

## WITHDRAWAL AGREEMENT: ARTICLE 18(1) VERSUS 18(4)

The Withdrawal Agreement (WA)<sup>1</sup> as endorsed by the European Council on 25<sup>th</sup> November 2018 provides the relevant host country with two alternative options as regards how citizens protected under the agreement will be able to secure their rights:

- a) The **declaratory system under Article 18(4)** of the draft WA, which corresponds to the current system in place under Directive 38/2004 and in accordance with EU law for the registration and confirmation of the primary right of free movement derived from the EU Treaty. The structure set up would thus mirror that under the Directive and EU law: the primary right would derive from the WA and simply be confirmed or “declared” through a registration system under Article 18(4) WA. In many Member States UK citizens are already required to be, and are, registered under this system.
- b) The **constitutive system under Article 18(1)**, which is not in line with the current system under Directive 38/2004. This would introduce a requirement to apply for a new status evidencing the rights provided for under the WA and would be subject to conditions that are not in accordance with current EU law e.g. systematic criminal checks. In addition, applications under the constitutive system could of course be rejected and, in the event of failing to apply, a citizen could be an illegal resident in the relevant country.

### What are the differences in how the constitutive and declaratory systems will apply in practice?

**Country Y chooses to apply the declaratory system.** Mary has lived for many years in Country Y and, now in her 80s, lives in sheltered accommodation and has mobility problems. She does not have any children and her husband died recently. Post Brexit, she misses the deadline to register as resident under new rules implemented under the Withdrawal Agreement in Country Y. Soon afterwards, she becomes aware that she needs to do this. She approaches the town hall with the help of her part-time professional carer and they help her to obtain her status and permanent residence under the new system.

**Country Y chooses to apply the constitutive system.** In the same scenario, Mary, having failed to apply for the new status implemented under the Withdrawal Agreement in time, is an illegal resident and faces deportation from Country Y, with her only possibility of appeal being from abroad.

We are concerned that there is some confusion as regards both the rights or status that would be derived from the WA and these two systems for securing the rights or status.

1. **The status.** While UK citizens in the EU will become third country nationals on 30 March 2019, their rights and status will not be pure third country national status. They will, as part of the protected group under the WA, have a hybrid status, and will keep many of the rights in their host country that they had as EU citizens. It is therefore not appropriate to issue them with the same residence cards or status as other third country nationals, since this risks creating confusion at local and regional level as to what their rights and status are. For example, the permanent residence rights that they will acquire after five years are **not** the same as those under Directive 109/2003 on long term residence for third country nationals (those under the WA are significantly better) and thus a clear distinction needs to be drawn.
2. **The system.** As regards the choice of system, it is not necessary to implement a constitutive system in line with the UK’s proposed settled status in order to provide for a system of compulsory registration or for a

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<sup>1</sup> <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration>

residence document providing proof of status. Both are possible under the current declaratory system in accordance with EU law under Article 8(2) of Directive 38/2004 if the relevant country wishes to implement such a system.

3. **The declaratory system itself.** We are concerned that there is some confusion about what this system is:
- The declaratory system is simply the current system under EU law.
  - For the avoidance of doubt, declaratory does not mean that it is optional for the citizen to declare his/her presence in the country of residence: it simply refers to the fact that the rights that the citizen has derive from the treaty and thus any registration system is merely 'declaratory' of those rights.
  - As explained above, the current declaratory system under Directive 38/2004 and in line with EU law allows an EU Member State to implement a compulsory registration system if it chooses and to provide for a residence document on such registration within three months of arrival in the host state (Article 8(2) Directive 38/2004).

In these circumstances, quite apart from the problems created for people like Mary, it is difficult to see what advantage the constitutive system brings to the host country, particularly those which already require registration. Doing so requires them to institute a new system different to those for EU citizens and TCNs, which has to be programmed, staff have to be trained and everyone who is already registered has to be re-registered. Given the small British populations in many countries, it seems a strange way to spend public resources.