

To: Michael Gove, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office
Maroš Šefčovič, Vice-President of the European Commission
Philippe Bertrand, EU Commission Task Force for Relations with the UK
Giles Portman, Deputy Director EU Exit – External and Security

Dear Mr Gove, Mr Šefčovič, Mr Bertrand and Mr Portman,

We write jointly as the3million and British in Europe ahead of the first meeting of the special sub-committee of the Joint Committee on citizens' rights on 20 May.

After more than two years of negotiations we were relieved that the EU and the UK were able to agree a Withdrawal Agreement and, in particular, the chapter on citizens' rights before the UK's departure from the EU in January. The EU and the UK now face the task of implementing that agreement and securing the WA rights of five million EU citizens who have or will have exercised freedom of movement before the end of the transition period.

We welcome the publication of the Guidance Note on implementation of the citizens' rights chapter last week and will be sending separate comments on that in due course. One key point of clarification for now is the legal status of this document. We note that the introduction states:

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.

More information on this would be appreciated.

We are conscious that the implementation of the agreement is taking place in the extremely challenging and unprecedented context of the global COVID-19 pandemic and that it is impacting every part of government in the UK and EU countries. It is also impacting every part of our lives and, potentially, our ability to secure our rights under the agreement.

We must all, therefore, get implementation right in the short time we have available before the end of the transition and grace periods. In that spirit of cooperation, our two organisations are very pleased to see the committee starting its work. We were also happy to receive the positive responses from Commissioner Šefčovič and Minister Morton to our request to participate as observers in the work of the committee.

For now, we wish to bring to your attention a number of specific concerns. While some issues are specific to the citizens on one side of the Channel or the other, many apply to all five million of us. We have detailed these issues in the Annex to this letter, and summarise them here below.

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We anticipate that other issues will arise as implementation is rolled out and we look forward to engaging with you further and proactively throughout the duration of the implementation process.

Yours sincerely,

Fiona Godfrey
British in Europe

Dimitri Scarlato
the3million

Annex 1. Withdrawal Agreement implementation

1.1 Issues specific to British citizens in the EU

1.1.1 Implementation timeline across Member States

We are primarily concerned about the state of play of implementation in the member states, although we understand the reasons behind this. There is an ever shortening window of time and we are concerned about the knock-on effects of COVID-19 on an already tight timetable. Very few countries appear to have final or even draft legislation in place. We need clarification regarding timelines and procedures in all EU26 states but particularly in the constitutive countries as soon as possible.

1.1.2 Interaction of Withdrawal agreement rights and Third Country National rights

We welcomed the publication of the guidance document on implementation last week. However, there is one glaring omission with regard to UK nationals in the EU: The guidance is silent on the **interaction and intersection of rights held by British citizens in the EU under the WA and as ordinary third country nationals living in the EU**. It appears that UK nationals falling within the scope of the WA may in fact have fewer mobility rights than all other third country nationals who currently enjoy EU long term residence status in the EU.

As former EU citizens and rights holders, and now also TCNs, we need clarification on this point as both the WA and the guidance document provide none. The loss of freedom of movement has the capacity to significantly impact the ability of UK citizens to continue to live and work in their host member states, particularly in a post-pandemic economy. To further deny us the rights enjoyed by all other TCNs with EU long term residence would be discriminatory. We raised this point on numerous occasions with the A50 Task Force and DG Home throughout the WA negotiations and were led to believe that we would enjoy mobility rights as TCNs. Accordingly, we ask the special committee to urgently address this issue and to confirm the extent of our mobility rights and how our rights under the WA can or cannot be combined with third country national statuses such as EU long term residence or the EU Blue Card.

1.2 Issues specific to EU citizens in the UK

1.2.1 Restrictions to Status under the EU Settlement Scheme

Under the UK's EU Settlement Scheme [EUSS], a residence status (pre-settled status or settled status) under Article 18(1) is given to anyone who can demonstrate residence, regardless of testing of eligibility criteria under the Citizens' Rights Directive 2004/38/EC (CRD). the3million have previously written to the Joint Committee in relation to this matter and understand that the European Commission, in their recent guidance note, confirms that the rights and entitlements flow from the grant of status when the article 18(1) procedure is adopted.

However, as set out in the 3million's correspondence, the UK has introduced barriers to those who have acquired rights via the article 18(1) procedure. For example, when people with pre-settled status attempt to apply for **social assistance**, their status does not provide them the entitlement to access support and help. EU citizens face destitution and homelessness despite having entitlements to support and social assistance under the Withdrawal Agreement. The UK's position is to say that they can conduct further tests at the point of use of social assistance services and deny them to those that don't satisfy the usual Article 24 CRD criteria. This appears to contradict a straightforward reading of the Withdrawal Agreement. We are concerned that this approach to the rights of EU citizens in the UK is not in accordance with the terms of 'good spirit' set out in the Withdrawal Agreement.

1.2.2 Comprehensive Sickness Insurance ('CSI') and access to the NHS

In its application of EU law, the UK continues to not recognise access to the NHS as equivalent to CSI. The European Commission has an outstanding infringement proceedings on this issue. Despite the EU Settlement Scheme not requiring proof of CSI, the issue continues to be a problem for those wishing to demonstrate a historical period of exercising rights inside the UK for the purposes of other applications to the Home Office including naturalisation. Much has been written on CSI in the UK and whether access to the National Health Service should be considered as satisfying the CSI requirement, not least the 2012 EU Infringement proceedings against the UK¹. In summary however, citizens who were never asked for CSI in practice in their daily lives in order to access any healthcare in the UK, only found out about the requirement at the point of contact with the Home Office, in many cases after many years of lawful residence in the UK.

1.2.3 EU Settlement Scheme status updates by new identity documents

Status under the EU Settlement Scheme is linked to a status holder's specific passport or identity card. When someone renews their passport or identity card, they are obliged to inform the Home Office so that the EU Settlement Scheme status can be updated.

The process of updating the status is problematic. When first applying for the status, many can make use of the digital app which scans the identity document. However, when updating the status with a new identity document, people are required to send their new passport or identity card to the Home Office through the post.

Although the identity documents are generally returned in a timely fashion, the actual update of the status with the new identity document details is taking months to complete.

Once people require proof of their status in the UK's 'hostile environment', this will leave thousands of people in a difficult situation as they will be unable to access or prove their status with their new identity document while the update is pending.

Citizens should instead be able to update their status using the same smartphone scanning technology as when first applying for status. We have concerns whether this is a 'smooth' and 'simple' process envisioned by article 18(1)(e) of the Withdrawal Agreement.

¹ https://www.europarl.europa.eu/doceo/document/P-8-2017-003659_EN.html

1.3 Issues related to both groups of citizens

1.3.1 Impact of COVID-19

Millions of EU citizens and residents are already suffering from the economic fallout of the pandemic and EU citizens in the UK and UK citizens in the EU are no different. Both groups are losing jobs and UK citizens face the additional problem of being unable to travel to take up work due to the lockdowns. This could have serious ramifications for those British citizens who don't have permanent residence and who have to reapply for their status and meet economic conditions, such as the genuine and effective work test.

British in Europe have received sporadic reports that UK citizens in the EU are not applying for COVID-19 related benefits because they do not want to prejudice WA applications.

We are also very concerned about the impact of COVID-19 on young British nationals who are having job offers (especially internships and post-graduate entry level) withdrawn leaving them vulnerable and unable to apply for status, or possibly to exercise FoM before the end of the transition period. We know this is an issue for all young EU citizens but the loss of FoM will have an even more acute impact on young British students, workers and job seekers, some of whom may have spent their whole lives living in an EU member state without acquiring citizenship for a variety of complex reasons. We would ask for flexibility and a generous approach from all member states.

There is a specific concern about qualifying 'continuous residence' (WA Article 15(2)) being broken by involuntary absences which were due to the impact of COVID-19. For EU citizens in the UK, the UK Government has hinted that it may be flexible about its treatment of absences where these absences were due to the impact of COVID-19. However, to date there has been no clarity or change of the Home Office's Immigration Rules or guidance.

1.3.2 Application deadline of constitutive application schemes

British citizens in the EU

As mentioned above, we are primarily concerned about the lack of implementation in the member states, particularly in the Article 18 (1) countries. We understand that some countries are not intending to start taking applications until the autumn or even January 2021 and we have real concerns that thousands of UK citizens will not be able to apply in time and will lose their status as of 30 June 2021.

EU citizens in the UK

the3million remains highly concerned about the cliff-edge deadline of 30 June 2021. Any eligible citizens who have not applied for status under the EUSS by then will lose their lawful status in the UK. The Government has indicated that the 'reasonable grounds' late applications will need to satisfy include physical or mental incapacity, or children whose parents fail to apply on their behalf². This mirrors the 'reasonable grounds' criteria established in other parts of UK immigration rules which is very restrictive. Applying the reasoning of these

² <https://uk.reuters.com/article/uk-britain-eu-immigration/eu-citizens-warned-over-missing-brexit-residency-deadline-idUKKBN1XOORH>

examples, someone who was unaware of the scheme and/or the need to apply would be unable to acquire the status they are entitled to and remain an unlawful resident of the UK.

In any case even if someone is allowed to apply after the deadline, their intervening residence between the date of deadline and the date of their grant of status will still be considered unlawful. The implications of this are significant should someone be charged for NHS treatment in that period.³

1.3.3 Documents evidencing proof of status under the Withdrawal Agreement

EU citizens in the UK

The UK Government is refusing to grant physical documents to EU citizens as proof of their status under the EU Settlement Scheme, instead insisting that the EUSS status will be digital-only for EU citizens. Physical proof of status is given however to non-EU family members granted status under the EUSS.

This is despite repeated requests from the3million, and a House of Lords defeat of the Government over the issue in January 2020⁴. In the largest survey of EU citizens about the EUSS to date⁵, over 89% of respondents stated they were unhappy about the lack of physical documents.

Whilst we appreciate it is within the scope of the Withdrawal Agreement for parties to decide on a physical or digital format, the unique circumstances of the UK and the hostile environment measures require the issuing of physical documents. People stand to lose opportunities, homes and livelihoods because of the current system and a digital-only system will only compound the issue. The3million has written detailed briefings on this issue - focusing on both the need for physical documents as proof of status⁶, and the rejection of a digital-only status⁷.

British citizens in the EU

The Commission decision on the WA residence card does not oblige member states to distinguish between UK nationals who have acquired permanent residence in their host state and those who have not. We are concerned that some British citizens in the EU will be unable to prove they have access to their full set of rights under the WA and this needs to be remedied by the Commission or through a decision of the joint committee.

British in Europe's arguments were set out more fully in its emails to the Commission of 4 March and 19 May on the Commission Implementing Decision on the WA residence card.

The Implementing Decision creates significant problems by not requiring the prescribed EU-wide residence card to state clearly that the holder has the right of permanent residence where this is the case. The form which evidence of rights under the WA takes is clearly crucial to that planning and vital for the citizens affected. This issue is not dealt with in the Guidance Note to the WA recently issued by the Commission.

³ See this example of someone deemed not to have status while receiving NHS treatment:

<https://www.theguardian.com/uk-news/2020/may/18/british-army-veteran-faces-27000-nhs-hospital-bill>

⁴ <https://www.bbc.co.uk/news/uk-politics-51184051>

⁵ <http://www.t3m.org.uk/SettledStatusSurvey>

⁶ <http://t3m.org.uk/PhysicalDocuments>

⁷ <http://t3m.org.uk/DigitalOnlyStatus>

We understand that permanent residence status where acquired can be clearly stated in Field 12 of the Annex to Reg. (EC) 1030/2002 and we would ask the Member States to confirm that they will all take advantage of that opportunity.

This is not a merely academic point. We are aware of declaratory member states who are not intending to distinguish between permanent and non-permanent residence in the cards which they will issue pursuant to Art. 18(4) and the Implementing Decision.

In Member States which decide not to issue a permanent residence certificate or card there will be no public record to which officials may refer if they need to know whether for example, someone who wants to return to their host country after a year's absence has the right to do so, or whether in certain states someone who is not economically active will have to have private health insurance where that is not a requirement for nationals. It follows that for years to come those who, as a matter of right, have permanent residence can be required by any number of officials to produce complex documentation to prove that they have at some point, possibly well in the past^[3], completed the necessary 5 years continuous legal residence. And if they cannot do so, they may be treated as if they never had it.

1.3.4 Extension of the Grace Period - Article 18(1)(c)

The UK and member states of the EU (who have adopted a constitutive system) have yet to confirm what procedures are in place to monitor when to engage the article 18(1)(c) procedure. Once the Grace Period ends, those that have yet to apply will have no legal basis to be in the UK/respective EU country. We note the Commission's observations about adopting different parts of the agreement to provide a safety net by adopting other elements of the Withdrawal Agreement (adaption to 'reasonable grounds' for applying late and the 'good faith' provisions). We request that all parties clarify their procedures for assessments on extending the grace period as soon as possible. This is in the interests of a smooth transition and ensuring all those eligible for status under the Withdrawal Agreement get what they are entitled to.

1.3.5 Issues of implementation and application procedure - Article 18(1) obligations

the3million continue to receive complaints of people having difficulties with lodging applications to the EUSS and receiving timely decisions. Most of these case types involve people with complex needs (digital literacy, document issues, ability to manage application process) and/or complex applications (derivative rights, extended family members, etc.). The current Covid-19 crisis has exacerbated these problems with closures of applications process and support services. These issues and concerns are mirrored for those British in Europe.

the3million have had reports of delays in decision making but also the issuance of Certificates of Application. Article 18(1)(b) requires that these be issued immediately at the point of application. We have received reports of delay of receipt for days and in some cases up to weeks/months until they have been issued. The certificates will be crucial for those with outstanding applications beyond the grace period to demonstrate their rights pending a decision.

The conditions for lawful residence both under the EU law which applies during the transition period and under the WA include, for those who have not yet acquired, or had confirmed, permanent residence, requirements to be employed/self-employed, or economically self-sufficient with comprehensive health insurance. These

conditions are applied strictly in many EU countries. The lockdown restrictions of the COVID-19 crisis have caused many to lose their jobs, businesses, or much of their income and there will be others unable to obtain comprehensive health insurance because of exclusions. Students studying abroad and recent graduates are at particular risk. The UK and EU Member States should adopt and publicise now a flexible and understanding approach to applications by such people in their countries. In particular, fear of being unable to comply with these rules should not deter anybody from seeking benefits necessary to feed their families.

We would hope that the Member States who have not applied the conditions under Directive 2004/38 EC as strictly as they could have up until now would not choose this moment in time to apply them more strictly to UK beneficiaries of the WA than to EU citizens.

1.3.6 Status of UK children in care in the EU and others

We do not have data on the numbers of UK children in care in the EU. We also don't have information on who will be responsible for ensuring that children in care are registered in the constitutive countries or receive evidence of their status in declaratory countries. The potential for children and teenagers to slip through the net is relatively high and could have lasting consequences that they are unable to remedy later on. Member States need to issue guidance on this point to the relevant authorities.

We continue to be concerned about the most vulnerable - in particular children in care, those with mental illness (such as dementia) and victims of trafficking / domestic violence. Whilst the UK government has published guidance in some areas for how local authorities are to help children in care in particular, we have seen no substantive guidance relating to those other key groups of vulnerability especially those who may be occupants of care homes and other support facilities. In the UK, the Children's Society have stated that only 11% of the estimated 9k eligible children in/leaving care have secured EUSS status.⁸

The most vulnerable stand to lose the most and the picture emerging is very concerning. We wish to understand what the parties will do, beyond provision of support with applications, to ensure that those most vulnerable are able to access their rights.

1.3.7 Transparency and Data Protection issue

EU citizens in the UK

the3million has a number of concerns surrounding the EUSS as regards transparency and data protection.

When citizens apply to the scheme, they have no choice but to accept a Privacy Notice⁹ which informs that the applicant's data can be shared with any number of public, private or charity organisations in the UK or abroad. A Freedom of Information Act request¹⁰ to disclose these organisations was refused, claiming to do so was against the public interest, and that *"the disclosure of such information will make the application system vulnerable to malicious attacks and hamper our ability to effectively operate immigration control."* Coupled with the fact that

⁸ <https://twitter.com/RAMPproject/status/1262743595401932802>

⁹ <https://www.gov.uk/guidance/eu-settlement-scheme-how-we-use-your-personal-information>

¹⁰ https://www.whatdotheyknow.com/request/settled_status_app_data_privacy#incoming-1285781

the Data Protection Act 2018 includes an ‘immigration exemption’¹¹, it is no surprise that a very significant minority of EU citizens are unwilling to apply to the scheme. In the largest survey¹² of EU citizens on the EUSS to date, over 35% of those who had not yet applied to the scheme gave as their reason that they had concerns over data protection.

There are many limitations on the statistical reporting on the EUSS, which we detail in [a separate document](#)¹³ alongside this letter. In summary, the UK does not know how many eligible citizens there are in the UK, and therefore the performance of the EUSS cannot be meaningfully assessed. The statistics report *applications* rather than *applicants*, and these contain double-counted *re-applications*. Finally, data fundamental for monitoring equalities impacts is not being disclosed even though it is collected.

Taken from the above and separate document in the round, we have concerns that this is not in compliance with or in the spirit of the Withdrawal Agreement, in particular Article 18(1)(e) which specifically sets out the need for transparency.

British citizens in the EU

As the majority of EU member states have not yet started the registration/application process British in Europe has no information on data sharing and security but we would welcome assurances on this issue from the Commission and member states.

We would also like confirmation that the Member States will keep details of successful and rejected applications and all relevant grounds for each rejection. We call on the member states to share this data with the Commission and Eurostat and to publish it on a quarterly basis throughout the implementation period until the end of 2021.

1.3.8 Dual EU/UK nationals evidencing their rights under the Withdrawal Agreement

The WA Guidance Note clarified that dual UK-EU nationals are covered by the WA but it doesn’t provide advice as to how dual nationals evidence that right and status. The Commission, UK and the Member States therefore need to define a process for us to obtain *appropriate* documentary evidence that we have rights as dual nationals under the WA, given our citizenship of either the host state or another EU country, and our continuing EU citizenship, and we would appreciate information on how this could be satisfactorily achieved.

¹¹ <https://www.openrightsgroup.org/press/releases/2019/open-rights-group-and-the3million-seek-to-appeal-immigration-exemption-judgment>

¹² <http://www.t3m.org.uk/SettledStatusSurvey>

¹³ <http://www.t3m.org.uk/EUSSReporting>

Annex 2 Ancillary issues directly related to the Withdrawal Agreement

2.1 Return to country of origin after transition, accompanied by family members

The Guidance states in section 1.2.2.3 that the right to family reunification for returning citizens falls out of scope of the Agreement, and that this equally affects EU citizens returning to their EU Member State of origin and UK citizens returning to the UK after Brexit.

However, this is incorrect and in fact only affects UK citizens returning to the UK.

EU citizens currently living in the UK are able to return to their Member State in future, with their British and other non-EU family members, using existing Surinder Singh rights. The Netherlands is the Member State that interprets Singh in the strictest way, and they have explicitly stated¹⁴ that Dutch citizens can return to the Netherlands with British and other non-EU family members at any time after Brexit.

Therefore, despite this issue being considered as 'out of scope' during the negotiations, we urge you to reconsider and to ensure that UK citizens living in the EU can return to the UK after Brexit with their non-British family members.

2.2 Travel and visa requirements for non-EU family members of EU and British citizens

The EU Commission confirmed¹⁵ to the3million that after the end of the transition period, non-EU family members of EU citizens living in the UK, who have visa-required nationalities, will no longer be visa exempt when travelling to the EU even when accompanying their EU family member. It is likely that the same will apply to non-EU family members of British citizens living in the EU. We would ask that both parties might consider to recognise the physical documents issued under the terms of the Withdrawal Agreement in the same way as the EEA Family Cards are currently still recognised. We have written¹⁶ to members of the European Parliament on this issue, but would appreciate this being discussed at the Citizens' Rights Specialised Committee.

¹⁴ <https://www.rijksoverheid.nl/onderwerpen/brexit/vraag-en-antwoord/britse-partner-meenemen-naar-nederland-na-brexit>

¹⁵ http://t3m.org.uk/EC_reply_t3m_TravelToEU

¹⁶ http://t3m.org.uk/non_EU_familymembers_travelrights