residence due to conduct occurring after the end of the transition period has to be taken in accordance with the national legislation.

2.8.3. Continued conduct

Under certain circumstances, persons concerned may be engaged in a **continued conduct** (i.e., conduct whose individual components are conducted with a single purpose, are connected by the same or similar manner of commission and by a close coincidence of time and object of the attack) **that starts before the end of the transition period and continues afterwards**.

In the hypothesis of a continued conduct the national authorities called upon to decide, after the end of the transition period, whether restrictive measures can be applied to a person, are likely to be confronted to, inter alia, the following scenarios:

- (a) the set of actions on the part of the person concerned which occurred after the end of the transition period, taken alone, is sufficient to adopt a restrictive measure under national immigration rules – in which case measures based on paragraph 2 of Article 20 can be adopted;
- (b) the set of actions which occurred after the end of the transition period, taken alone, is not sufficient to take measures under national immigration rules – in which case, measures based on paragraph 2 of Article 20 cannot be adopted;
- (c) in the case mentioned in (b), the national authorities can nevertheless examine under paragraph 1 of Article 20, whether the set of actions pre-dating the end of the transition period would justify restrictions on grounds of public policy or public security. This assessment, insofar as it has to establish the threat represented by personal conduct of the person concerned, can take account also of actions occurred after the end of the transition period.

Each restrictive measure must carefully consider the circumstances of the relevant case.

2.8.4. Article 20(3) and (4): Abuse of rights or fraudulent or abusive applications

Paragraphs 3 and 4 of Article 20 authorise the host State to remove from its territory applicants who abused their rights or committed fraud, in order to obtain rights under the Agreement.

While such removal can take place even before a final judgment has been handed down in case of judicial redress sought against rejection of such an application, it must comply with the conditions set out in Article 31 of Directive 2004/38/EC.

This means that persons concerned may not be removed from the host State where they appealed against the removal decision and applied for an interim order to suspend enforcement of the removal decision.

Actual removal may not take place until such time as the decision on the interim order has been taken, except either of the following situations:

- (a) where the expulsion decision is based on a previous judicial decision;
- (b) where the persons concerned have had previous access to judicial review;
- (c) where the expulsion decision is based on imperative grounds of public security under Article 28(3) of Directive 2004/38/EC.

Where domestic rules envisage that enforcement of the removal decision is *ex lege* suspended by the appeal, there is no need to apply for an interim order to suspend enforcement of the removal decision.

In accordance with Article 31(4) of Directive 2004/38/EC, the **host State may exclude the removed persons from its territory pending the appeal procedure**, but it may not prevent them from submitting their defence in person, except when his/her appearance may cause serious troubles to public policy or public security.

2.9. **Article 21 – Safeguards and right of appeal**

This provision covers all situations in which residence rights under the Agreement can be restricted or denied.

It ensures that the procedural safeguards of Chapter VI of Directive 2004/38/EC fully apply in all situations, i.e.:

- (a) abuse and fraud (Article 35 of Directive 2004/38/EC);
- (b) measures taken on grounds of public policy, public security or public health (Chapter VI of Directive 2004/38/EC) or in accordance with national legislation; and
- (c) measures taken on all other grounds (Article 15 of Directive 2004/38/EC) which include situations such as when an application for a residence document is not accepted as made, when an application is refused because the applicant does not meet the conditions attached to the right of residence or decisions taken on the ground that the person concerned does no longer meet the conditions attached to the right of residence (*such as when an economically non-active EU citizen becomes an unreasonable burden to the social assistance scheme of the host State*).

It also ensures that the material safeguards of Chapter VI of Directive 2004/38/EC fully apply with regard to restriction decisions taken on the basis of conduct that occurred before the end of the transition period.

In line with the CJEU's established case law on the general principles of EU law, restriction decisions taken in accordance with national legislation must comply also with the principle of proportionality and fundamental rights, such as the right to family life.

2.10. **Article 22 – Related rights**

This provision protects the right of family members, irrespective of nationality, to take up employment or self-employment in the host State, as per Article 23 of Directive 2004/38/EC.

This means that both family members, who were not workers before the end of the transition period, but who become workers after, and family members who were already workers either in the host State or in the State of work (frontier workers) are protected by the Agreement.

2.11. **Article 23 – Equal treatment**

This provision mirrors Article 24 of Directive 2004/38/EC that provides for a specific rule on equal treatment as compared to Article 11 of the Agreement.

The same rule is 'extended' to family members with a right of (permanent) residence in the host State. They are to be treated as nationals of the host State, not as family members of nationals of the host State.

The same exemptions as in Article 24(2) of Directive 2004/38/EC apply.

CHAPTER 2 – RIGHTS OF WORKERS AND SELF-EMPLOYED PERSONS

2.12. **Article 24 – Rights of workers**2.12.1. *Article 24(1): Rights*

Article 24(1) of the Agreement grants all Union law-based workers' rights to beneficiaries of the Agreement who are workers, including those who change status to that of worker after the end of the transition period (see also Article 17(1) and Article 22 of the Agreement). Other categories of beneficiaries of the Agreement are not covered by this Article.

2.12.1.1. Limitations

The same limitations on grounds of **public policy, public security and public health** as set out in Article 45(3) TFEU apply.

The Agreement does not cover employment in the public service as per Article 45(4) TFEU. Consequently, the host State or the State of work may reserve to its own nationals access to posts that involve the exercise of powers of public law and the safeguarding of the general interests of the State where this restriction would be in accordance with Article 45(4) TFEU (Case C-270/13 *Haralambidis*).

2.12.1.2. Points (a)–(h) of paragraph 1: a non-exhaustive list of rights

Workers enjoy the full panoply of rights stemming from Article 45 TFEU and Regulation (EU) No 492/2011. The rights set out in paragraph 1 of Article 24 of the Agreement have the same scope and meaning as defined in Article 45 TFEU and Regulation (EU) No 492/2011.

The rights of workers enumerated in paragraph 1 of Article 24 of the Agreement are not exhaustive and any development of those rights by future CJEU's interpretations of Article 45 TFEU would, therefore, be covered (in the case of the United Kingdom, their judicial and administrative authorities would have 'due regard' to the relevant case law of the CJEU handed down after the end of the transition period). This means for example, that in addition to the points set out in paragraph 1 of Article 24 of the Agreement, a worker retains the right to change employment and search for a new job in the State of work, as per Article 45 TFEU.

2.12.2. *Article 24(2): Right of a child of a worker to complete education*

Article 24(2) of the Agreement protects the right of children of workers to complete their education in the host State. Thus, a child whose EU or UK parent used to work in the host State as beneficiary of the Withdrawal Agreement can continue to reside in the host State and complete his or her education there, even after that parent has ceased to reside in the host State lawfully (i.e. has left the host State, has deceased or no longer fulfils the conditions for lawful residence, see for example Case C-310/08 *Ibrahim* and Case C-480/08 *Teixeira*). The child in question has also the right to be accompanied by a primary carer as long as the child is minor or, even after the age of majority, if the presence and care of the primary carer is needed to complete his or her education.

2.12.3. *Article 24(3): Frontier workers*

Frontier workers can continue working in the State of work if they did so by the end of the transition period.

If they stopped working before the end of the transition period, they can retain their status as workers in the State of work, if they fulfil any of the circumstances set out in points (a), (b), (c) or (d) of Article 7(3) of Directive 2004/38/EC, however, without having to change residence to the State of work. This allows them to enjoy the relevant rights set out in Article 24 (1)(a)–(h) of the Agreement.

Frontier workers retain the status in the State of work where:

- (a) they are temporarily unable to work as the result of an illness or accident;
- (b) they are in duly recorded involuntary unemployment after having been employed for more than one year and have registered as a job-seeker with the relevant employment office;
- (c) they are in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and have registered as a job-seeker with the relevant employment office (*in this case, the status of worker is retained for no less than six months*); or
- (d) they embark on vocational training (*for those voluntarily unemployed, the training must be related to the previous employment*).

In accordance with case law of the CJEU (Case C-507/12 *Saint Prix*), the list of circumstances under which the status of worker can be retained **is not exhaustive**.

2.13. Article 25 – Rights of self-employed persons

2.13.1. Article 25(1): Rights

The rights of paragraph 1 of Article 25 are granted to all beneficiaries of the Agreement who are self-employed persons – not only to those who are self-employed persons at the end of the transition period, but also to persons who change status (see also Article 17(1), which provides for the right to become a self-employed person).

According to the case law of the CJEU (e.g., case 63/86 *Commission v Italy*), self-employed persons falling under Article 49 TFEU can enjoy the rights under Regulation (EU) No 492/2011 that apply by analogy. This means, for example, that Article 24(1)(d) of the Agreement cannot apply with respect to dismissal, since by definition, a self-employed person is not in a relation of subordination to an employer and cannot be dismissed.

The rights of paragraph 1 of Article 25 of the Agreement are also granted to self-employed frontier persons. There is a difference between the following categories: (i) a person who resides in State A and pursues an activity as self-employed person in State B; and (ii) a person who resides in State A and pursues an activity as self-employed person in State A while also providing services in States B and C – either through the occasional provision of services or through secondary establishment. The first category corresponds to that of a frontier self-employed person while the second category does not.

In this regard, it is noted that setting up an office in a State different from that of residence for the purpose of providing services in that State does not necessarily amount to establishment in the State where those services are provided. The activity in question may still be considered as falling under the rules on freedom to provide services rather than those of establishment. Therefore, a person with an office in the State of work will not always be regarded as a self-employed frontier worker ⁽¹⁾.

Article 4(4) of the Agreement ensures that the notion of self-employed person is interpreted in the same way the CJEU has interpreted Article 49 TFEU in relevant case law.

2.13.1.1. Limitations

The rights of paragraph 1 of Article 25 of the Agreement are subject to the same restrictions as set out in Articles 51 and 52 TFEU.

Consequently, these rights can be subject to limitations justified on grounds of public policy, public security or public health (Article 52 TFEU) and the State of work may discriminate against self-employed persons with respect to activities that are connected, even occasionally, with the exercise of official authority (Article 51 TFEU).

2.13.1.2. Article 25(1)(a): The rights to take up and pursue activities as self-employed persons and to set up and manage undertakings

The Agreement protects the rights to take up and pursue activities as self-employed persons and to set up and manage undertakings in accordance with Article 49 TFEU, under the conditions laid down by the host State for its own nationals.

However, this Agreement should not be understood as granting UK nationals the possibility to rely on Union law to provide services in other EU Member States or to establish themselves in other EU Member States.

2.13.1.3. Article 25(1)(b): Reference to the non-exhaustive list of rights of Article 24(1)

Self-employed workers enjoy the full panoply of the relevant rights stemming from Article 45 TFEU and Regulation (EU) No 492/2011 in the State of work.

⁽¹⁾ A person who equips himself with some form of infrastructure in the host Member State which is necessary for the purposes of performing the activities in that Member State (including an office, chambers or consulting rooms) may fall under the Treaty provisions on freedom to provide services, rather than those of establishment. This would depend on the duration of the provision of the service, but also its regularity, periodicity or continuity (C-55/94, *Gebhard*, para. 27).

2.13.2. *Article 25(2): Right of a child of a self-employed worker to complete his/her education*

Article 25(2) protects children whose EU or UK parent was a worker, but who has ceased to reside lawfully in the host State of the child as per Article 24(2) of the Agreement, to the extent provided for by EU law as interpreted by the CJEU (Case C-147/11 *Czop & Punakova*).

2.13.3. *Article 25(3): Self-employed frontier workers' rights and limitations on those rights*

Self-employed frontier workers enjoy the same rights as employed frontier workers pursuant to Article 24(3) of the Agreement, with the same reservations as to relevance as described in the guidance to Article 25(1) (e.g. dismissals).

2.14. **Article 26 – Issuance of a document identifying frontier workers' rights**

Article 26 obliges the State of work to issue frontier workers covered by the Agreement with a document certifying their status if those frontier workers so request. At the same time, Article 26 also allows the State of work to require frontier workers covered by the Agreement to apply for such a document.

Unlike the residence document issued under Article 18(1) of the Agreement, this document does not grant a new residence status – it recognises a pre-existing right to pursue an economic activity in the State of work which continues to exist.

Given that frontier workers regularly leave and re-enter the State of work, it is essential that they are issued with the document certifying their status as soon as possible, so that they are not prevented from exercising their rights after the end of the transition period, and can easily demonstrate proof of those rights (notably those related to border crossing under Article 14 of the Agreement).

Frontier workers who are not in employment at the date of application are entitled to be issued with the document provided they retain their status as worker in accordance with Articles 24(3) or 25(3) of the Agreement (those provisions in turn refer to Article 7(3) of Directive 2004/38/EC).

CHAPTER 3 – PROFESSIONAL QUALIFICATIONS

Chapter 3 of Title II of Part Two of the Agreement deals with the cases of persons covered by the Agreement who have obtained, or are in the course of obtaining at the end of the transition period, recognition of their professional qualifications in their host State or State of work, as appropriate.

For those persons, the Agreement guarantees the following:

- (a) the validity and effectiveness of national decisions recognising their UK or EU professional qualifications (grandfathering of decisions); and
- (b) their corresponding right to practice and to continue practicing the relevant profession and activities in their host State or State of work (for frontier workers).

On the contrary, this Chapter does not guarantee or grant to UK nationals covered by the personal scope of the Agreement any internal market right relating to the provision of services to EU Member States other than their host State or State of work, as appropriate.

The Agreement does not guarantee UK nationals covered by the personal scope of the Agreement the right to rely on Union law in order to obtain additional recognitions of their professional qualifications after the end of the transition period, be it in the host State, State of work or in any other EU Member State.

The Agreement does not deal with the treatment of professional qualifications obtained in the UK or in the EU before the end of the transition period but not recognised or not in the course of being recognised on the other side before that date.

2.15. **Article 27– Recognised professional qualifications**

2.15.1. *Overall approach*

Article 27 describes the type of recognition decisions that are grandfathered under the Agreement, the States in which these decisions are grandfathered (host State or State of work), the persons benefitting from the grandfathering of the decisions (those persons covered by the Agreement) and the effects of the grandfathering of the decisions in the respective states.

What is grandfathered?

In essence, Article 27 of the Agreement covers recognition decisions which have been adopted in accordance with four specific EU legal instruments, namely the Professional Qualifications Directive (Directive 2005/36/EC), the Lawyers Establishment Directive (Directive 98/5/EC), the Statutory Auditors Directive (Directive 2006/43/EC) and the Toxic Products Directive (Directive 74/556/EEC).

2.15.2. Articles 27(1)(a) and 27(2): Recognitions under the Professional Qualifications Directive

The Agreement covers all three types of recognition for establishment purposes provided for by Title III of Directive 2005/36/EC:

- (a) recognitions under the general system (Article 10 and seq. of Directive 2005/36/EC);
- (b) recognitions on the basis of professional experience (Article 16 and seq. of Directive 2005/36/EC); and
- (c) recognitions on the basis of coordination of minimum training conditions (Article 21 and seq. of Directive 2005/36/EC).

These recognitions include the following:

- Under Article 27(2)(a) of the Agreement: recognitions of third country professional qualifications which are covered by Article 3(3) of Directive 2005/36/EC.

These are recognitions by an EU Member State or the UK of third country professional qualifications which have already been previously recognised in another EU Member State or in the UK under Article 2(2) of Directive 2005/36/EC and which have been assimilated to domestic (EU or UK) qualifications because the holder has, subsequently to the first recognition in an EU Member State or in the UK, obtained three years' professional experience in the profession concerned in the State (EU Member State or the UK) which initially recognised them.

The Agreement does not therefore cover the first recognition of third country qualifications in an EU Member State or in the UK, only subsequent ones and to the extent that the conditions provided under Article 3(3) of Directive 2005/36/EC have been fulfilled.

- Under Article 27(2)(b): decisions on partial access under Article 4f of Directive 2005/36/EC.
- Under Article 27(2)(c): recognition decisions for establishment purposes obtained under the electronic procedure of the European Professional Card.

The European Professional Card recognition procedures are currently available for nurses responsible for general care, pharmacists, physiotherapists, mountain guides and real estate agents.

It is important to note that the Agreement only ensures the continuous validity and effect of the recognition decision itself; it does not ensure continuous access to the underlying electronic network (*the IMI European Professional Card module*) of the authorities and professionals concerned (*see Articles 8 and 29 of the Agreement*). Access by professionals to the EPC's online interface for information purposes will not however be impaired.

A specific effect of the grandfathering offered by the Agreement to recognition decisions covered by Directive 2005/36/EC is that any knowledge of language requirements and/or approval by health insurance funds that might be required by the host State will continue to be considered taking into account the relevant provisions of Directive 2005/36/EC, namely its Articles 53 and 55.

2.15.3. Article 27(1)(b): Recognitions under the Lawyers Establishment Directive

The Agreement grandfatheres, for persons covered by its personal scope, decisions under which EU or UK lawyers have gained admission to the profession of a lawyer in a host State or State of work under Article 10(1) and (3) of Directive 98/5/EC (which facilitates practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained).

The grandfathering effect waives, in respect of EU citizens and UK nationals, any local nationality requirement which might limit access to the profession of a lawyer in the host State or State of work.

The grandfathering effect is limited to the host State or State of work.

Therefore, as regards UK lawyers, nationals of the UK, who might have benefitted from these provisions in any EU Member State, the Agreement does not provide for the application of the two relevant Union law Directives, namely Directives 77/246/EEC and 98/5/EC, beyond the host State or State of work concerned.

2.15.4. *Article 27(1)(c): Recognitions under the Statutory Auditors Directive*

As regards the persons covered by the personal scope of the Agreement, approvals in the host State or State of work of statutory auditors who have initially obtained their approval in the EU or in the UK under Article 14 of Directive 2006/43/EC will continue to produce their effects in the host State or State of work and the beneficiaries will continue to have access to the profession as before.

2.15.5. *Article 27(1)(d): Recognitions under the Toxic Products Directive*

As regards the persons covered by the personal scope of the Agreement, approvals for the purpose of establishment obtained in the host State or State of work under the relevant provisions of Directive 74/556/EEC will continue to produce their effects under the Agreement.

1.1.6. *Overall effects*

The grandfathering effects offered by Article 27 entail the assimilation of the established beneficiaries to nationals of their host State or State of work, as appropriate, as regards their access to and their pursuit of the profession and the professional activities concerned in those territories.

Such assimilation does not, however, extend to the granting of any other single market right under Union law to the beneficiaries as regards the provision of services in territories other than those covered by these specific grandfathering effects.

2.16. ***Article 28 – Ongoing procedures on the recognition of professional qualifications***

2.16.1. *Scope*

Article 28 mirrors Article 27 of the Agreement as regards its personal and material scope and captures all relevant requests for recognition of professional qualifications which have been formally submitted by, and are pending at, the end of the transition period. All such pending procedures will be continued and completed (including any compensation measure that may have been required) in accordance with the rules and procedures provided for by the relevant EU legislation until a final decision is taken by the competent authority.

Two specific aspects need be mentioned:

- Article 28 covers not only pending administrative procedures but also any judicial procedures and appeal which may be launched post-end of the transition period. The provision also captures relevant judicial proceedings pending at the end of the transition period;
- As regards pending requests for recognition of qualifications under the European Professional Card process, Article 28 second subparagraph confirms that they are to be completed under the relevant Union law provisions.

To the extent that continuous access to the relevant underlying electronic network (IMI module) will be necessary after the end of the transition period until completion of the relevant European Professional Card process, a specific enabling provision for limited access to the IMI module is inserted in Article 29(2) of the Agreement.

2.16.2. *Effects*

The effects of the proceedings to be completed under Article 28 should be identical to the effects of the recognition decisions grandfathered under Article 27 of the Agreement and explained above.

2.17. ***Article 29 – Administrative cooperation on recognition of professional qualifications***

2.17.1. *Obligation of cooperation between competent authorities*

Article 29(1) ensures that competent authorities of the UK and of the EU Member States should continue to be bound by the general obligation of cooperation during the period of examination of all pending proceedings of recognition covered by Article 28 of the Agreement.

This provision also constitutes a general waiver on any national provision which might impede the exchange of relevant information with foreign authorities on the applicants, their professional qualifications and general and professional conduct, pending recognition of their professional qualifications and their insertion in the profession of their host State or State of work.

Such obligation and waiver are necessary to ensure that public safety concerns are properly managed during the recognition process.

2.17.2. *Limited access to IMI after the withdrawal*

As already mentioned, Article 29(2) provides a temporary derogation to Article 8 of the Agreement, enabling access of the UK authorities to the IMI module for the European Professional Card for as long as it is necessary to complete the processes for recognition pending at the end of the transition period.

Such use is limited to 9 months from the end of the transition period, by which time all such processes will be completed taking into account the strict deadlines applicable in the processes in question.

3. TITLE III – COORDINATION OF SOCIAL SECURITY SYSTEMS

In the context of social security coordination, there are three categories of persons:

1. persons to whom the coordination rules in Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 apply and continue to apply, based on Article 30 of the Agreement;
2. persons to whom only part of the coordination rules continue to apply or become applicable in the future due to specific circumstances, based on Article 32 of the Agreement;
3. persons outside the scope of the Agreement, to whom the coordination rules in the relationship between the UK and the Union will not apply.

3.1. **Article 30 – Persons covered**

3.1.1. *General remarks*

Article 30 of the Agreement determines the persons to whom the full social security coordination rules will apply:

- the first paragraph lists the different situations covered when persons are in a social security cross-border situation involving the UK and an EU Member State;
- the second paragraph determines the time-limit of the application of Article 30(1) to these persons;
- the third paragraph contains a residual clause by which persons covered by the personal scope of Title II of Part Two of the Agreement are also covered by Title III even if not or no longer under the scope of Article 30(1);
- the fourth paragraph determines the time-limit of the application of Article 30(3) to these persons;
- the fifth paragraph explains that family members and survivors are only covered by Article 30 if they derive rights and obligations in that capacity in accordance with Regulation (EC) No 883/2004.

As mentioned in Article 31(2) of the Agreement, the notions used under this Title are to be understood by reference to the notions used in Regulation (EC) No 883/2004.

Article 30(1) of the Agreement refers to persons who are ‘*subject to the legislation of*’ an EU Member State or the UK. This situation is to be determined pursuant to the conflict-of-law rules in Title II of Regulation (EC) No 883/2004.

The personal scope of social security coordination is specific to Title III of Part Two of the Agreement and does not necessarily correspond to that of Title II. For instance, there may be circumstances in which persons who do not fall under the scope of Title II do nevertheless fall under the scope of Title III (e.g. those under the scope of Article 32 of the Agreement).

Because the aims of Titles II and III of Part Two of the Agreement are different, terms used in both titles of Part Two of the Agreement (for instance, for the notion of ‘residence’, ‘frontier worker’ or ‘posting’) may have different meanings in accordance with the different personal scopes of the provisions of Union law that they apply and their interpretation by the CJEU.

For instance, the notion of ‘habitual residence’ used in Title III of Part Two of this Agreement is to be understood as defined in Article 1(j) of Regulation (EC) No 883/2004 (the place where the person habitually resides) and as further explained in Article 11 of Regulation (EC) No 987/2009 (hereinafter ‘habitual residence’). More details on the notion of ‘habitual residence’ within the meaning of social security coordination rules may be found in the Practical Guide on the applicable legislation in the European Union, the European Economic Area and in Switzerland, as approved by the Administrative Commission for the Coordination of Social Security Systems. This notion under Regulation (EC) No 883/2004 has a different meaning and should not be confused with the notion of ‘residence’ in Title II of Part Two of this Agreement, which is borrowed from Chapter III of Directive 2004/38/EC.

An example where the two notions of ‘residence’ included in the EU law instruments do not correspond concerns the situation of students. For the purpose of social security coordination rules, students in principle keep their habitual residence in the Member State of origin and are temporarily staying in the Member State where they study. At the same time, students enjoy, under the conditions of Directive 2004/38/EC, a right of residence in the Member State where they study.

Another example to illustrate the relationship between Title II and Title III of Part Two of the Agreement would be of a Croatian citizen who:

- works and habitually resides in the UK at the end of the transition period;
- in 2022, acquires the permanent residence in the UK based on Article 16 of the Agreement;
- in 2025, returns to Croatia, starts working and moves his/her habitual residence there;
- at the same time, maintains the permanent residence right under Title II of Part Two of the Agreement in the UK for the five consecutive years.

As long as that Croatian citizen maintains a permanent right of residence in the UK within the meaning of Title II of Part Two of the Agreement, he/she will be entitled to benefit from the provisions of Title III if he/she returns to the UK. Furthermore, as long as that citizen maintains a permanent right of residence in the UK, he/she will have the right to export social security benefits there (e.g. unemployment benefits if he/she is a jobseeker) or the right to use his/her EHIC in the UK.

Separately from the two concepts of residence referred to above, a legal right of residence of third country nationals covered by Title III of Part Two of the Withdrawal Agreement should be understood as legal residence pursuant to Union secondary or domestic legislation.

For persons covered by Title III of the Agreement, the application of the coordination rules of Regulation (EC) No 883/2004 resulting from Title III does not in itself constitute the right to move or reside in a host state. It only determines the legal consequences for social security cover of such a situation. For instance, based on the Agreement, the posting of workers for the provision of services from or to the UK will no longer be possible after the end of the transition period.

3.1.2. Article 30(1): Personal scope (general clause)

3.1.2.1. Article 30(1)

Article 30(1) of the Agreement refers to the following categories of persons:

- *EU citizens* – citizens of the EU Member States
- *UK nationals* – as defined under its national legislation
- *Stateless persons and refugees* habitually residing in an EU Member State or in the UK
- *third country nationals* legally residing in an EU Member State or in the UK
- *family members and survivors* of the above categories.

These persons come within the scope of Title III of Part Two of the Agreement if they fulfil the conditions outlined in paragraph 1 of this Article:

- **Points (a) and (b):** EU citizens who are subject to the UK legislation at the end of the transition period and *vice versa* (irrespective of the habitual residence of that person). This includes any person subject to UK legislation or the legislation of a Member State under Title II of Regulation (EC) No 883/2004 including the cases mentioned under Article 11(2) of that Regulation.

- **Points (c) and (d):** EU citizens who are subject to the legislation of an EU Member State (in the same meaning as under the previous bullet point) at the end of the transition period and habitually reside in the UK and *vice versa*.
- **Point (e):** EU citizens who pursue a gainful activity in the UK at the end of the transition period, but are subject to the legislation of an EU Member State under Title II of Regulation (EC) No 883/2004 and *vice versa*. The receipt of benefits mentioned in Article 11(2) of the Regulation has to be treated as exercise of a gainful activity for that purpose. This applies regardless of the place of habitual residence.
- **Point (f):** Refugees and stateless persons in one of the situations mentioned above with the additional condition that they legally reside in the UK or in an EU Member State.
- **Point (g):** Third country nationals in one of the situations mentioned above with the additional condition that they legally reside (pursuant to EU secondary or domestic legislation) in the UK or in an EU Member State and that they are in a cross-border situation in between an EU Member State and the UK. This does not apply if the EU Member State involved is Denmark. Third country nationals who have cross-border elements in between the EU Member States where the UK is not involved are covered by Regulation (EU) No 1231/2010 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 and not by point (g) of Article 30(1) of this Agreement.
- **Points (a) to (g):** Family members (as defined in Article 1(i) of Regulation (EC) No 883/2004) of one of the persons mentioned in one of the bullet points above, irrespective of their nationality (further details can be found at the end of this chapter). Also family members born after the end of the transition period are covered (e.g. newborn child or new partner) who are living with the right holder and who are in situation covered by Article 30(1) of the Agreement.
- **Points (a) to (g):** Survivors of one of the persons mentioned in one of the bullet points above, when the deceased person fulfilled the conditions at the end of the transition period and the death of that person occurred after the end of the transition period. If this is not the case, the survivor can only be entitled to the benefits as provided under Article 32 of the Agreement.

3.1.2.2. Examples of situations covered by Article 30(1)

Article 30(1) covers, for example, persons who, at the end of the transition period, are:

— *points (a) and (b):*

1. a UK national, moving to Portugal, habitually residing and working therein at the end of the transition period, together with the family members residing in Portugal (subject to Portuguese legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004);
2. a Polish citizen, habitually residing and working in the UK (subject to the UK legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004), together with the family members residing in Poland;
3. a UK national, born in Malta in 1990, habitually residing and working therein at the end of the transition period (who does not have Maltese citizenship), together with the family members (subject to the Maltese legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004);
4. a UK national habitually residing in the UK, working in Belgium and returning home at least once a week (subject to the Belgian legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004);
5. a French citizen, habitually residing in France, working in the UK and returning home twice a month (subject to UK legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004);
6. a UK pilot with the home base in Germany, flying all over the European Union (subject to the German legislation based on Article 11(5) of Regulation (EC) No 883/2004; the home base is to be determined based on Regulation (EC) No 3922/91);
7. an inactive Bulgarian citizen habitually residing in the UK and looking for a job there (subject to the UK legislation based on Article 11(3)(e) of Regulation (EC) No 883/2004);

8. a French citizen, who has never worked in the UK and who receives a pension only from France and habitually resides in the UK (subject to the UK legislation based on Article 11(3)(e) of Regulation (EC) No 883/2004, for sickness benefits France is competent based on Articles 24 and 29 of the same Regulation);
9. a UK retired person who receives pensions from the UK and Spain and habitually resides in Spain (subject to Spanish legislation based on Article 11(3)(e), sickness benefits are granted under Articles 23 and 29 of Regulation (EC) No 883/2004 by Spain);
10. a Swedish student habitually residing in the UK, who receives a scholarship from the UK, covering all the expenses, rents a flat therein and spends all the weeks and week-ends there (subject to the UK legislation based on Article 11(3)(e) of Regulation (EC) No 883/2004);
11. a Polish citizen who works in the UK, starts receiving maternity benefits provided by the UK when she temporarily returns to Poland to give birth before the end of the transition period (subject to the UK legislation based on Article 11(2) and (3)(a) of Regulation (EC) No 883/2004); she could resume the work in the UK after the maternity leave and continue to be covered by Article 30(1) of this Agreement;
12. survivors of a UK national, when the UK national works in France at the end of transition period (subject to French legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004); he/she dies in 2023; Article 30(1) of the Agreement covers persons receiving French survivors' benefits, as a result of his/her death, irrespective of the nationality of the survivors and of whether they reside in the UK or in a EU Member State.

— *points (c) and (d)*

1. a Dutch citizen habitually residing in the UK, who works in The Netherlands and returns home at least once a week (subject to The Netherlands legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004);
2. a UK national habitually residing with his/her whole family in France, who works in the UK and returns to France twice a month (subject to the UK legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004);
3. a German citizen habitually residing in the UK, who goes to perform seasonal work in Germany for a period extending beyond the end of the transition period (subject to German legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004);
4. a Romanian diplomat, working for his/her Embassy in the UK and habitually residing therein – he/she rented his/her house in Romania and moved together with his/her family in the UK (subject to Romanian legislation based on Article 11(3)(b) of Regulation (EC) No 883/2004);

— *point (e):*

1. a Finnish diplomat working in his/her Embassy in the UK, habitually residing in Finland, his/her family lives in Finland where the diplomat spends all the holidays (covered by the Finnish legislation based on Article 11(3)(b) of Regulation (EC) No 883/2004);
2. a Croatian citizen sent to the UK within the meaning of Article 12 of the Regulation, for a 6-months training ending after the end of the transition period (subject to the Croatian legislation based on Article 12 of Regulation (EC) No 883/2004);
3. a Maltese citizen working on board of a vessel at sea flying the flag of the UK (this situation has to be treated *mutatis mutandis* as the exercise of a gainful activity on the territory of the UK), habitually residing in Malta and remunerated for such activity by an undertaking whose registered office or place of business is in Malta (subject to the Maltese legislation based on Article 11(4) of Regulation (EC) No 883/2004);
4. a Belgian citizen habitually residing in Belgium and normally pursuing an activity as an employed and/or self-employed person both in Belgium and the UK (if subject to the Belgian legislation based on Article 13 of Regulation (EC) No 883/2004);

5. a Portuguese citizen habitually residing in Portugal, working both in Portugal (no substantial part) and in the UK, subject to the Portuguese legislation according to a derogatory agreement based on Article 16 of Regulation (EC) No 883/2004. This person remains covered at least as long as the Article 16 of the Agreement indicates.

Article 30(1) also applies to stateless persons and refugees, as well as third country nationals, legally residing in the EU Member States or in the UK, as long as they are in any of the situations in Article 30(1)(a) – (e) of the Agreement. So, for instance:

1. Article 30(1) of the Agreement covers a Pakistani citizen, legally residing in the UK at the end of the transition period and working in France (subject to the French legislation based on Article 13(2)(a) of Regulation (EEC) No 1408/71 which applied as a consequence of Regulation (EEC) No 859/2003 in application of which the UK participates);
2. A Moroccan citizen, legally residing in Belgium and working in Belgium and in the UK (subject to the Belgian legislation based on Article 14(2)(b)(i) of Regulation (EEC) No 1408/71 which applied as a consequence of Regulation (EEC) No 859/2003);
3. Article 30(1) of the Agreement, however, does not cover an Indian citizen, legally residing in the UK and who is not in a situation involving any EU Member State. It does not cover either a Mexican citizen not legally residing in the UK or in an EU Member State at the end of the transition period.

Article 30(1) also covers family members and survivors of persons in one of the situations mentioned under paragraph (1) of that Article. Moreover, for the rights of the family members, a distinction should be made with Article 32(1)(d) and (e) of the Agreement that has a different scope of application concerning e.g. children born after the end of the transition period (see guidance on Article 32(1)(d) and (e)).

It is not necessary that the family members or the survivors are themselves in a cross-border situation. For instance, the survivors of a Czech citizen, who works in the UK at the end of the transition period and dies afterwards there, may have never left the Czech Republic. However, these survivors will be covered by Article 30(1) of the Agreement. Article 30(1) requires only that the deceased person is one of the situations provided therein (an EU citizen subject to the UK legislation in our example), without imposing a similar condition for his/her survivors. This coverage concerns those rights conferred in this capacity as survivors or family members by the social security coordination rules.

The family members and survivors are covered for those rights deriving from the social security coordination rules from their capacity as family members, respectively survivors.

Article 30(1) of the Agreement does not cover persons who are in an internal situation at the end of the transition period (for instance, a Greek citizen, who always worked and resided in Greece). If these persons decide in the future to move to the UK, this is considered a future movement, not covered by the Agreement.

3.1.3. *Article 30(2): The meaning of 'without interruption'*

The Agreement ensures the application of Regulations (EC) No 883/2004 and (EC) No 987/2009 for as long as the situation concerned remains unchanged or the persons continue to be in a situation involving both the UK and an EU Member State at the same time without interruption. Not every change in a situation of the person concerned is to be treated as one. Switches in between the different categories mentioned in Article 30(1) of this Agreement maintain the status of a person covered by Article 30(1) of this Agreement to whom Regulations (EC) No 883/2004 and (EC) No 987/2009 apply. If such a switch takes place, of course, the condition under Article 30(1) of this Agreement referring to the situation at the 'end of the transition period' cannot be applied. In cross-border situations 'without interruption' has to be understood in such a flexible way that also short periods in between two situations are not harmful, for instance break of for example one month before starting a new contract (by analogy, Case C-482/93, *Klaus*).

For instance, a Polish citizen, residing in the UK and working there for a British employer at the end of the transition period, will continue to be covered by Article 30(1):

1. for as long as the situation remains unchanged;

2. even if the situation changes, provided that he/she continues to be in one of the situations covered by Article 30(1) of this Agreement. So, the person will be covered if, for instance, he/she:
 - a. continues working for the British employer, but takes an additional job in France (subject to UK or French legislation based on Article 13 of Regulation (EC) No 883/2004, depending on whether substantial activities are performed in the United Kingdom);
 - b. continues working for the British employer, but moves his/her habitual residence to France (subject to UK legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004);
 - c. continues working for the British employer and goes on a holiday in Portugal;
 - d. ceases to work for the British employer and commences to work in France, while continuing to habitually reside in the UK (subject to French legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004);
 - e. ends the employment contract and concludes another one with an Irish employer, but the work continues to be performed in the UK (subject to UK legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004);
 - f. becomes unemployed without receiving unemployment benefits and continues to habitually reside in the UK (subject to UK legislation based on Article 11(3)(e) of Regulation (EC) No 883/2004);
 - g. becomes unemployed, receives unemployment benefits from the UK and exports these benefits to Poland while searching for a job there based on Article 64 of Regulation (EC) No 883/2004; after unsuccessfully searching for work in Poland, comes back to the UK and continues to receive unemployment benefits and to search for a job there (subject to UK legislation based on Article 11(3)(a) and 11(2));
 - h. ends the contract and habitually resides in the UK, while waiting to reach the retirement age (subject to UK legislation based on Article 11(3)(e) of Regulation (EC) No 883/2004).

However, persons in such situations will no longer be covered by Article 30(1) of the Agreement if they are no longer working in the UK and change their habitual residence to Poland (or any other EU Member State). For instance, the Polish citizen exporting UK unemployment benefits to Poland, finds a job there and moves also his/her habitual residence to Poland. In such a case, they will no longer be in a situation involving the UK, without prejudice to a possible right derived from Article 30(3) of the Agreement.

A person can move between the different situations set in points (a) to (e) of Article 30(1) without falling out of scope by virtue of Article 30(2). For instance:

1. An Austrian civil servant, habitually residing in Austria and working in the UK for the Austrian administration at the end of the transition period is covered by Article 30(1)(e) (subject to Austrian legislation based on Article 11(3)(b) of Regulation (EC) No 883/2004), where:
 - after the end of the secondment in 2023, he/she resigns from the Austrian administration and works as a German language teacher in the UK where he/she also moves her habitual residence – he/she continues to be covered by the Agreement based on Article 30(1)(a) of the Agreement (subject to UK legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004)
 - not satisfied by the new job, he/she resigns again and takes up employment in a school in France, while maintaining the habitual residence in the UK – in such a case, he/she continues to be in a situation involving both the UK and an EU Member State at the time, referred to in Article 30(1)(c) of the Agreement (subject to French legislation based on Article 11(3)(a) of Regulation (EC) No 883/2004).
2. A UK national habitually residing in the UK simultaneously working in the UK and France for an employer established in France at the end of the transition period:
 - (a) initially, he/she does not pursue a substantial part of his/her activity in the UK, but the bulk of the activity is in France, and is covered by Article 30(1)(b) of the Agreement (subject to French legislation based on Article 13(1)(b) of Regulation (EC) No 883/2004);

- (b) in a few years, he/she starts pursuing a substantial part of his/her activity in the UK, while continuing to work in France, and is covered by Article 30(1)(e) of the Agreement (subject to UK legislation based on Article 13(1)(a) of Regulation (EC) No 883/2004).

Therefore, a change in the applicable legislation based on the conflict rules in Title II of Regulation (EC) No 883/2004 does not lead on its own to an exclusion from the scope of Article 30(1) of the Agreement as long as the person concerned continues to be in one of the situations covered thereby.

3.1.4. *Article 30(3): Personal scope (residual clause)*

Article 30(3) contains a residual clause by which persons covered by Article 10 concerning the personal scope of Title II of Part Two of the Agreement who are not or no longer under the scope of points (a) to (e) Article 30(1) should also benefit from the provisions on full social security coordination of Title III of Part Two of the Agreement.

For instance, children born after the end of the transition period who are under the scope of Title II of Part Two of the Agreement would also benefit from the provisions of Title III.

If, for instance, an EU citizen studies in the UK at the end of the transition period, without habitually residing therein in the sense of Article 1(j) of Regulation (EC) No 883/2004, such a situation is not covered by Article 30(1) of the Agreement. However, the student maintains a right of residence under Title II of Part Two of the Agreement if, for instance, he/she gains access to the labour market. In this case, he/she will then benefit from the provisions of Title III as well pursuant to Article 30(3) of the Agreement.

Persons who are both UK nationals and EU citizens may also be covered by Article 30(3) of the Agreement if they are covered by Title II of the Withdrawal Agreement (see Section 1.2 of this Guidance on Article 10 of the Agreement).

Therefore:

1. Article 30(3) covers a person who is both a UK national and a Spanish citizen, who was born in Spain and was subject to the Spanish social security system and moved to the UK before the end of the transition period, where he/she acquired British citizenship; such a person is covered by Article 30(3) of the Agreement and he/she will benefit from the rules on Title III of Part Two of the Agreement. In this case, its situation would be similar to that of a person covered by Article 30(1)(a) of the Agreement (Spanish/British citizen subject to the UK legislation).
2. However, Article 30(3) of the Agreement does not cover a person who is both a UK national and an Italian citizen, who was born and lived only in Italy before the end of the transition period and was subject to the Italian social security system.

This residual clause also applies to family members and survivors of the beneficiaries of Title II of Part Two of the Agreement (see, however, Article 30(5) of the Agreement, below).

3.1.5. *Article 30(4): The link to the host State or State of work for persons covered by paragraph 3*

Article 30(4) ensures the application of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to the persons covered by Article 30(3) for as long as the situation concerned remains unchanged: that is, for as long as the persons covered by Article 30(3) retain a right to reside in their host State under Article 13 of the Agreement or a right to work in their State of work under Articles 24 or 25 of the Agreement.

3.1.6. *Article 30(5): Family members and survivors*

This provision explains that, to the extent that the expression 'family members and survivors' must be understood by reference to the notions used in Regulation (EC) No 883/2004 (see also Article 31(2) of the Agreement), 'family members and survivors' are covered under Article 30 only to the extent that they derive rights and obligations in that capacity in accordance with social security legislation.

3.2. **Article 31 – Social security coordination rules**

3.2.1. *Article 31(1): Material scope*

Article 31(1) ensures the application of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 in their entirety to the persons mentioned in Article 30(1).

The coordination rules will be maintained as amended by the Regulations listed in Annex I to the Agreement with the possibility of making any necessary adaptations in the future in accordance with Article 36 of the Agreement.

Where there are exceptions regarding the UK under the current rules, such as special entries in the Annexes to the Regulations, these will continue to apply under the same conditions. For instance, the UK does not apply Article 28(2) to (4) of Regulation (EC) No 883/2004. The Agreement will not change this.

In addition to the Regulations, due account must be taken of all the relevant decisions and recommendations of the Administrative Commission for the coordination of social security systems set up by Article 71 of Regulation (EC) No 883/2004 which are listed in Annex I to the Agreement.

3.2.2. *Article 31(2): Definitions*

The notions used in Title III of Part Two of the Agreement shall be understood by reference to the same notions used in Regulation (EC) No 883/2004.

For instance, the definition of 'family member' under Article 9 of the Agreement is not relevant in the context of social security coordination provisions and the definition in Article 1(i) of Regulation (EC) No 883/2004 will apply.

3.2.3. *Article 31(3): Third country nationals*

For third country nationals, the UK did not take part in the adoption of Regulation (EU) No 1231/2010. However, the UK is bound by Regulation (EC) No 859/2003 extending Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 on the coordination of Member States' social security schemes to the nationals of third countries who were not already covered by those Regulations solely on the ground of their nationality.

Pursuant to Regulation (EC) No 859/2003, the UK and the EU Member States (except Denmark) apply Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community.

Therefore, for third country nationals who fulfil the conditions of Regulation (EC) No 859/2003, as well as their family members and survivors, any reference in both Articles 30 and 32 of the Agreement to Regulations (EC) No 883/2004 and (EC) No 987/2009 (new Regulations) must be understood as referring to the corresponding provisions in the preceding Regulations. Similarly, any references to specific provisions in the new Regulations shall be understood as references to the corresponding provisions of the preceding Regulations.

3.3. **Article 32 – Special situations covered**

Article 32 governs special situations in which, even if the persons are not or are no longer within the scope of Article 30 of the Agreement, their rights deriving from the social security coordination rules need to be protected.

For these special categories of persons, some provisions of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 need to be maintained. These provisions apply in accordance with the general principles of these Regulations, such as for instance non-discrimination or the unicity of the applicable legislation.

3.3.1. *Article 32(1)(a) and (2): Past and future periods*

Article 32(1)(a) protects existing and future rights based on past periods of insurance, employment, self-employment and residence.

This provision ensures that EU citizens with previous periods in the UK and *vice versa* will be able to claim benefits and, if needed, to rely on the aggregation of periods. The provision concerns any kind of social security benefit based on periods of insurance, employment, self-employment or residence, such as old-age pensions, invalidity benefits, accidents at work benefits, sickness benefits or unemployment benefits.

This provision is also applicable when a benefit is granted exclusively on past periods in the State which examines entitlement to benefits under its legislation (irrespective of whether they have been completed before or after the end of the transition period), when no aggregation is needed because past periods are sufficient to grant a benefit.

At the same time, all rights and obligations deriving directly (or indirectly) from such periods are maintained. 'Rights and obligations deriving from such periods' means entitlements provided under the UK or an EU Member State's legislation in accordance with the provisions of Regulation (EC) No 883/2004, deriving from those periods [or the granting of a benefit based on these periods, and any consequent entitlement to benefits,] as well as the corresponding obligations. For sickness and family benefits of persons covered by Article 32(1)(a) of the Agreement the special rules under Article 32(2) of the Agreement are applicable (see below and also Section 3.3.6 of this document), so these rights are in addition to 'rights and obligations deriving from such periods'.

This may cover, for instance, the right to receive periodical medical check where a person habitually resides in order to continue receiving an invalidity benefit (based on Article 87 of Regulation (EC) No 987/2009); the right to receive a supplement based on Article 58 of Regulation (EC) No 883/2004.

The social security coordination rules will apply both to periods completed before the end of the transition period and those completed by the same persons after that date.

At the same time, the second paragraph of this provision ensures that the coordination rules on sickness and family benefits will apply to persons covered by Article 32(1)(a).

Article 32(2) concerning sickness benefits refers to rules on competence for sickness for the person who receives a benefit under 32(1)(a) of the Agreement. It covers the situations where there is a change of competence because this person comes back to an EU Member State or the UK or because she/he starts receiving another pension.

The conflict rules for determining the competence for sickness cover are to be seen as a whole and future changes which might appear in the habitual residence of the person or the receipt of an additional benefit have to be taken into account and the relevant rules of Regulation (EC) No 883/2004 remain applicable.

For instance, a Danish citizen worked in the UK and Denmark. He/she returns to Denmark before the end of the transition period:

- in 2022, he/she reaches the retirement age in the UK at age X, and receives a UK pension, while being inactive in Denmark → the UK is competent for sickness benefits based on Article 32(2) of the Agreement (Article 24 of Regulation (EC) No 883/2004);
- two years later, he/she reaches the retirement age in an EU Member State, at age X+2 and starts also receiving a Danish pension → Denmark is competent for the sickness cover based on Article 23 of Regulation (EC) No 883/2004;
- in 2027, he/she moves residence to the UK, under the rules in force at that time, while continuing to receive the two pensions → the UK is competent for his/her sickness cover (N.B. the change of residence in 2027 will be a future move and will not be covered for the purposes of residence rights by Title II of Part Two of this Agreement).

In practice, the application of Article 32(1)(a) and (2) of the Agreement will have the following consequences:

1. In case of a German citizen who:

- has worked all his/her life in the UK;
- returns to Germany before the end of the transition period when close to retirement age and remains inactive; and
- when reaching the retirement age (before or after the end of the transition period), makes a claim in the UK for old-age benefits based on Regulation (EC) No 883/2004.

After receiving the UK pension, the German citizen, for his/her whole life:

- based on Article 32(1)(a):
 - (a) has the right to receive the UK pension without any reduction based on Article 7 of Regulation (EC) No 883/2004 while habitually residing in Germany or any other EU Member State;
- based on Article 32(2):
 - (b) is issued a Portable Document S1 by the UK and has access to sickness benefits in kind in Germany under the same conditions as German retired persons, but at the expense of the UK, based on Article 24 of Regulation (EC) No 883/2004;
 - (c) has the right to sickness benefits in cash (including long-term care benefits) provided under the UK legislation and paid directly to him/her based on Article 29 of Regulation (EC) No 883/2004 regardless in which Member State he/she habitually resides;
 - (d) has the right to planned treatment in any EU Member State other than the one in which he/she habitually resides with a Portable Document S2 issued by the UK and at the UK's expense based on Article 27 of Regulation (EC) No 883/2004;
 - (e) has the right to use the European Health Insurance Card issued by the UK for his/her holiday in any Member State other than the one in which he/she habitually resides based on Article 27 of Regulation (EC) No 883/2004;
 - (f) his/her family members may enjoy the derived rights for access to sickness benefits in kind in the Member State where they habitually reside, at the expense of the UK. Under Article 32(1)(d) the person has a right to family benefits under the conditions set out in the Regulation and the UK legislation, even if his/her family members are residing in a Member State other than the one in which he/she habitually resides based on Article 67 of Regulation (EC) No 883/2004;

If the German citizen, while receiving his/her UK pension, starts working in Germany, then the applicable legislation, including for sickness benefits, will be the German legislation according to the *lex loci laboris* principle of Article 11 of Regulation (EC) No 883/2004 which continues to be applicable (see also Article 31 of this Regulation).

2. In case of a UK national who:

- has worked all his/her life in the Netherlands;
- continues working there at the end of the transition period;
- returns to the UK after the end of the transition period when close to retirement age;
- is inactive in the UK; and
- after one year, claims a Dutch pension.

This UK national:

- (a) is covered by the full social security coordination rules, based on Article 30(1)(b) of the Agreement, for the period after the end of the transition period until returning to the UK;
- (b) he/she is covered by Article 32(1)(a) and (2) of the Agreement in order to continue receiving the Dutch pension (for more details, see the previous example).

3. In case of an Australian citizen who:

- 1996–2000: works in the UK;
- 2001–2010: works in Belgium;
- 2011–2030: works and habitually resides in Australia; and
- 2031 moves his/her legal residence to the UK and claims benefits based on his/her previous periods of insurance.

This third country national can rely on Article 32(1)(a) of the Agreement to claim the UK and Belgian pensions based on his/her previous periods of insurance, provided that he/she fulfils the conditions of Regulation (EC) No 859/2003: has legal residence in the UK and previous periods of insurance in an EU Member State. The fact that the person was not legally residing in the UK or an EU Member State at the end of transition period is not relevant, as long as the person completed periods under the UK legislation and/or the legislation of an EU Member State before that date and fulfils the conditions of Regulation (EC) No 859/2003 when claiming the pension.

4. In case of an American citizen who:

- 2005–2010: works in the UK;
- 2010–2025: works in the United States of America;
- 2026–2030: works and legally resides in Malta; and
- 2031 claims benefits based on his/her previous periods of insurance.

This person is not covered by Article 32(1)(a) of the Agreement. Indeed, before the end of the transition period, the person concerned was not within the personal scope of Regulation (EC) No 859/2003, because he was not in a cross-border situation by the end of the transition period.

This provision will also cover *mutatis mutandis* survivors receiving benefits following the death of a person who completed past periods but is not or is no longer covered by Article 30 of the Agreement. For example:

5. A Maltese citizen who returns to Malta before the end of the transition period after having worked for 20 years in the UK. In 2018, he/she retires and receives a UK pension under Regulation (EC) No 883/2004. He/she dies that same year:
 - (a) the spouse is entitled to UK survivors' benefits based on the UK legislation and the Regulation and will continue to receive the benefits after the end of the transition period without any reduction;
 - (b) the coordination rules will apply to determine the competent State for sickness cover on the basis of Article 32(2) of the Agreement.
6. A Greek citizen who returns to Greece before the end of the transition period after having worked for 20 years in the UK (not covered by Article 30 of the Agreement). In 2025, retires and receives a UK pension under Article 32(1)(a) of the Agreement. He/she dies in 2026:
 - (a) the spouse is entitled to UK survivors' benefits based on the UK legislation and the Regulation and will receive the benefits without any reduction even after the end of the transition period on the basis of Article 32(1)(a) of the Agreement;
 - (b) the coordination rules will apply to determine the competent State for sickness cover on the basis of Article 32(2) of the Agreement.

3.3.2. Article 32(1)(b): Ongoing planned treatment

3.3.2.1. Scope

Article 32(1)(b) of the Agreement ensures that the right to receive planned treatment under Regulation (EC) No 883/2004 is protected for persons who have begun to receive such treatment or at least have requested the prior authorisation to receive it before the end of the transition period. As the freedom to provide services is not extended beyond the end of the transition period, other forms of rights connected to patient mobility, especially the cases under Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, will not be covered any longer by Union law if the treatment takes place after the end of that period.

As this provision refers to 'persons', it covers EU citizens, UK nationals, stateless persons or refugees habitually residing in the UK or an EU Member State, as well as third country nationals who fulfil the conditions in Regulation (EC) No 859/2003.

This provision concerns persons who are not covered by Article 30 of the Agreement.

For example:

1. A Maltese citizen works and habitually resides in Malta. In 2020, he/she makes a request for prior authorisation to receive a specific planned treatment in the UK. The request is granted in 2021:
 - (a) the treatment may start under the conditions of Regulation (EC) No 883/2004, even if the UK is a third country at that date;
 - (b) his/her access to this treatment will be based on the equal treatment principle;
 - (c) any relevant provisions of Regulations (EC) Nos 883/2004 and 987/2009 related to planned treatment shall continue to apply (e.g. Article 26 of Regulation (EC) No 987/2009);

- (d) the reimbursement procedures between the UK and Malta will continue to apply accordingly based on Article 35 of the Agreement;
 - (e) he/she and, if needed, his/her accompanying person or persons will have the right to enter the UK territory for the treatment, under the conditions set out in the Agreement.
2. A Czech citizen works and habitually resides in Slovakia. In 2020, he/she makes a request for prior authorisation to receive a specific planned treatment in the UK. The request is granted and the treatment starts before the end of 2020 and is planned to last until the summer of 2021. The same conditions as above apply.

Whenever Regulation (EC) No 883/2004 is mentioned, it should be understood that the relevant provisions of Regulation (EC) No 987/2009 shall apply accordingly.

3.3.2.2. Travel-related issues

The **persons undergoing planned treatment who are benefiting from Article 32(1)(b) as described above (patients)** have the right, until the end of the treatment, to enter and exit the State of treatment in accordance with Article 14 of the Agreement (which relates to the right for the beneficiaries of Title II of Part Two of the Agreement to enter and exit the host State), *mutatis mutandis*.

The existing Portable Document S2 issued under Regulation (EC) No 883/2004 is sufficient evidence of personal entitlement to such planned treatment for the purposes of Article 32(1)(b) of the Agreement.

Concretely, a UK national or an EU citizen who holds the Portable Document S2 and the necessary travel documents provided for in Article 14(1) of the Agreement has the right to enter and exit the State of treatment in accordance with Article 14(2) (i.e. visa free).

Patients benefitting from Article 32(1)(b) of the Agreement who are neither EU citizens nor UK nationals may, in accordance with applicable legislation, be required to have an entry visa.

In individual cases, patients benefitting from Article 32(1)(b) of the Agreement may, in order not to be deprived of their right to receive the course of planned treatment, require the presence and care provided by other persons (accompanying person).

An **accompanying person** may be a family member or any other person who takes care of the person in need of a planned treatment. The EU Member States and the UK will consider how to evidence the status of accompanying persons and the ensuing rights under the Withdrawal Agreement.

The accompanying person has the right to enter and exit the State of treatment with a valid travel document provided for in Article 14(1) of the Agreement. The State of treatment may require the accompanying person to have an entry visa in accordance with applicable legislation.

Whenever the State of treatment requires patients or their accompanying persons to have an entry visa, it must grant those persons every facility to obtain the necessary visas in accordance with Article 14(3) of the Agreement. Such visas must be issued free of charge as soon as possible and on the basis of an accelerated procedure.

No exit visa or equivalent requirement can be required from patients or accompanying persons.

Article 32(1)(b) of the Agreement does not grant any residence rights in the meaning of Directive 2004/38/EC to patients and accompanying persons during their stay in the State of treatment. They have the right to stay on the territory of the EU Member State or the UK for as long as it is needed for the effective provision of the treatment to the patient. They are not subject to Articles 18 or 19 of the Agreement.

If a treatment has to be prolonged for medical reasons, the Portable Document S2 could be renewed or prolonged for this period. Potential unforeseen occurrences related to the treatment will be analysed on a case-by-case basis.

3.3.3. Article 32(1)(c): Ongoing unplanned treatment

The purpose of Article 32(1)(c) is to ensure that the right to receive unplanned necessary treatment is protected for persons who are on temporary stays that extend beyond the transition period, via the European Health Insurance Card (EHIC) or a replacement certificate.

The notion of 'stay' is to be understood as defined in Article 1(k) of Regulation (EC) No 883/2004, meaning temporary residence (in application of Article 31(2) of the Agreement). The maximum duration of stay is not determined by law and depends of the factual circumstances in each case. In practice, this could be e.g. a holiday period or a period of study (if not accompanied by a change in habitual residence). A stay which from the beginning is planned for a longer period (e.g. for the purpose of studies) is not regarded as ending when the person concerned stays in between for a short period in another State. Therefore such a person remains covered by Article 32(1)(c) of the Agreement also after returning again to the State of stay e.g. of studies.

This provision concerns only persons who are not covered by Article 30 of the Agreement. If a person is covered by Article 30, then all the social security coordination rules, including those concerning unplanned treatment, will apply for holidays ongoing at the end of the transition period as well as for future holidays. Article 32(1)(c) of the Agreement is applicable to situations such as:

1. A Spanish citizen, habitually residing and working in Poland, visits London for winter holidays at the end of December 2020. If this person has an accident, he/she:
 - (a) should be able use the EHIC for the whole holiday period, even if the accident occurs after the end of the transition period;
 - (b) should be able to prolong, based on the medical assessment, the stay in the UK to receive the necessary treatment.
 - (c) Any reimbursement procedures (either claiming back costs from the UK or Poland or between the countries concerned) take place under the same conditions as provided in the Regulations even after the end of the transition period based on Article 35 of the Agreement.
2. A UK national, habitually residing and working in the UK, is on a tour of Belgium, Luxembourg and the Netherlands at the end of December 2020. On 30 December 2020, he/she is in Luxembourg and wishes to leave to the Netherlands on 10 January 2021; this person:
 - (a) is covered by the EHIC for the whole period of stay in Luxembourg until leaving this country to go to the Netherlands on 10 January;
 - (b) can no longer use the EHIC during his/her stay in The Netherlands as any move to another EU Member State after the end of the transition period (in this case, to the Netherlands) is considered as a future move falling outside the scope of the Agreement.
3. A Cypriot citizen is attending a course of study lasting three years in the UK that starts in the autumn of 2020. He/she maintains the habitual residence (within the meaning of the Regulations) in Cyprus for the whole period (is financially dependent on his/her parents and returns home during week-ends and holidays). This person may use the EHIC in the UK for the duration of the course even if he/she returns for holidays to Cyprus.

Whenever Regulation (EC) No 883/2004 is mentioned, by virtue of Article 6(3) of the Agreement, the relevant provisions in Regulation (EC) No 987/2009 apply accordingly.

3.3.4. *Article 32(1)(d): Export of family benefits*

This provision fills a gap left by Article 30 of the Agreement for cases in which the person opening entitlements is not in a cross-border situation between an EU Member State and the UK, but the family members of such a person are. It is applicable for instance to:

1. A UK national who works and habitually resides in the UK at the end of the transition period while his/her spouse, who is economically inactive, habitually resides in Hungary together with the couple's children.
 - (a) This UK national is entitled to family benefits for the children habitually residing abroad, for as long as the conditions of the Regulation and the UK legislation as regards the entitlement are fulfilled;
 - (b) the UK will continue to export the family benefits as if the children habitually resided in its territory as long as the conditions under the Regulations and its national legislation as regards the entitlement are fulfilled;
 - (c) it is not necessary that the family benefits are actually paid before the end of the transition period, as long as there is entitlement for the said benefits before that date;

- (d) if the first or a further child is born to the couple in 2025, the UK will have no obligation under the Agreement to export family benefits pertaining to that child. Also children who become only family members after that date (because the person opening entitlement remarries after that date a partner with children who are 'added' to the family of the person covered) will not be covered by the rules of Regulation (EC) No 883/2004. This provision does not cover situations set in Article 30 of the Agreement.

A situation covered by Article 30 of the Agreement would be as follows:

2. An Austrian citizen working in the UK at the end of the transition period whose children habitually reside in Austria is entitled to family benefits from the UK:
 - (a) the social security coordination rules apply in full, based on Article 30(1)(a) of the Agreement; and
 - (b) if the first or other child is born in 2025, he/she will be entitled to family benefits under the social security coordination rules, including the export of family benefits for these future children.

In the situations set in Article 32(1)(d)(i) and (ii) of the Agreement, *the entitlement to family benefits* is to be understood as referring to:

- entitlement to the full benefit paid by the primary competent State;
- entitlement to a differential supplement paid by the secondary competent State; and
- a suspended entitlement to benefits when the benefit in the secondary competent State is lower than the benefit in the primary competent State.

This provision will continue to apply even if there are changes between primary and secondary competence.

For instance:

3. A UK national who works and habitually resides in the UK at the end of the transition period while his/her Croatian spouse, who is economically inactive, habitually resides in Croatia together with the couple's children (as this situation is not covered by Article 30(1) of the Agreement, Article 32(1)(d) of the Agreement becomes applicable):
 - (a) based on Article 68(1)(a) of Regulation (EC) No 883/2004, the UK has primary competence and will continue to pay the benefits for the children habitually residing abroad, for as long as the conditions in the Regulation and the UK legislation are fulfilled;
 - (b) If in 2024 the Croatian spouse starts working in Croatia, based on Article 68(1)(b) of Regulation (EC) No 883/2004, as the children habitually reside in Croatia, Croatia is the primary competent State and the UK is secondary competent and will start to pay just a differential supplement if needed;
 - (c) If the spouse becomes inactive again, the competence between Croatia and the UK will shift accordingly;
 - (d) If the spouse and the children join the UK national in the UK based on the provisions in force at that point in time, they fall out of the scope of Article 32(1)(d) of the Agreement; any future change (the family or just the spouse and the children return to Croatia) will be considered a future movement and no rights will be maintained based on the Agreement.
4. A UK national who works and habitually resides in the UK at the end of the transition period while his/her German spouse works in Germany and habitually resides therein together with the couple's children:
 - (a) based on Article 68(1)(b) of Regulation (EC) No 883/2004, Germany has primary competence and will continue to pay the benefits for the children habitually residing therein, for as long as the conditions in the Regulation and the German legislation are fulfilled; let us assume the UK is not actually paying any differential supplement, because the German benefit is higher than the UK one;

- (b) In 2024, the German spouse becomes inactive in Germany; based on Article 68(1)(a) of Regulation (EC) No 883/2004, the UK is primarily competent and will start to pay the benefit in full.

Article 32(1)(d) of the Agreement applies also to additional or special benefits for orphans coordinated under Article 69 of Regulation (EC) No 883/2004. It is not relevant if the entitlement to additional or special family benefits for orphans existed already at the end of the transition period or afterwards, provided that in the latter situation there was an entitlement to 'standard' family benefits at the end of the transition period.

3.3.5. Article 32(1)(e): derived rights as family members

Article 32(1)(e) protects also any derived rights as family members.

'Family member' is to be understood as defined in Article 1(i) of Regulation (EC) No 883/2004. As a rule, it includes the spouse and minor or dependent children who have reached the age of majority.

This provision protects those rights which exist at the end of the transition period, whether they are exercised or not.

It concerns situations set in Article 32(1)(d)(i) and (ii), without it meaning that it applies only to those family members for which family benefits are paid based on this provision. So, it is possible that a spouse is protected by Article 32(1)(e), even if the couple has no children and no family benefits are paid based on Article 32(1)(d).

The determinant factor is that the family member relationship exists at the end of the transition period. The provision is not covering future spouses or further and future children, but all the rules of the Regulations apply to the existing ones. Examples of situations covered:

1. A UK national works in the UK at the end of the transition period; his/her Slovak spouse habitually resides in the Slovak Republic and is inactive; the spouse has derived rights as family member for sickness benefits in kind based on Articles 17 and 32 of Regulation (EC) No 883/2004; the UK will continue to pay the relevant costs;
 - In 2024, the spouse starts working in Slovakia and is entitled to sickness benefits under the Slovak legislation as the competent state under Article 11(3)(a) of Regulation (EC) No 883/2004;
 - In 2025, when he/she becomes inactive, habitually residing in the Slovak Republic, the UK derived right will start again and takes priority over any independent right he/she might have based on residence in the Slovak Republic.
2. A Lithuanian citizen works and habitually resides in Lithuania at the end of the transition period; his/her UK spouse habitually resides in the UK and is working therein; the UK spouse is entitled to sickness benefits under the UK legislation as the competent state under Article 11(3)(a) of Regulation (EC) No 883/2004;
 - In 2026, the spouse becomes inactive in the UK; the derived right to sickness benefits in kind from Lithuania will take priority over any independent right based on the residence in the UK;
3. An Estonian citizen works and habitually resides in Finland at the end of the transition period; his/her UK spouse habitually resides with their children in the UK and is working therein:
 - The spouse will have the independent right to sickness benefits in kind in the UK and the children have derived rights as family members in the UK based on Article 32 of Regulation (EC) No 883/2004;
 - In 2023 the spouse becomes inactive, both him/her and the children will have derived rights as family members from Finland;
 - In 2024 a child is born to the couple; this child will not have derived rights as family member based on the Agreement.

3.3.6. *Article 32(2): Changes of competence*

The first sentence of this Article ensures that persons who have been subject to the legislation of a Member State or of the UK before the end of the transition period and who, based on rules of Article 32(1)(a) of the Agreement, start receiving a social security benefit before or after the end of the transition period, will continue to be subject to the provisions of the Regulation (EC) No 883/2004 concerning sickness benefits. This means that, as a result of receiving a benefit under Article 32(1)(a), before or after the end of the transition period, the competence for sickness may change, but the relevant sickness rules will be applied by that competent Member State accordingly to the concerned persons.

Underpinned by a similar logic, the second sentence of this Article ensures that rules regarding family benefits under the Regulation (EC) No 883/2004 will also continue to apply where relevant to a person in a situation as described above.

A situation covered by Article 32(2) could be illustrated by the following example:

- A Danish non-active national residing in Denmark starts receiving a pension from the UK where he/she previously worked. The UK becomes competent for his/her sickness benefits. If he/she is entitled to family benefits, the conditions under the UK legislation will apply as regards family benefits for members of his/her family residing with him/her in Denmark.

See also further explanations on this Article in Section 3.3.1 above as the provision operates in conjunction with Article 32(1) of the Agreement.

3.4. **Article 33: Nationals of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and Switzerland**

According to Article 33, Title III of Part Two of the Agreement applies not only to UK nationals and EU citizens but also to citizens of Iceland, Liechtenstein, Norway and Switzerland, under the following two cumulative conditions:

- Iceland, Liechtenstein, Norway and Switzerland must have concluded and apply corresponding agreements with the UK which apply to EU citizens; and
- Iceland, Liechtenstein, Norway and Switzerland must have concluded and apply corresponding agreements with the Union which apply to UK nationals.

If those agreements enter into force, the Joint Committee is empowered to take a decision setting out the date from which this Article will apply.

The aim of this provision is to protect the rights of the citizens of Iceland, Liechtenstein, Norway and Switzerland as provided under Title III of the Agreement just as if these nationals were citizens of EU Member States, in situations where there is a triangular situation (e.g. an EU Member State, the UK, and, as applicable, Iceland, Liechtenstein, Norway or Switzerland). In the same vein, rights of UK nationals and EU citizens in such type of triangular situations should be protected.

The solution to the triangular situation is particularly relevant for the application of the aggregation principle as provided by Article 32(1)(a) of the Agreement.

For instance, a Norwegian citizen who:

- worked in Norway between 2005–2007;
- worked in France between 2007–2018;
- worked in the UK between 2018–2020;
- in 2021 claims benefits based on his/her previous periods of insurance,

would be covered by Article 33 of the Agreement (if the conditions for the application of that Article are met) and would thus be assimilated to an EU citizen or UK national covered by Article 30(1) of the Agreement.

For instance, an Icelandic citizen who:

- has worked for most part of his life in the UK;
- has worked for a short period in France;

- returns to Iceland before the end of the transition period when he/she is close to retirement age and remains inactive; and
- when reaching the retirement age (before or after the end of the transition period), makes a claim for old-age benefits,

the UK would aggregate past periods and grant him/her a UK pension. After receiving the UK pension, the concerned person has the right to receive the UK pension without any reduction (in application of the relevant provisions corresponding to the logic of Article 7 of Regulation (EC) No 883/2004) in Iceland or any other EU Member State or EEA State where he/she might habitually reside.

3.5. **Article 34 – Administrative cooperation**

In order to ensure the smooth implementation of the Agreement, the UK may participate, as an observer, in the meetings of the Administrative Commission for the coordination of social security systems, as well as in the meetings of bodies attached to it as referred to in Articles 73 and 74 of Regulation (EC) No 883/2004: i.e., the Technical Commission for data processing and the Audit Board.

Whenever items on the agenda relating to Title III of Part Two of the Agreement concern the UK, the Chair of the Administrative Commission, of the Technical Commission and of the Audit Board, respectively, will invite the UK, which will participate in an advisory capacity.

The UK will continue to take part in the Electronic Exchange of Social Security Information system in order to process the cases covered by the Agreement and will bear the related costs.

Both EU Member States and the UK are committed to reduce the administrative burden in the implementation of the Agreement. Therefore, Portable Documents issued before the end of the transition period will not automatically become invalid.

The basic principle is that these documents have just a declaratory nature. They do not, by themselves, create rights to the persons concerned. The rights themselves are created by the Agreement.

A distinction should be made between:

1. *Documents which refer to situations which are covered by the coordination rules referred to in the Agreement* (for instance, a Portable Document A1 expiring in 2021 for a person performing work simultaneously in the United Kingdom and France, a Portable Document S1 for a UK pensioner habitually residing in Spain)
 - These Portable Documents reflect rights which continue to exist, but on a different legal basis;
 - To avoid unjustified administrative burden, the documents remain valid for the whole period of validity (as long as they are not withdrawn); new Portable Documents will be issued based on the Agreement, once the previous ones expire, provided that the conditions for their issuance are met.
2. *Documents issued before the end of the transition period which refer to situations which are no longer covered by the Agreement* (for instance, the EHIC for persons in a purely internal situation at the end of the transition period, PDA1 for posted workers providing services)
 - These documents reflect rights which no longer exist; they cannot produce any legal effects after the end of the transition period, even if they are not withdrawn by the issuing institution.

Any doubts on the validity of a document will be clarified via the procedures set in Decision No A1 of 12 June 2009 of the Administrative Commission for the coordination of social security systems concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provisions of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council.

3.6. **Article 35: Reimbursement, recovery and offsetting**

The aim of this provision is to ensure that the rules regarding reimbursement, recovery and offsetting of Regulations (EC) No 883/2004 and (EC) No 987/2009 will continue to apply, even if the full coordination rules will no longer apply to a specific person.

This provision applies in relation to events which relate to persons not covered by Article 30 of the Agreement that occurred before the end of the transition period. It also covers events which occurred after the end of the transition period but which relate to persons who used to be covered, when the event occurred, by Article 30 of the Agreement or by Article 32 of the Agreement.

In particular, it applies to three categories of events:

- (a) events which occurred before the end of the transition period and relate to persons not covered by Article 30 of the Agreement. For instance:
 1. A Polish citizen, who has never been subject to the legislation of the UK before the end of the transition period, goes on holiday in November 2019. He/she receives sickness benefits in kind in the UK based on the EHIC and returns home before the end of the transition period:
 - (a) he/she may claim the reimbursement (if the case) for the sickness benefits in kind in Poland even after that date;
 - (b) if the reimbursement is requested in the UK but the procedure is not finalised before the end of the transition period, the reimbursement will still be processed under the relevant coordination rules.
- (b) events which occurred after the end of the transition period and relate to persons covered by Article 32 of the Agreement when the event occurred. For instance:
 2. A UK national worked in the UK and Sweden before the end of the transition period being subject to the UK legislation. He/she stops any activity in Sweden before that date. He/she is not in the scope of Article 30 of the Agreement, but it is discovered after the end of the transition period that he/she should have been in fact subject to the Swedish legislation. The provisions in Regulation (EC) No 883/2004 regarding the conciliation procedure under the Administrative Commission (in case Sweden and the UK disagree on competence) on reimbursement, recovery or offsetting, shall apply even after the end of the transition period.
 3. A Polish citizen habitually resident in Poland with past periods in the UK, retires after the end of the transition period. As the UK becomes competent for sickness benefits based on Article 32(2) of the Agreement, the reimbursement procedures between the UK and Poland will apply accordingly;
 4. A French citizen habitually resides in France and works in the UK as a frontier worker. Before the end of the transition period, he/she becomes unemployed and starts receiving French unemployment benefits. The corresponding procedures for reimbursement for unemployment benefits will continue to apply between France and the UK even after the end of the transition period;
 5. The same applies to persons who use the Portable Document S2, start a course of planned treatment before the end of the transition period which ends after the end of the transition period, on the basis of Article 32(1)(b) of the Agreement, for the respective treatment.
- (c) events which occurred after the end of the transition period and relate to persons covered by Article 30 of the Agreement when the event occurred. For instance:
 6. A Belgian citizen, who habitually resides in the UK and works in Belgium at the end of the transition period is covered by Article 30(1)(c). After 5 years, he/she moves residence to Belgium. Therefore, he/she is no longer covered by Article 30 and is not covered by Article 32 of the Agreement either, as he/she has no past periods in the UK:
 - (a) Belgium will continue to reimburse the UK for all the expenses related to sickness benefits in kind during the period of residence there;
 - (b) The UK will continue to apply the recovery procedure for sums which are due by that person in Belgium.

While in most of the cases the persons concerned might have past periods and are covered by Article 32 of the Agreement, this is not necessary in order to apply this provision.

The provision concerns 'events' which happened in a specific time frame. This is a broad term which covers for instance benefits in kind provided, benefits in cash paid, contributions paid, but as well contributions which were just due before the end of the transition period or the end of the application of the Regulations in the cases mentioned in Articles 30 and 32 of the Agreement.

On the basis of this provision, all procedures related to the Audit Board will continue to apply including the reimbursement based on fixed amounts.

3.7. **Article 36 – Development of law and adaptations of Union acts**

The Agreement ensures the application of Regulations (EC) No 883/2004 and (EC) No 987/2009 as amended or replaced by Regulations adopted after the end of the transition and listed in Annex I to the Agreement.

Article 36 of the Agreement sets out an update mechanism in respect of amendments to these Regulations at European Union level after the end of the transition period.

As a rule, the update is automatically done by the Joint Committee. Limited exceptions are provided under Article 36(2)(a)–(c) of the Agreement. These concern the following situations:

1. adding a new social security branch or deleting an existing one in Article 3 of Regulation (EC) No 883/2004;
2. making a cash benefit exportable under that Regulation, non-exportable or a non-exportable one, exportable; for instance:
 - amending that Regulation so that the special non-contributory cash benefits become exportable;
 - amending that Regulation so that family benefits are no longer exportable;
3. making a cash benefit exportable for a limited period of time, exportable for an unlimited period of time or *vice versa*. For instance, deciding that unemployment benefits are to be exported for an unlimited period of time.

When such amendments are decided at EU level, the Joint Committee will assess these amendments and the scale of changes. Both the UK and the EU Member States are strongly committed to ensuring the continued good functioning of the social security coordination rules for the persons covered by the Agreement.

The Joint Committee will also, in this context, consider in good faith the need to ensure an effective coverage for the persons concerned especially when the changes in the exportability of a benefit are determined by a change in determining the competent State, be it an EU Member State or the UK.

4. TITLE IV – OTHER PROVISIONS

4.1. **Article 37 – Publicity**

This provision is modelled on Article 34 of Directive 2004/38/EC.

It imposes an obligation on EU Member States and the UK. It does not impose any obligation on others, such as on employers, the European Commission or the Joint Committee.

4.2. **Article 38 – More favourable provisions**

4.2.1. *Effects of applying more favourable treatment*

It is for each State to decide whether it will adopt domestic laws, regulations or administrative provisions that are more favourable to the beneficiaries of the Agreement than those laid down in the Agreement.

4.2.2. *More favourable treatment and coordination of social security schemes*

Article 38(1) provides that Part Two of the Agreement does not affect any laws, regulations or administrative provisions that would be more favourable to the persons concerned. This provision does not apply to Title III on coordination of social security systems, other than what Regulations (EC) No 883/2004 and (EC) No 987/2009 allow, given the specificity of these rules whereby persons are subject to the social security scheme of only one EU Member State, in order to prevent the complications which could result from overlapping of applicable provisions.

Article 38(2) acknowledges that the provisions in Part Two of the Agreement on the prohibition of discrimination on grounds of nationality (Article 12) and the right to equal treatment (Article 23(1)) will be without prejudice to the Common Travel Area arrangements between Ireland and the UK (referred to in Article 3 of the Protocol on Ireland/Northern Ireland to the Agreement) as regards more favourable treatment which may result from these arrangements for the persons concerned.

4.3. **Article 39 – Life-long protection**

4.3.1. *Life-long protection and its interaction with different Titles*

Article 39 provides for an important safeguard that the rights under the Agreement do not have ‘an expiry date’.

Beneficiaries of the new residence status under Title II of Part Two of the Agreement will retain their residence status – and all connected rights – for as long as they meet the conditions Title II attaches to the right of residence (*to the extent it attaches any conditions*).

Beneficiaries of rights under Title III of Part Two of the Agreement will retain their rights for as long as they meet the conditions Title III requires.

Article 39 clarifies that the rights stemming from different Titles may be disconnected – rights under Title III are not necessarily lost when the residence status under Title II is lost, for example.

It should also be highlighted that some provisions of Part Two of the Agreement do not require that their beneficiaries continue to meet any conditions – for example, a recognition decision made under Chapter 3 of Title II of Part Two of the Agreement before the end of the transition period remains valid.

4.4. **Useful links**

Consolidated versions of legislative instruments of Union law can be downloaded in English at the EUR-LEX website of the Commission.

The Treaty on European Union:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF>

The Treaty on the Functioning of the European Union:

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>

Directive 2004/38/EC:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1523871765223&uri=CELEX:02004L0038-20110616>

Regulation (EU) No 492/2011:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1523864845084&uri=CELEX:02011R0492-20160512>

Regulation (EC) No 883/2004:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1579691198448&uri=CELEX:02004R0883-20190731>

Regulation (EC) No 987/2009:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1579691236860&uri=CELEX:02009R0987-20180101>

Selected Communications from the Commission

Free movement of workers – achieving the full benefits and potential (*COM(2002) 694 final*)

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1525420348454&uri=CELEX:52002DC0694>

Guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State (*COM(2009) 313 final*)

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1525421270630&uri=CELEX:52009DC0313>

Reaffirming the free movement of workers: rights and major developments (*COM(2010) 373 final*)

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1525420568284&uri=CELEX:52010DC0373>

Free movement of EU citizens and their families: Five actions to make a difference (*COM(2013) 837 final*)

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1525420823976&uri=CELEX:52013DC0837>

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