SEPARATION AGREEMENT JOINT COMMITTEE

ANNUAL REPORT FOR THE YEAR 2021

Report from the Secretariat to the Joint Committee on the functioning of the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union (The Separation Agreement)
for the calendar year 2021

INTRODUCTION

1. The Separation Agreement established a Joint Committee (Article 65) to supervise and facilitate the implementation and application of the Agreement. The Separation Agreement requires the Joint Committee to issue an annual report, drawn up by the Secretariat, each calendar year. This report is provided pursuant to Article 65(6).

2. The Secretariat to the Joint Committee operates under the authority of the rotating Joint Committee Chair to perform the tasks conferred on it, as outlined in the Rules of Procedure of the Joint Committee. The Secretariat is composed of officials from Her Majesty's Government of the United Kingdom and the EFTA Secretariat.

3. The Separation Agreement requires the Joint Committee to meet at least once a year after the end of the transition period as defined in Article 2(h). In 2021, the Joint Committee met once, on 27 May 2021. The meeting was chaired by an official of the Government of Iceland. Although not covered by this report, it is noted that the Joint Committee also met once before the end of the transition period, on 18 December 2020. That meeting was chaired by a representative of Her Majesty's Government of the United Kingdom.

4. This report provides an overview of Separation Agreement activity from the end of the transition period, on 31 December 2020, until 31 December 2021.

5. The report contains three annexes:

   (A) The full text of the Joint Committee Decision adopted in 2021;

   (B) The Joint Statement issued by the Parties following the meeting of the Joint Committee in 2021; and

   (C) Reports by the Independent Monitoring Authority and the EFTA Surveillance Authority, respectively, issued pursuant to Article 64(3) of the Separation Agreement.

SEPARATION AGREEMENT JOINT COMMITTEE ACTIVITY IN 2021

6. The Joint Committee met on 27 May 2021. Iceland chaired the meeting. Given constraints due to movement restrictions caused by the COVID-19 pandemic, the meeting was held by video conference.

7. At the meeting, representatives from Iceland, Norway, Liechtenstein and the United Kingdom gave updates on their implementation and application of the Separation Agreement, with a particular emphasis on the provisions relating to citizens' rights. Both the EEA EFTA States and the United Kingdom agreed that implementation of the Agreement was going well and that citizens' rights remain a priority.

8. Representatives of the Independent Monitoring Authority and the EFTA Surveillance Authority also attended, presenting information on the monitoring of the implementation and application of the Separation Agreement.

9. The Joint Committee adopted one Decision (No 1/2021), amending Part I of Annex I to the Separation Agreement. The amendment was adopted pursuant to Article 34(3) of the Separation Agreement to reflect any new Decision or Recommendation which has been adopted by the Administrative Commission for the Coordination of Social Security Systems ("Administrative Commission") and which has been incorporated into and is in force under the EEA Agreement.

10. The EEA EFTA States and the United Kingdom noted at the meeting that they shared the objective of ensuring the continued correct implementation and application of the Separation Agreement, to provide certainty to citizens. A Joint Statement to this effect was issued by the Parties following the meeting of the Joint Committee.

CONCLUSION

11. The Joint Committee's actions and Decision during 2021 provide a solid foundation for ongoing cooperation between the EEA EFTA States and the United Kingdom and the continued proper implementation of the Separation Agreement.

Signed in London, 8 June 2022

For the Joint Committee

The Chair

Pascal Schafhauser

Ambassador, Mission of Liechtenstein to the EU

ANNEX A – DECISION NO 1/2021 OF THE JOINT COMMITTEE

Decision No 1/2021 of the Joint Committee established by the Separation Agreement

of 27 May 2021

amending Part I of Annex I to the Separation Agreement

THE JOINT COMMITTEE,

Having regard to the Separation Agreement[1], and in particular Article 34(3) thereof,

Whereas:

(1) Pursuant to Article 34(3) of the Separation Agreement, the Joint Committee shall amend Part I of Annex I to reflect any new Decision or Recommendation which has been adopted by the Administrative Commission for the Coordination of Social Security Systems ("Administrative Commission") and has been incorporated into and is in force under the EEA Agreement.

(2) The Administrative Commission has adopted four Decisions which have been incorporated into and are in force under the EEA Agreement, and which are not listed in Part I of Annex I to the Separation Agreement. Furthermore, two Decisions of the Administrative Commission that are listed in Part I of Annex I to the Separation Agreement are no longer in force.

(3) Part I of Annex I to the Separation Agreement should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Part I of Annex I to the Separation Agreement shall be amended as follows:

1. The following decisions are added in Part I of Annex I to the Separation Agreement:

   (a) Under Electronic Data Exchange (E series):

   - 'Decision No E5 of 16 March 2017 concerning the practical arrangements for the transitional period for the data exchange via electronic means referred to in Article 4 of Regulation (EC) No 987/2009 (OJ C 233, 19.7.2017, p. 3)[2];

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[1] Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union of 28 January 2020.

[2] Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 162/2019 of 14 June 2019.

- Decision No E7 of 27 June 2019 concerning practical arrangements for cooperation and data exchange until the Electronic Exchange of Social Security Information (EESSI) is fully implemented in Member States (OJ C 73, 6.3.2020, p. 5)[3];'

(b) Under Family benefits (F series):

- 'Decision No F3 of 19 December 2018 concerning the interpretation of Article 68 of Regulation (EC) No 883/2004 relating to the method for the calculation of the differential supplement (OJ C 215, 26.6.2019, p. 2)[4];'

(c) Under Horizontal issues (H series):

- 'Decision No H8 of 17 December 2015 (updated with minor technical clarifications on 9 March 2016) concerning the methods of operation and the composition of the Technical Commission for Data Processing of the Administrative Commission for the Coordination of Social Security Systems (OJ C 263, 20.7.2016, p. 3)[5];'

2. The following decisions are deleted from Part I of Annex I to the Separation Agreement:

(a) Under Electronic Data Exchange (E series):

- Decision E1 of 12 June 2009 concerning the practical arrangements for the transitional period for the data exchange via electronic means referred to in Article 4 of Regulation (EC) No 987/2009 of the European Parliament and of the Council (OJ C 106, 24.4.2010, p. 9)[6],

(b) Under Horizontal issues (H series):

- Decision No H2 of 12 June 2009 concerning the methods of operation and the composition of the Technical Commission for data processing of the Administrative Commission for the coordination of social security systems (OJ C 106, 24.4.2010, p. 17)[7].

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3 Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 43/2021 of 5 February 2021.

4 Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 208/2020 of 11 December 2020.

5 Incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 77/2019 of 29 March 2019.

6 Repealed under the EEA Agreement by Decision of the EEA Joint Committee No 162/2019 of 14 June 2019.

7 Repealed under the EEA Agreement by Decision of the EEA Joint Committee No 77/2019 of 29 March 2019.

Article 2

This Decision shall enter into force on the day of its adoption. In relation to Liechtenstein, this Decision shall enter into force on the first day of the second month following its notification to the Depository that its domestic legal requirements have been fulfilled.

Done at Reykjavik, 27 May 2021

For the Joint Committee

The Chair

Nikulás Hannigan

Director General for External Trade and Economic Affairs

ANNEX B – JOINT STATEMENT OF 27 MAY 2021

JOINT STATEMENT FOLLOWING THE SECOND MEETING OF THE SEPARATION AGREEMENT JOINT COMMITTEE BETWEEN THE UNITED KINGDOM AND THE EEA EFTA STATES

The second meeting of the Separation Agreement Joint Committee was held today, chaired by officials from the Government of Iceland, with representatives from the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom (UK) in attendance. The Committee has been established by the Separation Agreement to monitor its implementation and application, for EEA EFTA nationals in the UK, and UK nationals in the EEA EFTA States.

At the meeting, representatives from Iceland, Norway, Liechtenstein and the UK gave updates on their implementation and application of the Separation Agreement, with a particular emphasis on the provisions relating to citizens' rights. Representatives of the EFTA Surveillance Authority and the Independent Monitoring Authority also attended, presenting information on the monitoring of the implementation and application of the Separation Agreement.

The EEA EFTA States and the UK also adopted a Decision amending Part I of Annex I to the Separation Agreement, in order to include recent relevant Decisions of the Administrative Commission for the Coordination of Social Security Systems.

The EEA EFTA States and the UK share the objective of ensuring the continued correct implementation and application of the Separation Agreement, to provide certainty to citizens.

ANNEX C – REPORTS BY THE INDEPENDENT MONITORING AUTHORITY AND THE EFTA SURVEILLANCE AUTHORITY FOR 2021

IMA

For the Citizens' Rights Agreements

IMA's Annual Report to the Specialised Committee on Citizens' Rights established under the Withdrawal Agreement and the Joint Committee established under the EEA EFTA Separation Agreement.

Independent Monitoring Authority

IMA's Annual Report to the Specialised Committee on Citizens' Rights established under the Withdrawal Agreement and the Joint Committee established under the EEA EFTA Separation Agreement.

Independent Monitoring Authority for the Citizens' Rights Agreements Annual Report to the Specialised Committee on Citizens' Rights and the Joint Committee 2021

Presented to Parliament pursuant to the European Union (Withdrawal Agreement) Act 2020

This publication is available at: **www.gov.uk/official-documents**.
Any enquiries regarding this publication should be sent to us at **IMA@ima-citizensrights.org.uk**.

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1. Introduction

This report was prepared in accordance with Article 159(2) of the Withdrawal Agreement and Article 65(1) of the EEA EFTA Separation Agreement. It reports on measures taken in the UK and Gibraltar to implement and comply with Part 2 and the number and nature of complaints made to the Independent Monitoring Authority on Citizens' Rights ("the IMA")[1].

The requirement for the IMA to prepare this report is set out in the UK's domestic legislation in paragraph 31 of Schedule 2 to the European Union (Withdrawal Agreement) Act 2020 ("the Act"). Similar provision in relation to Gibraltar is made in regulation 14 of the Independent Monitoring Authority Regulations 2020[2] ("the Gibraltar Regulations"). In accordance with these provisions, this report also provides information on the exercise by the IMA of its functions in relation to Part 2 of the Agreements.

This is the first annual report prepared by the IMA and reports on the 12-month period commencing from the end of the transition period, 11pm on 31 December, 2020.

In addition to the prescribed matters which the IMA must report on, the report also contains information that we think is relevant to our operation which relates to this period.

The report is submitted to the Specialised Committee on Citizens' Rights established under Article 165(1)(a) of the Specialised Committee and the Joint Committee established under Article 65(1) of the EEA EFTA Separation Agreement.

This report will provide details on the implementation of Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA Separation Agreement. In general, the report does not distinguish between the two except where that is relevant and helpful, for example in relation to data on complaints.

The report will be submitted to the governments of each part of the UK and Gibraltar who will in turn lay it before their respective legislatures as required by the Act and the Gibraltar Regulations[3].

1. European Union (Withdrawal Agreement) Act 2020 (legislation.gov.uk)
2. Independent Monitoring Authority Regulations 2020 (gibraltarlaws.gov.gi)
3. See paragraph 31(8), (9) and (11) of Schedule 2 to the Act and regulation 14(8) and (9) of the Gibraltar Regulations.

The report will also be published on the IMA website where full details of all our work can be found.

2. Role of the Independent Monitoring Authority (IMA)

The IMA was established in 2020 and became fully operational as at 11pm on 31 December 2020. We are an independent body that makes sure the rights of EU and EEA EFTA citizens and their family members living in the UK and Gibraltar as at the 31 December 2020 are upheld following the departure of the UK from the EU.

The IMA has two broad duties – to monitor and to promote.

We monitor UK public bodies[4] to make sure they adequately and effectively implement the rights provided for by the Citizens' Rights Agreements. We promote the adequate and effective implementation and application of the Agreements by holding public bodies to account where there is not full compliance.

As to the scope of the IMA's powers, these are framed by the rights set out in the Agreements. These rights are extensive and were designed to broadly provide EU and EEA EFTA citizens and their family members the same entitlements to work, study and access public services and benefits as they enjoyed before the UK left the EU.

The citizens covered by the Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA Separation Agreement ("the Citizens' Rights Agreements") are those from the 27 EU Member states as well as Iceland, Lichtenstein and Norway, along with their family members.

4. Public bodies include all parts of government and any body which exercises functions of a public nature. It would therefore include UK Government departments, the Northern Ireland Executive, the Scottish Government, the Welsh Government and the Government of Gibraltar. It also includes local government.

AMBASSADOR VISIT: We were pleased to welcome the EU Ambassador to the UK to our offices. From left to right IMA Chairman Sir Ashley Fox, EU Ambassador to the UK, João Vale de Almeida and IMA Chief Executive Dr Kate Chamberlain.

These citizens' rights include:

- **residency:** this means the right to live in the UK or Gibraltar. It also includes the right to enter and exit the UK.
- **the right to work:** this means the right to work, including self-employed work and also the right to continue to be a frontier worker.
- **mutual recognition of professional qualifications:** this means the right for qualifications which have already been recognised before 31 December 2020 (or in the process of being recognised at that time) to continue to be recognised in the UK.
- **co-ordination of social security system:** this means that individuals who have lived in both the UK and the EU before the end of the transition period can continue to be able to access pensions, benefits and other forms of social security.
- **equal treatment and non-discrimination:** within scope of the rights set out above, EU and EEA EFTA citizens and their family members are entitled to be treated equally with UK citizens and not to be discriminated against on the grounds of their nationality. This includes ensuring access to certain public services such as education, healthcare and certain benefits.

Detailed information on the IMA's powers can be found on our website including our **Annual Plan for 2021/22** and **operational guidance**.

In summary, the IMA's specific powers are as follows:

2.1 Our power to receive complaints

We can receive complaints from persons who claim to have a right under the Agreements[5]. Complaints may set out where the UK or Gibraltar has failed to comply with the Agreements, or a public body has acted or is proposing to act in a way that prevents the person exercising the right in question.

Although we do not resolve individual complaints, we assess every complaint to assess whether they indicate a potential breach of the Agreements, consider whether any potential breach may be a general or systemic failing and decide whether to carry out an inquiry. Individual complaints provide intelligence to help us build a wider picture of possible systemic issues.

While an individual complaint may not indicate a general or systemic failing and therefore would not of itself trigger the threshold for the carrying out an inquiry, we maintain the information as it may help form part of a wider set of intelligence gathered over time which could indicate a systemic failing.

2.2 Our power to conduct inquiries

Our powers to conduct inquiries are set out in paragraph 25 of Schedule 2 to the Act[6].

We may decide to conduct an inquiry in one of three situations:

(i) Following a request from the Secretary of State, the Northern Ireland Executive, the Scottish Government, the Welsh Government, or the Government of Gibraltar.

(ii) As a result of a complaint or series of complaints received.

(iii) Of our own initiative.

5. The IMA may also receive a complaint from a person who claims to have a right provided under UK or Gibraltar law which corresponds to rights provided under the Agreements.
6. The corresponding power in relation to Gibraltar is found in regulation 8 of the Gibraltar Regulations.

The purpose of an IMA inquiry is to:

- decide whether the United Kingdom has failed to comply with the Citizens' Rights Agreements; or
- decide whether a relevant public body has acted or is proposing to act in a way that prevents a person exercising a relevant right (see definition in paragraph 41 of Schedule 2 to the Act); and
- to identify any recommendations for relevant public bodies appropriate to promote the adequate and effective implementation of the Citizens' Rights Agreements.

When considering whether to carry out an inquiry we will consider the importance of addressing general or systemic failings. We may not carry out an inquiry in the situations in (ii) or (iii) above unless we have reasonable grounds to believe that the inquiry may conclude that a failure to comply with the Citizens' Rights Agreements has occurred or that a public body has acted or is proposing to act in a way that prevents a person from exercising their rights under the Agreements.

To inform this assessment we will carry out pre-inquiry investigations. In carrying out such investigations we may be able to resolve any issues in a more timely way than proceeding to full inquiry.

To date we have not started any inquiries. Pre-inquiry investigations are proceeding in regard to a number of issues which are outlined in section four below in relation to the emerging themes of some of the complaints we have received to date.

A number of issues have also been resolved in what we refer to as Early Case Resolutions. Detail of these issues are outlined in section five of this report.

2.3 Our powers to take legal action

Our powers to take legal action are contained in paragraph 30 of Schedule 2 to the European Union (Withdrawal Agreement) Act 2020[7].

It provides that the IMA may:

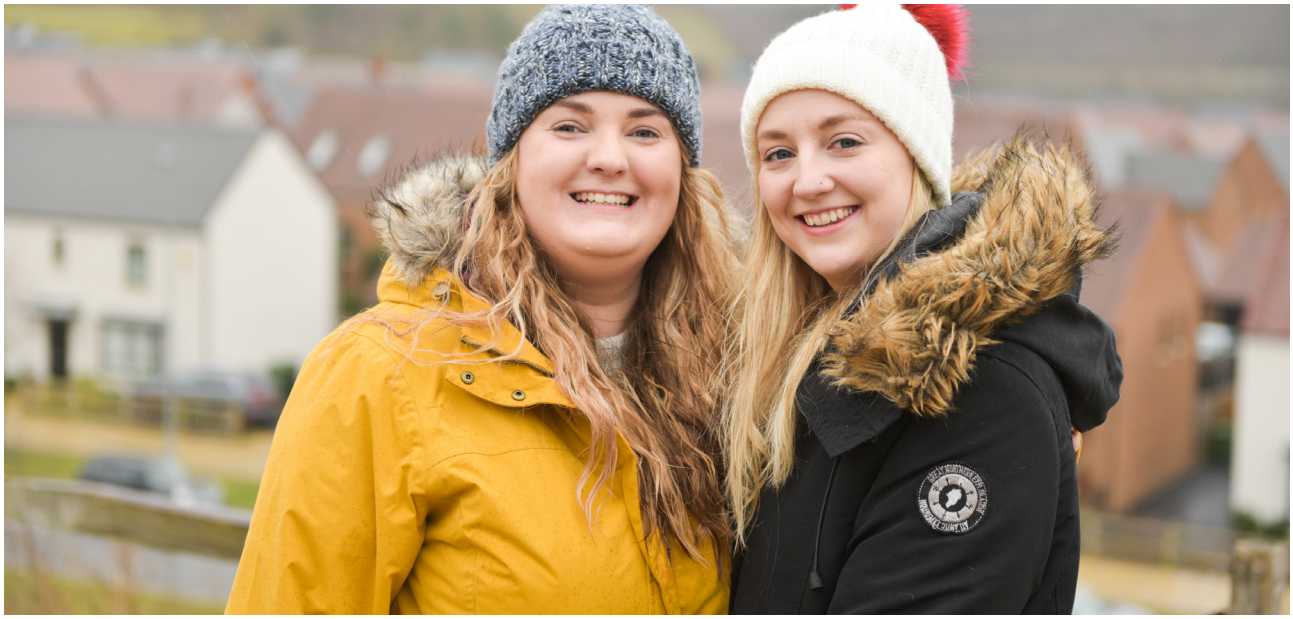
- take legal action, or
- intervene in any legal proceedings.

In both cases, the IMA must be satisfied that it is appropriate to do so in order to promote the adequate and effective implementation or application of the Agreements.

While we are only able to take legal action by way of judicial review proceedings, we are able to intervene in "any" legal proceedings. This includes not only public law actions brought against public bodies, but sometimes we may also feel it is appropriate to join private causes of action in order to ensure that we are effectively performing our duties.

Our approach on the exercise of our litigation powers is also detailed in our **operational guidance**.

To date we have used our litigation powers in respect of two cases and these are detailed in **section five** of this report.



7. The corresponding power in relation to Gibraltar is found in regulation 13 of the Gibraltar Regulations.

3. Measures Taken on the Implementation and Application of Part 2 of the Agreements

To provide details on the measures taken on the implementation and application of Part 2 of the Agreements, we have sought information from those responsible for implementing and applying the Agreements.

We requested the UK Government, the Northern Ireland Executive, the Scottish Government, the Welsh Government and the Government of Gibraltar to provide us with information relating to:

- most relevant legislative instruments in place to implement Part 2 of the Agreements;
- most relevant legislative instruments implementing Part 2 of the Agreements that were adopted or amended in the last year;
- most relevant domestic jurisprudence from the last year;
- basic statistical data that show how the Withdrawal Agreement and EEA EFTA Separation Agreement has been applied (for example for residence rights: estimated number of resident beneficiaries of the Agreements, number of applications made in the last year and in total and their outcome (residence granted/permanent residence granted/refused/invalid applications/pending cases)

To do this we provided a proforma for them to complete in November 2021 and their returns are included at section seven below numbered Annexes 1–5.

4. Complaints

The IMA receives complaints about any of the rights which are protected by the Citizens' Rights Agreements. We are also able to receive complaints which 'correspond' to rights in the Agreements but are established in domestic legislation. For example, where the EU Settlement Scheme is extended to EU or EEA nationals not strictly in scope of the Agreements.

Complaints must be about a relevant public body which is defined as bodies carrying out public functions excluding courts and tribunals, parliament, and the devolved legislatures.

We accept complaints from third parties as well as individuals who are affected and we encourage complaints to be made via our complaints portal on our website.

We received a steady flow of complaints in 2021 with 237 received. Of these, 236 concerned rights arising under the Withdrawal Agreement and one related to rights under the EEA EFTA Separation Agreement.

We have received complaints from the majority of EU and EEA EFTA countries with only citizens from Estonia, Iceland and Lichtenstein not registering an issue in 2021.

The majority of complainants (61%) come from the 14 countries that were members of the EU before 2004 which are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden.

We have received complaints involving a range of public bodies and relating to every citizens' right within the Withdrawal and Separation Agreements.

The majority of complaints relate to the Home Office, including UK Visas and Immigration, Border Force and Immigration Enforcement (70%).

4.1 Complaint Themes

A number of themes have emerged, which are captured below, with a corresponding outcome where applicable. More details of the outcomes are detailed in section five of this report.

Theme: Access to Healthcare

Inquiry Action		Outcomes
3 lines of enquiry (1 closed) addressing:		
1.	delays in issuance of European Health Insurance Cards (EHIC)	Early Case Resolution EHIC
2.	access to healthcare via Gibraltar Health Authority	
3.	proof of continuous residence for NHS purposes	

Theme: Access to Benefits

Inquiry Action		Outcomes
4 lines of enquiry (2 closed) addressing:		
1.	access to HMRC National Insurance documentation	Early Case Resolution HMRC National Insurance No Further Action National Insurance Numbers via DWP
2.	suspension or refusal of benefits	
3.	obtaining National Insurance Numbers via Department for Work and Pensions	
4.	the use of share codes by a local authority	

Theme: Living in the UK and Gibraltar

Inquiry Action		Outcomes
5 lines of enquiry addressing:		
1.	inaccurate guidance via the Employee Checking Service	
2.	delays in processing DVLA applications linked to share codes	
3.	access to civilian registrations cards in Gibraltar	
4.	the guidance for universities regarding student 'Home Fee' for EU Settlement Scheme (EUSS) applicants	
5.	fees charges in relation to Biometric Residence Cards	

Theme: Entry into the UK		
Inquiry Action		**Outcomes**
6 lines of enquiry addressing:		
1.	difficulties experienced at the border	
2.	difficulties associated with COVID-19	
3.	visa denial regarding immigration route Appendix FM which is the non EUSS route	
4.	delivery issues relating to Biometric Residence Cards	
5.	difficulties with EUSS Family Permits	
6.	appropriate guidance regarding ID travel documents and digital status	

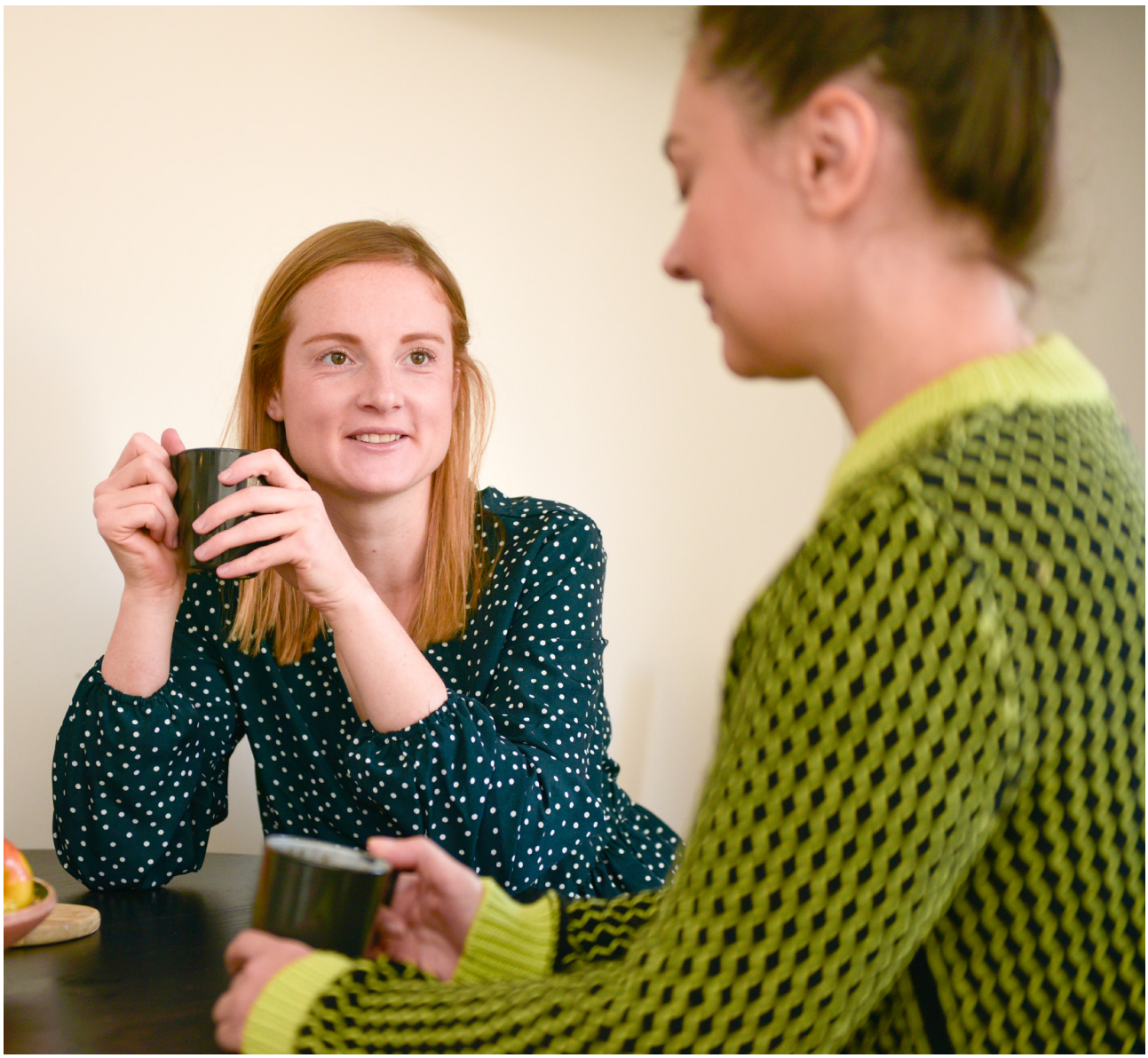
Theme: Housing		
Inquiry Action		**Outcomes**
3 lines of enquiry (2 closed) addressing:		Early Case Resolution Pembrokeshire Council Early Case Resolution with Newham Council
1.	access to housing in Pembrokeshire	
2.	access to housing in Newham	
3.	access to housing in Gibraltar	

Theme: Living in the UK		
Inquiry Action		**Outcomes**
15 lines of enquiry addressing:		
1.	citizens experiencing delays in EUSS application decisions	
2.	citizens experiencing issues with the Settlement Resolution Centre	
3.	delays in the issuance of Certificates of Applications when applying to EUSS	
4.	citizens disputing EUSS decisions	
5.	difficulties with EEA Family Permits	
6.	citizens experiencing difficulty with UKVI View and Prove	
7.	the rights of late applicants to EUSS	
8.	immigration enforcement for EU citizens	
9.	the conversion of status from pre-settled to settled status	
10.	interpretation of the EU Withdrawal Agreement	
11.	access to EUSS for prisoners and immigration detainees	
12.	EUSS access issues for dual nationals	
13.	access to National Insurance Numbers (NINOs) using share codes	
14.	retainment of citizen identity documents during EUSS processing	
15.	experience of child applications to EUSS	

Pre-Settled Status to Settled Status subject to ongoing litigation

5. Exercise of IMA's Functions

In general terms, in all of the activities outlined below no differentiation is made between the rights provided under the Withdrawal Agreement and the EEA EFTA Separation Agreement. This is due to the fact that any potential breach, piece of legislation or litigation do not specifically relate to those with rights under the Withdrawal Agreement or EEA EFTA Separation Agreement.



5.1 Early Case Resolutions

Where possible we try to resolve issues we uncover quickly to ensure that citizens are not disadvantaged or denied their rights for very long.

We do this by undertaking Early Case Resolutions (ECR) which are agreed interventions with public bodies to make improvements or changes to overcome potential issues.

The inquiries which have resulted in ECRs are referred to briefly, in the section on complaint themes above, with more details outlined below.

- We received a number of complaints about the length of time it was taking for citizens to receive their European Health Insurance Cards (EHIC). This could prevent them from being able to access medical care when travelling in the EU. We explained to NHS Business Services Authority and the Department of Health and Social Care that this was unacceptable. We requested that their systems be improved, including employing more staff to deal with applications more promptly. Wait times have now been substantially reduced.

- We were made aware of delays for EU and EEA EFTA citizens trying to get national insurance documentation which meant they were having difficulty proving they had made contributions. If they could not prove these contributions it was leading to problems in claiming benefits in a host country. We spoke to HMRC who put a plan in place to reduce the waiting time for applications.

- Two councils had also wrongly removed EU and EEA EFTA citizens with pre-settled and settled status from their social housing lists. We contacted them to say it was unlawful and the policy was immediately reversed.

5.2 No Further Action

We refer to something as a No Further Action (NFA) when we have been in contact with public bodies about certain issues and are satisfied that the information provided does not show evidence of a breach and therefore no intervention is needed at that time. This, however; does not prevent the IMA from intervening or taking action at a later date.

In the interests of transparency and openness our NFAs are published and below is a summary of the two that were concluded in 2021.

- Concerns were raised about delays to citizens receiving national insurance numbers and a withdrawal of face-to-face interviews to check identity as a result of the Department for Work and Pensions' (DWP) response to the start of the Covid pandemic.

  We spoke with DWP who explained they had put in place other ways of citizens providing a national insurance number and had also increased publicity around national insurance not being required to work or claim social security benefits. As a result, no further action was needed at this time.

- Eligible citizens with pending or late applications to EU Settlement Scheme (EUSS) are able to receive compensation for backdated childcare tax relief once their applications are granted. We had concerns that if the applications took a long time to be granted citizens might be unable to afford childcare in the meantime.

  On speaking to HMRC they explained that solutions were in place to ensure citizens could identify their status while applying for childcare tax relief and should receive the payments. The compensation scheme remains as a safeguard. No further intervention was, therefore, needed at this time.

5.3 Legislation Monitoring

The IMA is also required to keep under review the adequacy and effectiveness of the legislative framework which implements or otherwise deals with matters arising out of or related to the Agreements[8].

During our first year of operation, we identified 145 pieces of legislation for review. The legislation identified covered the period from 2018 to the end of 2021.

The legislation reviewed relates to all of the rights covered by the Citizens' Rights Agreements. Many of the pieces of legislation cover areas already being looked at by the IMA such as late applications to the EUSS, student finance, eligibility for benefits and assistance and ID cards in Gibraltar. Where we spot an issue with legislation, our preference is to seek to resolve this, where possible, with the relevant government.

An example of this is an **approach** we made to the UK Government's Department for Education (DfE) to amend legislation which appeared to exclude some EU and EEA EFTA families living and working in England from receiving 30 hours of free childcare.

Whilst looking at the relevant legislation we identified that some citizens who did not yet have a decision on their EUSS applications were unable to apply for the free childcare. We wrote to the DfE to say we believed they were breaking the terms of the Agreements and were considering taking legal action.

The DfE quickly responded to say they were already aware of the issue and that a solution had been put in place to ensure no eligible citizens would be disadvantaged. The DfE also agreed to amend the legislation at the earliest opportunity.

The amending legislation was made on October 20th and was laid before the UK Parliament on October 22nd.

8. See paragraph 22(2)(a) of Schedule 2 to the Act and regulation 5(2) of the Gibraltar Regulations.

5.4 Litigation

The IMA also used its litigation powers on two occasions during 2021.

In May 2021 we intervened in the case of Fratila and another (AP) (Respondents) v Secretary of State for Work and Pensions (Appellant) UKSC 2021/0008[9] which related to the rights of certain groups of citizens with pre-settled status to social security payments.

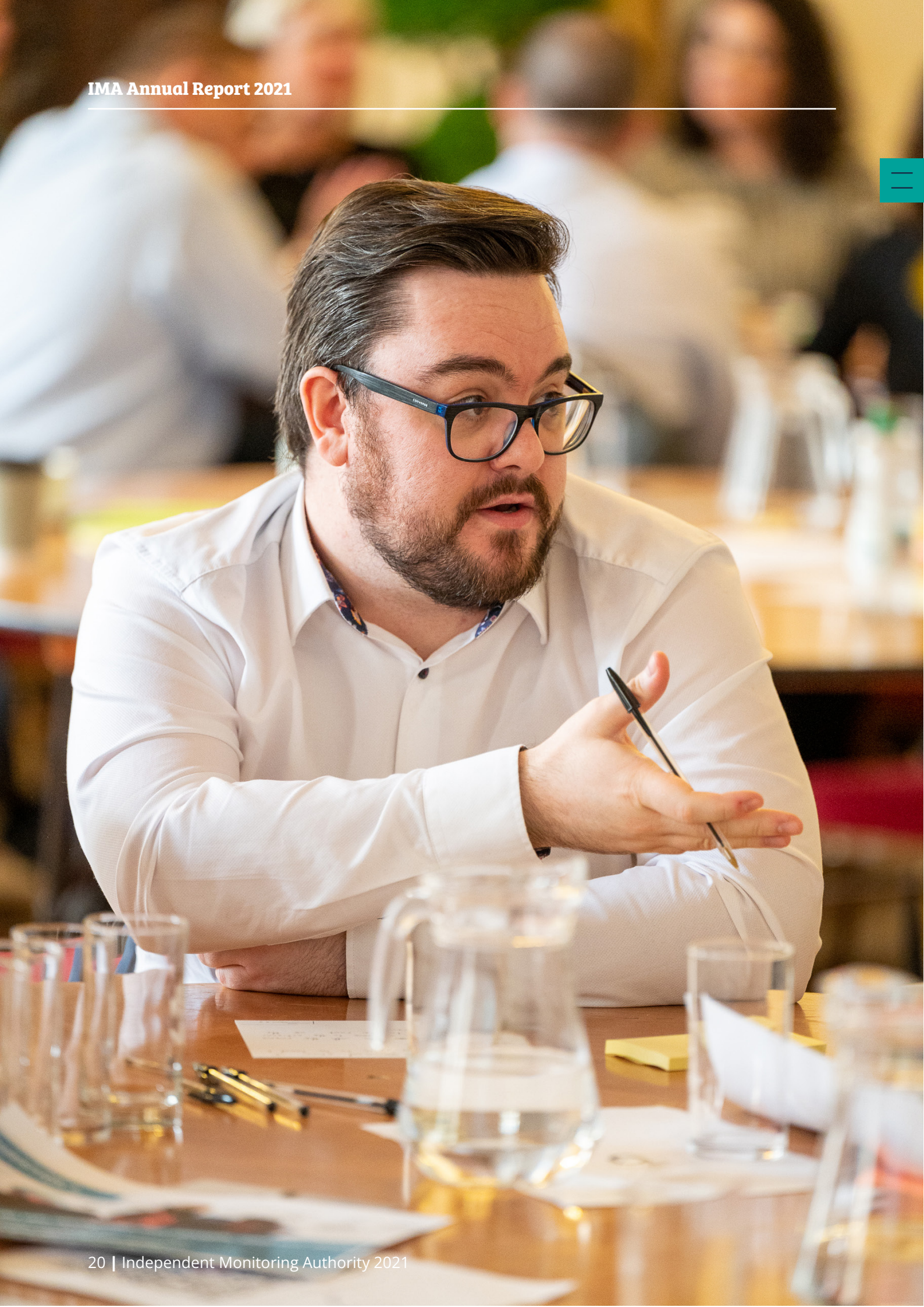
Whilst the case was concerned with the law as it applied before the UK left the EU, we intervened because the case was concerned with the interpretation of Article 18 of the Treaty on the Functioning of the European Union which is referred to in the Citizens' Rights Agreements. There was therefore potential for the case to have relevance to the interpretation of the Agreements.

More recently, in December 2021, we have issued a claim for judicial review – against the Home Office – regarding a specific element of the EU Settlement Scheme.

We believe that the current legal framework, whereby citizens granted Pre-Settled Status (of which there are currently more than two million) will automatically lose their rights if they fail to apply for Settled Status before the expiry of their Pre-Settled Status, is not compatible with the Agreements.

The Home Office does not agree with the IMA's interpretation of the Agreements. We hope taking legal action will provide clarity to all those citizens impacted.

9. Fratila and another (AP) (Respondents) v Secretary of State for Work and Pensions (Appellant) – The Supreme Court.



6. Other Information

As a new body we have made it a key focus to raise awareness of our existence and role among stakeholders.

A comprehensive stakeholder engagement programme has been underway since the middle of 2020. Meetings have taken place with organisations supporting and representing EU citizens such as Settled, the 3Million, and Citizens Advice Services. We have also met with representatives of the Northern Ireland Executive, Scottish Government, Welsh Government and the Government of Gibraltar.

We have written to every elected member of the legislatures of the UK, Gibraltar, Northern Ireland, Scotland and Wales. We have undertaken regular and wide-ranging media interviews, including a number of briefings for the Foreign Press Association and are continuing to meet with EU Embassies as well as organisations that work with EU citizens.

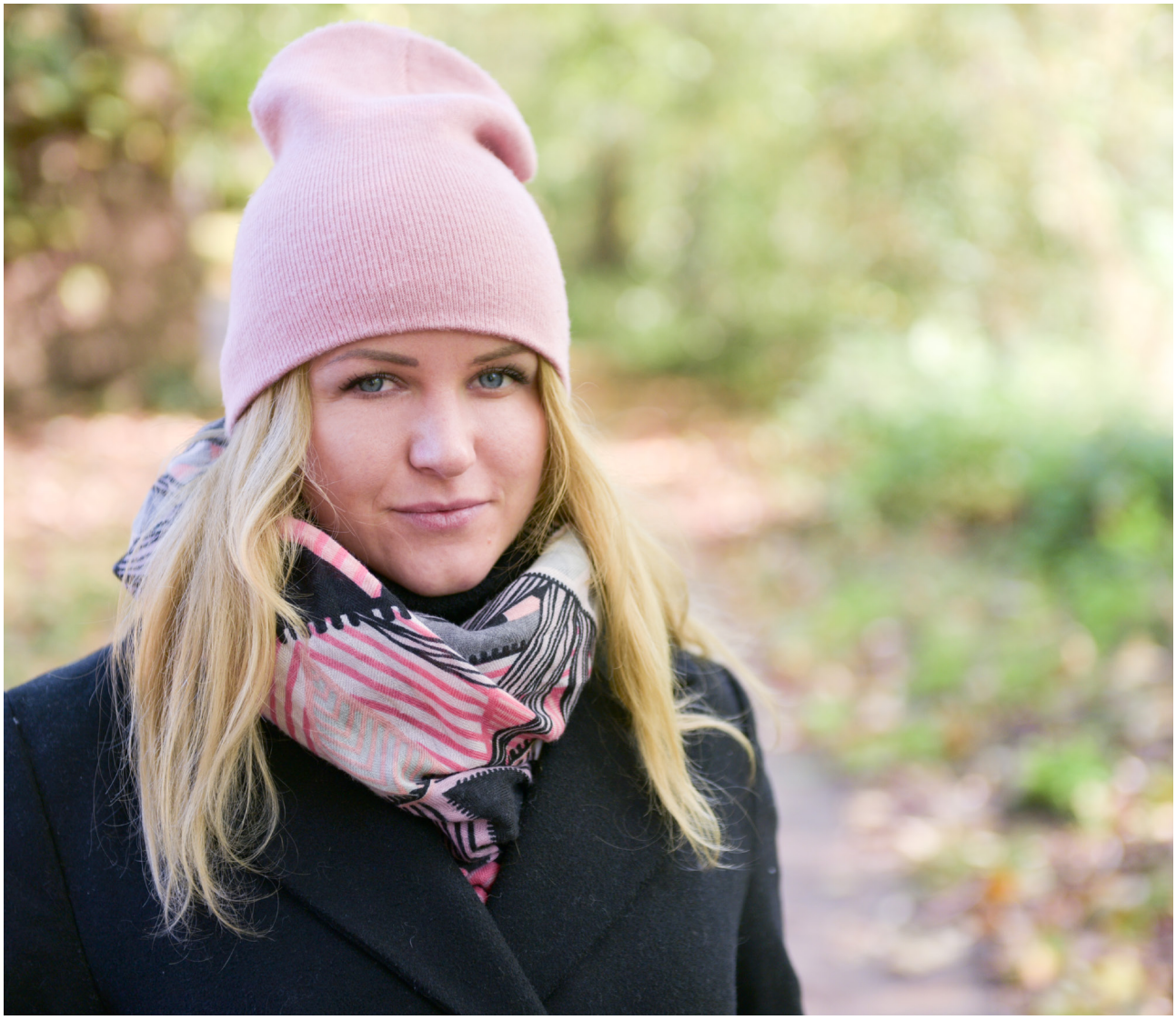
We have established a citizens' panel which consists of over 60 citizens from most of the EU and EEA EFTA countries. The panel acts as a critical friend to the IMA, with members sharing their lived experiences as well as supporting and challenging the way we work.

We have undertaken a survey to try to better understand the experience of EU and EEA EFTA citizens living in the UK and Gibraltar since the UK left the EU. This has provided valuable insight and helped to shape our work.We regularly engage with UK Government departments and the devolved nations and have set up a number of groups consisting of representatives from these departments to discuss issues and raise questions. We are also in the process of agreeing Memorandums of Understanding with various government departments and the devolved nations. These are displayed on our **website**.

Our proactive intelligence gathering involves developing relationships and we meet regularly with stakeholders including those from representative stakeholder networks and organisations that provide employment and immigration advice to citizens, including EUSS advisers. We also attend the EU Delegation to the UK's Citizens' Rights Monitoring Network. This approach has enabled us to develop our understanding of the impact or potential impact on citizens of reported issues, as well as to identify emerging issues.

We continue to attend many events and networks including an Institute for Government public event on our role and work.

7. Annexes



Information provided from the UK Government, the Northern Ireland Executive, the Scottish Government, the Welsh Government and the Government of Gibraltar in relation to implementation and application of Part 2 of the Agreements.

ANNEX 1

UK Government

1) Residence rights

The United Kingdom operates a constitutive residence scheme in accordance with Article 18(1) of the Withdrawal Agreement. The residence scheme went fully live for applications on 30 March 2019. Residence documents have been issued in a digital form since it went fully live on 30 March 2019. Residence documents are issued free of charge.

The deadline for applications under Article 18(1)(b) of the Withdrawal Agreement was 30 June 2021. This deadline applied to those EEA EU nationals and their family members resident in the UK by the end of the transition period (31 December 2020)[10] – it did not apply to joining family members arriving on or after 1 April 2021 who are subject to a rolling three-month post arrival deadline, as per Article 18(1)(b) of the Withdrawal Agreement.

The United Kingdom has put in place more favourable residence conditions than required under the UK-EU Withdrawal Agreement. Aside from identity and suitability requirements, eligibility to the EU Settlement Scheme (EUSS) is based on an EEA national being resident in the United Kingdom before the end of the transition period (23:00 on 31 December 2020), rather than requiring them to have been exercising relevant Treaty rights. This expanded the scope of those EEA nationals eligible to apply for residency and simplifies the application process. As a matter of domestic policy, the UK has also chosen to allow certain derivative rights holders who meet the residency requirements, to apply under the scheme.

The United Kingdom has made use of derogations from equal treatment under Article 23(2) of the Withdrawal Agreement. However, this is a continuation of the position which was in place prior to the UK leaving the EU, and there have been no new derogations following EU-exit.

10. Parallel provisions exist in the EEA EFTA Separation Agreement

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

European Union (Withdrawal Agreement) Act 2020 (legislation.gov.uk)

The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 (legislation.gov.uk)

The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (legislation.gov.uk)

The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020 (legislation.gov.uk)

The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (legislation.gov.uk)

Immigration Rules Appendix EU – Immigration Rules – Guidance – GOV.UK (www.gov.uk)

Immigration Rules Appendix EU (Family Permit) – Immigration Rules – Guidance – GOV.UK (www.gov.uk)

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

EU Settlement Scheme caseworker guidance – GOV.UK (www.gov.uk)

Apply to the EU Settlement Scheme (settled and pre-settled status) – GOV.UK (www.gov.uk)

EU Settlement Scheme: family and travel permits – GOV.UK (www.gov.uk)

View and prove your immigration status – GOV.UK (www.gov.uk)

Visiting the UK as an EU, EEA or Swiss citizen – GOV.UK (www.gov.uk)

EEA nationals at the border post grace period – GOV.UK (www.gov.uk)

Entering the UK under the EU Settlement Scheme and EU Settlement Scheme family permit – GOV.UK (www.gov.uk)

Public funds – GOV.UK (www.gov.uk)

Landlord's guide to right to rent checks – GOV.UK (www.gov.uk)

EU Settlement Scheme: employer toolkit – GOV.UK (www.gov.uk)

Right to work checks: employing EU, EEA and Swiss citizens – GOV.UK (www.gov.uk)

Right to work checks: an employer's guide – GOV.UK (www.gov.uk)

EEA decisions taken on grounds of public policy – GOV.UK (www.gov.uk)

Considering immigration status and deciding enforcement action – GOV.UK (www.gov.uk)

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

	Estimated number of resident beneficiaries of the Withdrawal Agreement	3.5 – 4.1 million
A1	Total number of EUSS applications to date (up to 31 December 2021)	**6,385,470**
A1a	Number of EUSS applications made in (2021)	**1,469,300**
B1	Number of EUSS applications made by the application deadline (30 June 2021)	**6,050,860**
B1a	Number of applications granted pre-settled status by 30 June 2021	**2,327,850**
B1b	Number of applications granted settled status by 30 June 2021	**2,846,820**
B1c	Number of applications refused by 30 June 2021	**109,430**
B1c1	Number of applications that were invalid by 30 June 2021	**79,730**
B1c2	Number of applications that were withdrawn by applicants by 30 June 2021	**80,600**
B1d	Total number of in time applications pending at the end of the reporting year	**Unable to provide data**
B2	Number of late EUSS applications until 31 December 2021	**160,600**
B2a	Number of applications where national authorities concluded that there were reasonable grounds for not respecting the application deadline	**Unable to provide data**
B2b	Number of applications where national authorities concluded that there were no reasonable grounds for not respecting the application deadline	**Unable to provide data**
B2c	Number of applications where national authorities are still assessing there were reasonable grounds for not respecting the application deadline	**Unable to provide data**

e. Statistical data (continued)

	Estimated number of resident beneficiaries of the Withdrawal Agreement	3.5 – 4.1 million
B2c1	Number of applications granted as pre-settled status residence	**16,000**
B2c2	Number of applications granted settled status	**23,700**
B2c3	Number of applications refused	**Unable to provide data**
B2c3a	Number of applications that were invalid	**Unable to provide data**
B2c3b	Number of applications that were withdrawn by applicants	**Unable to provide data**
B2c4	Number of late applications with other outcomes (includes refused, withdrawn or void and invalid)	**15,200**
B2e	Total number of late applications pending at the end of the reporting year	**Unable to provide data**
C	Number of entry visa applications made in 2021 by family members seeking to join the beneficiary under Article 14(3) of the Withdrawal Agreement	**103,037**
C1	Number of entry visas granted	**59,254**
C2	Number of entry visas applications refused	**34,102**
C3	Total number of entry visa applications pending at the end of the reporting year	**Unable to provide data**

Notes regarding the data:

Data up to 30 June 2021 is taken from the EUSS June 2021 quarterly report, to include all in-time applications. Data up to the end of the reporting year of 2021 is taken from the EUSS quarterly report up to 31 December 2021.

1. EUSS application figures are rounded to the nearest 10 and may not match overall totals
2. Figured in these tables have been derived from live management information systems and are provisional and subject to change.
3. Total applications received by nationality include small numbers of records (less than 0.01%) in which nationality is not currently in an analysable form from live systems.
4. For EUSS outcomes, invalid, withdrawn or void are not subsets of refusal figures.
5. While the IMA is not responsible for monitoring the UK-Swiss Citizens' Rights Agreement, applications from Swiss nationals have been included in the figures because they are part of our published statistics.
6. For EU, EEA and Swiss citizens and their family members resident in the UK by the end of the transition period, the deadline for applications to be made to the EUSS was 30 June 2021.
7. In-time applications include online applications received by 9am on 1 July 2021 and paper applications received by midnight 7 July 2021.
8. As data is taken is taken from live management systems, there may be differences to previous publications.
9. Late application figures are taken from provisional management information and therefore subject to change. Figures are rounded to the nearest 100.
10. Figures from the Private Testing Beta Phase 1 and 2 (28 August 2018 – 30 March 2019) are included in the first reporting year.
11. The statistics include applications from cohorts able to apply as a result of domestic policy decisions (e.g. Zambrano cases). They are not covered by the Citizens' Rights Agreement or monitoring by the IMA.
12. EUSS family permits include a small number of EUSS travel permits.
13. For EUSS family permits, grants and refusals do not include applications that have been withdrawn or lapsed.
14. Data for EUSS family permits can be found in the Immigration quarterly report up to December 2021 (VIA_D01 and VIS_D02).

The United Kingdom has provided data for previous reporting years, and with nationality breakdowns. Please see see data sheet at annex 1.1 for details.

2) Rights of employed and self-employed frontier workers

In the United Kingdom, beneficiaries of the Withdrawal Agreement are able to apply for a permit confirming their status as a frontier worker. This permit is required to enter the UK as a frontier worker after 30 June 2021.

The frontier worker scheme opened for applications on 10 December 2020.
The permits identifying frontier workers' rights are issued primarily in a digital form.
The permits are issued free of charge.

a. Key legislative instruments implementing the Withdrawal Agreement

The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020 (legislation.gov.uk)

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

Frontier worker permit scheme caseworker guidance – GOV.UK (www.gov.uk)

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

	Number of frontier worker permit applications made in 2021	14,251
A1	Number of applications granted	**10,016**
A2	Number of applications refused	**3,820**
A2a	Number of applications that were invalid	**Unable to provide data**
A2b	Number of applications that were withdrawn by applicants	**173**
A3	Number of applications that are still pending at the end of the reporting year	**Unable to provide data**

Notes regarding the data:

1. Data is taken from the Immigration Quarterly report up to 31 December 2021 – Data can be found in table VIS_D01 and VIS_D02.

2. Invalid, withdrawn and void applications are not subsets of refusals.

The United Kingdom has provided data for previous years, and with nationality breakdowns. Please see data sheet at annex 1.1 for details.

3) Co-ordination of social security schemes

a. Key legislative instruments implementing the Withdrawal Agreement

European Union (Withdrawal Agreement) Act 2020 (legislation.gov.uk) (Gibraltar: European Union (Withdrawal Agreement) Act 2020 (gibraltarlaws.gov.gi)

Healthcare (European Economic Area and Switzerland Arrangements) Act 2019

b. Key legislative instruments adopted or amended in the reporting year

The Healthcare (European Economic Area and Switzerland Arrangements) (EU Exit) Regulations 2019

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

Guidance relating to Operational Implementation of SSC Provisions

d. Key domestic jurisprudence from the reporting year

Fratila and another (Respondents) v Secretary of State for Work and Pensions (Appellant) (supremecourt.uk)

CG vs The Department for Communities in Northern Ireland: CURIA – Documents (europa.eu)

e. Statistical data

Relevant statistical data on social security coordination can be found at the following links:

Coordination of social security coordination systems at a glance – 2021 statistical report (full list of social security coordination reports here)

First Annual Report on payments made under the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 for the period 31 December 2020 to 31 March 2021.

Cross-border healthcare in the EU under social security coordination – Publications Office of the EU (europa.eu)

4) Recognition of professional qualifications

a. Key legislative instruments implementing the Withdrawal Agreement

Section 12 of the Recognition of Professional Qualifications section of the European Union (Withdrawal Agreement) Act 2020

The Professional Qualifications and Services (Amendments and Miscellaneous Provisions) (EU Exit) Regulations 2020 (S.I. 2020/1038)

Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2020 (S.I. 2020/1342)

Recognition of Professional Qualifications (Amendment etc) (EU Exit) Regulations 2019 (S.I. 2019/312) (amends the European Union (Recognition of Professional Qualifications) Regulations 2015).

b. Key legislative instruments adopted or amended in the reporting year

Recognition of Professional Qualifications (Amendment etc.) (EU Exit) Regulations 2021

Professional Qualifications [Bill/Act 2022]

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

Recognition of professional qualifications: guidance for regulatory bodies

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

The UK Government does not hold detailed statistical data on recognition decisions on professional qualifications that relate to the provisions in the Withdrawal Agreement. Information on recognition decisions is held by the relevant regulators and professional bodies for professions in scope of the Withdrawal Agreement.

ANNEX 1.1

Data Sheet Provided By UK Government

EU Settlement Scheme Statistics 28 August 2018 – 31 December 2021 Independent Monitoring Authority: Annual Report to the Specialised Committee on Citizens' Rights – EUSS data			
Ref	**Title**	**Number**	**Period covered**
A	Estimated number of resident beneficiaries of the Withdrawal Agreement	**3.5 – 4.1 Million**	**Data from Home Office Impact Assessment**
A1	Number of EUSS applications to date (up to 31 December 2021)	**6,385,470**	**28 August 2018 – 31 December 2021**
A2	Number of EUSS applications from 2018 - 2019 (including testing phase data)	**2,762,970**	**28 August 2018 – 31 December 2019**
A3	Number of EUSS applications in 2020	**2,153,220**	**1 January 2020 – 31 December 2020**
A4	Number of EUSS applications in 2021	**1,469,300**	**1 January 2021 – 31 December 2021**
B1	Number of EUSS applications made by the application deadline (30 June 2021)	**6,050,860**	**28 August 2018 – 30 June 2021**
B1a	Number of applications granted pre-settled status by 30 June 2021	**2,327,850**	**28 August 2018 – 30 June 2021**
B1b	Number of applications granted settled status by 30 June 2021	**2,846,820**	**28 August 2018 – 30 June 2021**
B1c	Number of applications refused by 30 June 2021	**109,430**	**28 August 2018 – 30 June 2021**
B1c1	Number of applications that were invalid by 30 June 2021	**79,730**	**28 August 2018 – 30 June 2021**
B1c2	Number of applications that were with-drawn or void by applicants by 30 June 2021	**80,600**	**28 August 2018 – 30 June 2021**
B1d	Total number of applications pending by the 30 June 2021	**Unable to provide data**	
B1e	Total number of applications pending by 31 December 2021	**Unable to provide data**	

Post 30 June 2021 Applications			
B2	B2: Total number of late EUSS applications until 31 December 2021	**160,600**	**1 July 2021 – 31 December 2021**
B2a	B2a: Number of applications where national authorities concluded that there were reasonable grounds for not respecting the application deadline	**Unable to provide data**	**1 July 2021 – 31 December 2021**
B2b	B2b: Number of applications where national authorities concluded that there were no reasonable grounds for not respecting the application deadline	**Unable to provide data**	**1 July 2021 – 31 December 2021**
B2c	B2c: Number of applications where national authorities are still assessing there were reasonable grounds for not respecting the application deadline	**Unable to provide data**	**1 July 2021 – 31 December 2021**
B2c1	Number of late applications granted as pre-settled status[11]	**16,000**	**1 July 2021 – 31 December 2021**
B2c2	Number of late applications granted settled status	**23,700**	**1 July 2021 – 31 December 2021**
B2c3	Number of late applications with other outcomes	**15,200**	**1 July 2021 – 31 December 2021**
B2d	Total number of late applications pending at the end of the reporting year	**Unable to provide data**	**1 July 2021 – 31 December 2021**
EUSS Family Permits			
C	C: Number of entry visa applications made in 2021 by family members seeking to join the beneficiary under Article 14(3) of the Withdrawal Agreement[12]	**103,037**	**1 January 2021 – 31 December 2021**
C1	C1: Number of entry visas granted[13]	**59,254**	**1 January 2021 – 31 December 2021**
C2	C2: Number of entry visas applications refused[14]	**34,102**	**1 January 2021 – 31 December 2021**
C3	C3: Total number of entry visa applications pending at the end of the reporting year	**Unable to provide data**	

For further information, contact: MigrationStatsEnquiries@homeoffice.gov.uk

11. Please refer to notes on data
12. Includes both EUSS Family Permits and EUSS Travel Permits
13. Includes both EUSS Family Permits and EUSS Travel Permits
14. Includes both EUSS Family Permits and EUSS Travel Permits. Excludes decisions counted as withdrawn or lapsed

B1	Number of EUSS applications made by the application deadline (30 June 2021), by nationality

Country of nationality	Total in-time Applications:			
	28 Aug 2018 – 30 June 2021	28 Aug 2018 – 31 Dec 2019	1 Jan 2020 – 31 Dec 2020	1 Jan 2021 – 30 June 2021
Total	**6,050,860**	**2,762,960**	**2,153,210**	**1,129,660**
Total EU27	**5,570,160**	**2,600,890**	**1,968,040**	**997,790**
Austria	24,710	12,640	8,070	3,980
Belgium	44,250	18,900	16,980	8,350
Bulgaria	320,370	139,120	120,470	60,680
Croatia	13,270	5,310	5,780	2,190
Cyprus	28,720	9,710	13,080	5,900
Czech Republic	73,070	33,080	25,680	14,250
Denmark	30,360	13,350	11,020	5,970
Estonia	15,030	7,460	5,180	2,390
Finland	21,870	9,370	8,670	3,830
France	232,250	104,510	88,290	39,330
Germany	165,080	75,640	59,590	29,720
Greece	132,820	61,290	51,320	20,150
Hungary	155,490	79,520	51,600	24,300
Ireland	15,320	4,370	5,230	5,700
Italy	549,510	291,420	180,850	77,070
Latvia	139,550	82,730	37,750	18,980
Lithuania	272,480	139,530	90,850	41,990
Luxembourg	1,810	710	750	350
Malta	7,990	3,960	2,640	1,400
Netherlands	144,790	69,290	47,150	28,240
Poland	1,107,060	513,040	398,190	194,970
Portugal	418,070	231,420	122,770	63,590
Romania	1,082,260	436,200	400,770	244,550
Slovakia	124,410	57,130	41,680	25,510
Slovenia	5,180	2,550	1,860	770
Spain	356,090	171,500	130,280	54,170
Sweden	88,360	27,170	41,540	19,570
Total EEA EFTA and Swiss	**60,320**	**18,990**	**26,560**	**14,700**
Iceland	2,650	1,140	1,060	460
Liechtenstein	80	30	30	10
Norway	37,580	10,700	16,660	10,190
Switzerland	20,000	7,120	8,810	4,050
Non-EEA	**417,820**	**142,620**	**158,290**	**117,080**

B1a	Number of applications granted pre-settled status by 30 June 2021			
Country of nationality	Total in-time Applications:			
	28 Aug 2018 – 30 June 2021	28 Aug 2018 – 31 Dec 2019	1 Jan 2020 – 31 Dec 2020	1 Jan 2021 – 30 June 2021
Total	**2,327,850**	**1,005,650**	**943,800**	**378,400**
Total EU27	**2,103,510**	**933,230**	**840,500**	**329,790**
Austria	8,450	3,630	3,460	1,360
Belgium	17,800	6,730	7,350	3,720
Bulgaria	172,820	71,180	71,520	30,120
Croatia	8,810	3,610	3,810	1,390
Cyprus	15,130	4,100	7,070	3,960
Czech Republic	20,570	7,800	9,350	3,420
Denmark	8,370	2,800	3,720	1,850
Estonia	3,730	1,530	1,630	580
Finland	9,110	3,410	4,050	1,650
France	87,780	33,080	37,800	16,890
Germany	54,300	20,280	24,150	9,870
Greece	75,650	33,740	30,190	11,720
Hungary	52,890	26,130	19,950	6,810
Ireland	4,350	1,250	1,720	1,380
Italy	279,910	152,030	97,090	30,780
Latvia	30,610	15,450	11,130	4,030
Lithuania	56,930	24,770	23,490	8,670
Luxembourg	990	320	480	200
Malta	2,920	1,400	1,160	360
Netherlands	37,690	15,640	15,340	6,710
Poland	199,900	82,540	83,970	33,380
Portugal	150,390	79,210	51,450	19,730
Romania	565,460	245,220	229,900	90,350
Slovakia	25,410	9,460	11,130	4,820
Slovenia	2,550	1,220	980	350
Spain	174,310	78,860	70,600	24,850
Sweden	36,700	7,870	18,000	10,840
Total EEA EFTA and Swiss	**26,790**	**7,020**	**13,060**	**6,710**
Iceland	1,160	490	500	170
Liechtenstein	30	10	20	10
Norway	17,070	3,820	8,520	4,730
Switzerland	8,530	2,700	4,020	1,810
Non-EEA	**197,400**	**65,360**	**90,160**	**41,870**

B1b	Number of applications granted settled status by 30 June 2021			
Country of nationality	Total in-time Applications:			
	28 Aug 2018 – 30 June 2021	28 Aug 2018 – 31 Dec 2019	1 Jan 2020 – 31 Dec 2020	1 Jan 2021 – 30 June 2021
Total	**2,846,820**	**1,434,990**	**998,080**	**413,760**
Total EU27	**2,725,830**	**1,390,590**	**944,590**	**390,650**
Austria	13,590	7,840	4,120	1,630
Belgium	20,100	10,000	6,940	3,160
Bulgaria	98,170	52,240	32,750	13,190
Croatia	3,120	1,190	1,260	670
Cyprus	9,360	4,380	3,280	1,700
Czech Republic	40,480	20,960	13,920	5,600
Denmark	18,250	9,260	6,160	2,830
Estonia	9,850	5,340	3,300	1,210
Finland	10,140	5,050	3,520	1,570
France	120,020	61,070	42,120	16,830
Germany	93,020	48,170	31,640	13,200
Greece	44,290	21,570	15,010	7,710
Hungary	87,630	47,190	28,530	11,910
Ireland	7,250	2,360	2,890	2,000
Italy	218,720	110,140	73,760	34,830
Latvia	94,330	59,800	25,850	8,680
Lithuania	186,100	100,870	63,570	21,670
Luxembourg	630	330	200	100
Malta	4,170	2,190	1,310	670
Netherlands	87,410	45,560	29,250	12,600
Poland	775,120	382,350	286,620	106,150
Portugal	218,280	125,940	64,580	27,760
Romania	315,260	135,940	119,030	60,290
Slovakia	75,000	39,130	26,570	9,300
Slovenia	2,200	1,150	730	330
Spain	140,870	74,750	45,900	20,220
Sweden	32,460	15,830	11,800	4,840
Total EEA EFTA and Swiss	**22,600**	**9,200**	**8,910**	**4,490**
Iceland	1,210	540	430	230
Liechtenstein	30	10	10	0
Norway	12,280	5,100	4,700	2,480
Switzerland	9,090	3,540	3,770	1,780
Non-EEA	**97,880**	**34,980**	**44,350**	**18,550**

B1c	Number of applications refused by 30 June 2021 (excluding invalid and withdrawn or void)			
Country of nationality	Total in-time Applications:			
	28 Aug 2018 – 30 June 2021	28 Aug 2018 – 31 Dec 2019	1 Jan 2020 – 31 Dec 2020	1 Jan 2021 – 30 June 2021
Total	**109,430**	*	**34,230**	**75,190**
Total EU27	**94,800**	*	**27,770**	**67,030**
Austria	240	0	60	180
Belgium	940	0	200	750
Bulgaria	12,680	0	3,330	9,350
Croatia	160	0	50	110
Cyprus	590	0	160	430
Czech Republic	1,280	0	460	820
Denmark	370	0	80	290
Estonia	90	0	30	60
Finland	400	0	80	320
France	2,290	0	490	1,800
Germany	1,290	0	370	920
Greece	2,100	0	580	1,520
Hungary	1,660	0	540	1,120
Ireland	200	0	50	150
Italy	6,790	0	2,170	4,610
Latvia	1,700	0	770	930
Lithuania	2,890	*	1,190	1,700
Luxembourg	10	0	*	*
Malta	50	0	10	40
Netherlands	1,920	*	570	1,350
Poland	8,050	*	2,960	5,080
Portugal	4,730	0	1,520	3,200
Romania	29,750	*	8,670	21,080
Slovakia	2,620	0	950	1,670
Slovenia	40	0	10	30
Spain	6,530	0	1,800	4,730
Sweden	5,460	0	670	4,780
Total EEA EFTA and Swiss	**1,710**	**0**	**370**	**1,330**
Iceland	40	0	*	30
Liechtenstein	*	0	0	*
Norway	1,460	0	320	1,140
Switzerland	200	0	40	160
Non-EEA	**12,920**	**0**	**6,080**	**6,830**

B1c1	Number of applications that were invalid by 30 June 2021 (excluding refused and withdrawn or void)			
Country of nationality	Total in-time Applications:			
	28 Aug 2018 – 30 June 2021	28 Aug 2018 – 31 Dec 2019	1 Jan 2020 – 31 Dec 2020	1 Jan 2021 – 30 June 2021
Total	**79,730**	**3,250**	**45,970**	**30,510**
Total EU27	**73,330**	**3,210**	**43,150**	**26,980**
Austria	90	10	40	40
Belgium	420	20	180	220
Bulgaria	5,550	150	3,010	2,390
Croatia	150	*	70	70
Cyprus	220	*	110	110
Czech Republic	1,770	60	1,100	610
Denmark	160	20	80	60
Estonia	90	*	60	20
Finland	140	*	70	70
France	1,730	160	930	640
Germany	900	70	490	340
Greece	700	50	400	260
Hungary	1,420	100	880	440
Ireland	180	10	100	70
Italy	3,420	260	2,090	1,070
Latvia	800	80	500	220
Lithuania	1,990	160	1,280	550
Luxembourg	*	*	0	*
Malta	50	*	30	20
Netherlands	790	70	430	290
Poland	11,980	770	7,540	3,680
Portugal	5,820	290	3,780	1,750
Romania	27,100	560	15,500	11,040
Slovakia	4,150	100	2,420	1,620
Slovenia	30	*	10	10
Spain	2,980	200	1,820	960
Sweden	700	30	260	410
Total EEA EFTA and Swiss	**460**	**20**	**190**	**240**
Iceland	20	*	10	*
Liechtenstein	0	0	0	0
Norway	330	10	130	190
Switzerland	110	10	50	50
Non-EEA	**5,910**	**20**	**2,610**	**3,280**

B1c2	Number of applications that were withdrawn or void by applicants by 30 June 2021 (excluding refused or invalid)			
Country of nationality	Total in-time Applications:			
	28 Aug 2018 – 30 June 2021	28 Aug 2018 – 31 Dec 2019	1 Jan 2020 – 31 Dec 2020	1 Jan 2021 – 30 June 2021
Total	**80,600**	**7,320**	**40,370**	**32,910**
Total EU27	**68,010**	**6,470**	**33,630**	**27,910**
Austria	310	70	130	120
Belgium	570	90	260	230
Bulgaria	3,320	180	1,630	1,510
Croatia	130	10	60	60
Cyprus	330	40	160	140
Czech Republic	950	80	510	360
Denmark	380	110	120	140
Estonia	220	20	110	80
Finland	230	60	100	80
France	2,740	740	1,080	930
Germany	1,820	330	810	680
Greece	1,310	270	510	520
Hungary	1,910	120	960	830
Ireland	330	60	140	130
Italy	5,970	1,070	2,620	2,270
Latvia	1,990	100	1,090	810
Lithuania	3,930	210	2,020	1,700
Luxembourg	20	*	*	*
Malta	120	30	50	50
Netherlands	1,860	320	850	690
Poland	12,440	720	7,120	4,600
Portugal	6,820	490	3,880	2,440
Romania	12,210	570	5,320	6,320
Slovakia	1,840	100	1,000	730
Slovenia	50	*	20	20
Spain	5,230	490	2,700	2,040
Sweden	990	160	390	440
Total EEA EFTA and Swiss	**770**	**100**	**330**	**330**
Iceland	30	*	*	10
Liechtenstein	*	*	*	0
Norway	380	50	160	170
Switzerland	360	40	170	150
Non-EEA	**11,730**	**740**	**6,360**	**4,640**

C Number of entry visa applications made in the reporting year by family members seeking to join the beneficiary under Article 14(3) of the Withdrawal Agreement. Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Afghanistan	1,381	78	331	972
Albania	11,754	453	2,411	8,890
Algeria	440	46	120	274
Angola	329	30	78	221
Antigua and Barbuda	1	0	0	1
Argentina	153	25	44	84
Armenia	38	7	14	17
Australia	101	24	29	48
Austria	37	0	0	37
Azerbaijan	31	7	13	11
Bahrain	5	0	1	4
Bangladesh	13,460	309	3,977	9,174
Barbados	4	0	2	2
Belarus	229	34	90	105
Belgium	58	0	0	58
Benin	117	8	31	78
Bolivia	266	24	62	180
Bosnia and Herzegovina	36	10	10	16
Botswana	10	1	2	7
Brazil	3,574	159	363	3,052
British overseas citizens	2	0	1	1
Bulgaria	166	1	0	165
Burkina	76	1	30	45
Burma	8	2	2	4
Burundi	6	2	0	4
Cambodia	9	0	4	5
Cameroon	574	54	172	348
Canada	147	31	41	75
Cape Verde	74	8	21	45
Central African Republic	6	1	4	1
Chad	8	0	1	7
Chile	47	7	15	25
China	460	102	152	206
Colombia	1,352	158	447	747
Comoros	4	0	2	2
Congo	19	3	5	11
Congo (Democratic Republic)	92	10	22	60
Costa Rica	15	3	6	6

C Number of entry visa applications made in the reporting year by family members seeking to join the beneficiary under Article 14(3) of the Withdrawal Agreement. Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Croatia	13	0	0	13
Cuba	78	15	20	43
Cyprus	48	0	1	47
Cyprus (Northern part of)	9	1	1	7
Czech Republic	40	0	1	39
Denmark	45	0	0	45
Djibouti	55	5	19	31
Dominica	7	0	5	2
Dominican Republic	1,541	115	199	1,227
East Timor	188	9	36	143
Ecuador	877	83	241	553
Egypt	672	73	211	388
El Salvador	13	0	3	10
Equatorial Guinea	51	4	14	33
Eritrea	62	2	21	39
Estonia	11	0	0	11
Ethiopia	371	25	121	225
Fiji	2	1	0	1
Finland	33	0	0	33
France	253	0	5	248
Gabon	7	1	3	3
Gambia, The	2,266	775	600	891
Georgia	130	21	38	71
Germany	105	1	4	100
Ghana	10,307	1,131	3,036	6,140
Greece	168	0	0	168
Grenada	1	1	0	0
Guatemala	14	0	2	12
Guinea	544	46	148	350
Guinea-Bissau	531	76	155	300
Guyana	3	1	1	1
Haiti	20	2	3	15
Honduras	20	0	8	12
Hong Kong	105	33	38	34
Hungary	119	0	1	118
Iceland	3	0	0	3
India	28,030	1,778	10,293	15,959
Indonesia	132	37	32	63

C	Number of entry visa applications made in the reporting year by family members seeking to join the beneficiary under Article 14(3) of the Withdrawal Agreement. Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Iran	202	38	77	87
Iraq	688	37	158	493
Israel	111	17	33	61
Italy	523	3	1	519
Ivory Coast	346	18	81	247
Jamaica	72	18	15	39
Japan	76	12	37	27
Jordan	130	15	36	79
Kazakhstan	105	22	38	45
Kenya	710	56	263	391
Korea (South)	33	8	9	16
Kosovo	73	5	16	52
Kuwait	1	0	0	1
Kyrgyzstan	18	3	4	11
Laos	1	0	0	1
Latvia	123	0	0	123
Lebanon	161	21	48	92
Liberia	56	6	14	36
Libya	44	6	7	31
Lithuania	44	0	2	42
Luxembourg	4	0	0	4
Macau	7	0	4	3
Macedonia	505	51	209	245
Madagascar	6	3	1	2
Malawi	17	5	5	7
Malaysia	46	7	17	22
Maldives	2	0	0	2
Mali	60	5	27	28
Malta	21	0	3	18
Mauritania	18	2	2	14
Mauritius	47	7	14	26
Mexico	135	25	47	63
Moldova	4,132	290	753	3,089
Mongolia	14	5	0	9
Montenegro	7	2	2	3
Morocco	1,246	110	379	757
Mozambique	61	7	21	33
Namibia	6	2	1	3

C	Number of entry visa applications made in the reporting year by family members seeking to join the beneficiary under Article 14(3) of the Withdrawal Agreement. Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Nepal	1,228	12	429	787
Netherlands	174	0	2	172
New Zealand	35	5	15	15
Nicaragua	12	0	1	11
Niger	6	2	2	2
Nigeria	7,043	559	1,929	4,555
Norway	55	0	0	55
Occupied Palestinian Territories	162	10	26	126
Oman	1	1	0	0
Other and unknown	264	59	109	96
Pakistan	33,723	2,217	8,239	23,267
Panama	6	1	2	3
Paraguay	11	2	2	7
Peru	253	36	73	144
Philippines	831	156	276	399
Poland	294	0	3	291
Portugal	429	0	2	427
Refugee	340	42	122	176
Romania	553	1	1	551
Russia	1,194	212	444	538
Rwanda	26	2	5	19
Sao Tome and Principe	150	14	57	79
Saudi Arabia	17	5	3	9
Senegal	1,331	88	451	792
Serbia	178	33	48	97
Seychelles	3	0	1	2
Sierra Leone	559	54	178	327
Singapore	31	10	10	11
Slovakia	18	0	0	18
Slovenia	5	0	0	5
Somalia	7,030	436	2,412	4,182
South Africa	1,142	158	422	562
Spain	541	0	2	539
Sri Lanka	627	85	163	379
St. Lucia	3	1	0	2
St. Vincent and the Grenadines	2	0	2	0

C	Number of entry visa applications made in the reporting year by family members seeking to join the beneficiary under Article 14(3) of the Withdrawal Agreement. Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Stateless	21	1	8	12
Sudan	452	39	81	332
Sudan (South)	8	1	3	4
Surinam	7	4	0	3
Swaziland	3	0	1	2
Sweden	177	0	0	177
Switzerland	43	0	0	43
Syria	619	15	66	538
Taiwan	38	4	13	21
Tajikistan	11	1	2	8
Tanzania	85	9	44	32
Thailand	203	45	65	93
Togo	36	7	5	24
Trinidad and Tobago	11	1	2	8
Tunisia	208	29	68	111
Turkey	753	113	222	418
Turkmenistan	10	6	2	2
Uganda	314	18	92	204
Ukraine	4,647	590	1,983	2,074
United Arab Emirates	1	0	0	1
United States	534	98	147	289
Uruguay	8	0	2	6
Uzbekistan	76	7	27	42
Venezuela	773	138	277	358
Vietnam	164	18	54	92
Yemen	445	13	95	337
Zambia	31	3	11	17
Zimbabwe	122	21	44	57
Total	**159,890**	**12,022**	**44,832**	**103,037**

C1 Number of entry visas granted
Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Afghanistan	806	44	139	623
Albania	7,362	302	1,665	5,395
Algeria	248	33	50	165
Angola	130	20	41	69
Antigua and Barbuda	1	0	0	1
Argentina	107	18	35	54
Armenia	25	6	10	9
Australia	55	16	12	27
Austria	16	0	0	16
Azerbaijan	25	5	8	12
Bahrain	2	0	1	1
Bangladesh	7,656	207	1,383	6,066
Barbados	2	0	2	0
Belarus	162	26	65	71
Belgium	13	0	0	13
Benin	30	4	9	17
Bolivia	116	13	22	81
Bosnia and Herzegovina	21	6	4	11
Botswana	7	0	1	6
Brazil	1,617	112	201	1,304
British overseas citizens	1	0	0	1
Bulgaria	45	0	0	45
Burkina	33	0	10	23
Burma	7	2	2	3
Burundi	2	1	0	1
Cambodia	6	0	1	5
Cameroon	306	32	80	194
Canada	96	16	29	51
Cape Verde	30	4	9	17
Central African Republic	2	0	2	0
Chad	3	0	0	3
Chile	30	4	9	17
China	295	64	94	137
Colombia	700	86	225	389
Comoros	1	0	0	1
Congo	3	1	0	2
Congo (Democratic Republic)	30	3	11	16
Costa Rica	10	2	6	2
Croatia	8	0	0	8
Cuba	43	7	8	28
Cyprus	8	0	0	8
Cyprus (Northern part of)	8	1	1	6
Czech Republic	17	0	0	17

C1 Number of entry visas granted
Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Denmark	16	0	0	16
Djibouti	31	2	5	24
Dominican Republic	613	78	89	446
East Timor	66	9	28	29
Ecuador	469	52	139	278
Egypt	406	38	126	242
El Salvador	3	0	2	1
Equatorial Guinea	23	3	9	11
Eritrea	22	0	5	17
Estonia	2	0	0	2
Ethiopia	166	12	40	114
Fiji	1	1	0	0
Finland	10	0	0	10
France	92	0	0	92
Gabon	5	0	1	4
Gambia, The	358	131	45	182
Georgia	88	17	20	51
Germany	94	0	0	94
Ghana	2,053	335	315	1,403
Greece	61	0	0	61
Grenada	1	1	0	0
Guatemala	3	0	2	1
Guinea	204	36	35	133
Guinea-Bissau	182	49	49	84
Guyana	1	0	1	0
Haiti	2	0	1	1
Honduras	11	0	3	8
Hong Kong	73	21	23	29
Hungary	46	0	0	46
Iceland	1	0	0	1
India	18,190	1,096	5,502	11,592
Indonesia	80	26	19	35
Iran	125	18	39	68
Iraq	344	26	54	264
Israel	90	9	12	69
Italy	206	1	0	205
Ivory Coast	120	9	18	93
Jamaica	28	6	10	12
Japan	62	10	25	27
Jordan	75	7	23	45
Kazakhstan	69	17	27	25
Kenya	314	38	73	203
Korea (South)	19	7	7	5
Kosovo	48	4	11	33

C1	Number of entry visas granted Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Kyrgyzstan	9	3	2	4
Latvia	45	0	0	45
Lebanon	100	19	19	62
Liberia	24	4	4	16
Libya	23	2	5	16
Lithuania	18	0	0	18
Luxembourg	2	0	0	2
Macau	5	0	3	2
Macedonia	392	35	122	235
Madagascar	3	0	3	0
Malawi	8	4	1	3
Malaysia	26	7	11	8
Maldives	1	0	0	1
Mali	26	5	4	17
Malta	9	0	3	6
Mauritania	9	1	1	7
Mauritius	31	6	6	19
Mexico	94	19	36	39
Moldova	2,818	229	472	2,117
Mongolia	9	5	0	4
Montenegro	6	1	1	4
Morocco	705	70	171	464
Mozambique	39	5	14	20
Namibia	4	2	1	1
Nepal	873	10	239	624
Netherlands	39	0	0	39
New Zealand	23	4	11	8
Nicaragua	6	0	0	6
Niger	3	1	2	0
Nigeria	2,791	303	527	1,961
Norway	12	0	0	12
Occupied Palestinian Territories	80	4	13	63
Oman	1	1	0	0
Other and unknown	221	54	51	116
Pakistan	17,959	1,137	3,219	13,603
Panama	4	0	1	3
Paraguay	5	1	0	4
Peru	155	27	47	81
Philippines	502	101	137	264
Poland	111	0	0	111
Portugal	161	0	0	161
Refugee	193	24	44	125
Romania	152	0	0	152

C1 Number of entry visas granted
Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Russia	889	163	268	458
Rwanda	5	1	1	3
Sao Tome and Principe	63	6	27	30
Saudi Arabia	6	5	1	0
Senegal	642	59	142	441
Serbia	110	20	30	60
Seychelles	1	0	0	1
Sierra Leone	222	38	28	156
Singapore	21	9	4	8
Slovakia	8	0	0	8
Somalia	2,449	197	274	1,978
South Africa	709	100	218	391
Spain	260	0	0	260
Sri Lanka	332	26	80	226
St. Vincent and the Grenadines	2	0	2	0
Stateless	9	0	2	7
Sudan	225	16	50	159
Sudan (South)	6	1	1	4
Surinam	6	4	0	2
Sweden	53	0	0	53
Switzerland	12	0	0	12
Syria	282	9	30	243
Taiwan	27	4	8	15
Tajikistan	9	1	2	6
Tanzania	43	7	11	25
Thailand	120	25	40	55
Togo	16	6	1	9
Trinidad and Tobago	5	0	3	2
Tunisia	113	21	44	48
Turkey	452	71	120	261
Turkmenistan	5	4	0	1
Uganda	115	7	16	92
Ukraine	3,799	447	1,273	2,079
United States	337	60	98	179
Uruguay	6	0	1	5
Uzbekistan	51	7	12	32
Venezuela	520	93	175	252
Vietnam	113	11	33	69
Yemen	212	9	40	163
Zambia	17	3	1	13
Zimbabwe	61	3	24	34
Total	**84,988**	**6,611**	**19,123**	**59,254**

C2 Number of entry visas applications refused
Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Afghanistan	364	8	91	265
Albania	2192	30	229	1,933
Algeria	114	9	20	85
Angola	105	2	21	82
Argentina	30	5	5	20
Armenia	8	0	0	8
Australia	24	7	10	7
Austria	6	0	0	6
Azerbaijan	2	1	1	0
Bahrain	2	0	0	2
Bangladesh	3425	33	571	2,821
Belarus	30	3	6	21
Belgium	12	0	0	12
Benin	64	3	16	45
Bolivia	102	6	15	81
Bosnia and Herzegovina	10	3	2	5
Botswana	2	1	0	1
Brazil	915	33	63	819
Bulgaria	46	0	0	46
Burkina	29	0	12	17
Burundi	4	0	1	3
Cambodia	2	0	1	1
Cameroon	179	9	41	129
Canada	25	10	6	9
Cape Verde	23	1	7	15
Central African Republic	3	0	3	0
Chad	2	0	0	2
Chile	11	2	2	7
China	79	19	23	37
Colombia	428	40	128	260
Comoros	3	0	2	1
Congo	11	1	2	8
Congo (Democratic Republic)	38	3	10	25
Costa Rica	1	0	0	1
Cuba	18	2	4	12
Cyprus	6	0	0	6
Cyprus (Northern part of)	2	0	0	2
Czech Republic	3	0	0	3
Denmark	5	0	0	5
Djibouti	17	1	4	12
Dominica	6	0	0	6
Dominican Republic	518	12	65	441
East Timor	43	0	7	36

C2	Number of entry visas applications refused Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Ecuador	266	8	71	187
Egypt	156	7	39	110
El Salvador	8	0	1	7
Equatorial Guinea	19	0	3	16
Eritrea	20	2	8	10
Estonia	4	0	0	4
Ethiopia	123	5	19	99
Fiji	1	0	0	1
Finland	4	0	0	4
France	41	0	0	41
Gabon	1	1	0	0
Gambia, The	1527	59	940	528
Georgia	22	1	5	16
Germany	33	0	0	33
Ghana	6216	83	1957	4176
Greece	26	0	0	26
Guatemala	7	0	0	7
Guinea	226	7	56	163
Guinea-Bissau	226	15	63	148
Guyana	1	0	0	1
Haiti	4	0	0	4
Honduras	5	0	1	4
Hong Kong	19	7	7	5
Hungary	18	0	0	18
Iceland	1	0	0	1
India	5886	176	1687	4023
Indonesia	20	5	4	11
Iran	39	8	14	17
Iraq	190	4	18	168
Israel	17	5	5	7
Italy	75	0	0	75
Ivory Coast	128	5	20	103
Jamaica	25	4	6	15
Japan	13	2	4	7
Jordan	24	2	7	15
Kazakhstan	15	2	4	9
Kenya	284	6	45	233
Korea (South)	8	0	1	7
Kosovo	17	1	1	15
Kuwait	1	0	0	1
Kyrgyzstan	4	0	0	4
Latvia	16	0	0	16
Lebanon	33	2	5	26
Liberia	19	0	4	15

C2	Number of entry visas applications refused Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Libya	14	0	3	11
Lithuania	7	0	1	6
Luxembourg	1	0	0	1
Macedonia	58	5	21	32
Madagascar	2	1	0	1
Malawi	6	1	1	4
Malaysia	7	0	4	3
Mali	20	0	5	15
Malta	3	0	0	3
Mauritania	5	1	0	4
Mauritius	7	0	4	3
Mexico	23	2	5	16
Moldova	409	13	32	364
Mongolia	3	0	0	3
Montenegro	1	1	0	0
Morocco	324	12	74	238
Mozambique	15	0	1	14
Namibia	2	0	0	2
Nepal	195	1	37	157
Netherlands	36	0	0	36
New Zealand	4	0	1	3
Nicaragua	3	0	1	2
Niger	3	1	0	2
Nigeria	2849	97	623	2129
Norway	12	0	0	12
Occupied Palestinian Territories	55	0	4	51
Other and unknown	40	2	9	29
Pakistan	10411	597	1854	7960
Panama	1	0	0	1
Paraguay	4	1	1	2
Peru	54	6	12	36
Philippines	193	32	52	109
Poland	62	0	0	62
Portugal	106	0	0	106
Refugee	151	12	28	111
Romania	112	0	0	112
Russia	131	27	37	67
Rwanda	10	1	2	7
Sao Tome and Principe	52	4	19	29
Saudi Arabia	6	0	2	4
Senegal	442	10	139	293
Serbia	25	8	3	14
Sierra Leone	264	8	61	195

C2	Number of entry visas applications refused Data provided includes EUSS Family Permits and EUSS Travel Permits

Country of nationality	Jan 2019 – Dec 2021	Jan 2019 – Dec 2019	Jan 2020 – Dec 2020	Jan 2021 – Dec 2021
Singapore	6	0	2	4
Slovakia	1	0	0	1
Slovenia	1	0	0	1
Somalia	3274	71	436	2767
South Africa	210	21	85	104
Spain	85	0	0	85
Sri Lanka	179	48	38	93
St. Lucia	1	0	1	0
Stateless	9	0	5	4
Sudan	123	7	19	97
Sudan (South)	1	0	0	1
Surinam	1	0	0	1
Swaziland	1	0	1	0
Sweden	17	0	0	17
Switzerland	2	0	0	2
Syria	173	1	9	163
Taiwan	1	0	1	0
Tanzania	33	0	16	17
Thailand	39	10	14	15
Togo	14	0	3	11
Trinidad and Tobago	1	0	0	1
Tunisia	46	5	8	33
Turkey	154	23	37	94
Turkmenistan	4	2	2	0
Uganda	141	5	32	104
Ukraine	494	34	189	271
United Arab Emirates	1	0	0	1
United States	93	15	26	52
Uruguay	1	0	0	1
Uzbekistan	11	0	5	6
Venezuela	155	26	48	81
Vietnam	29	6	4	19
Yemen	110	3	9	98
Zambia	9	0	2	7
Zimbabwe	47	8	10	29
Total	**46,292**	**1,789**	**10,401**	**34,102**

Applications for FW Permits. Frontier Worker		
Country of nationality	**1 Jan 2020 – 31 Dec 2020**	**1 Jan 2021 – 31 Dec 2021**
Argentina	**0**	**1**
Australia	**0**	**1**
Austria	**4**	**78**
Belgium	**34**	**211**
Bulgaria	**41**	**326**
Canada	**0**	**1**
Croatia	**28**	**306**
Cyprus	**3**	**17**
Czech Republic	**18**	**275**
Denmark	**22**	**419**
Estonia	**41**	**94**
Finland	**5**	**43**
France	**85**	**424**
Germany	**40**	**994**
Greece	**22**	**238**
Guyana	**0**	**1**
Hungary	**33**	**263**
Iceland	**0**	**8**
India	**0**	**1**
Ireland	**2**	**14**
Israel	**0**	**1**
Italy	**86**	**599**
Latvia	**114**	**794**
Lithuania	**86**	**479**
Luxembourg	**1**	**3**
Malta	**8**	**58**
Netherlands	**128**	**940**
Nigeria	**0**	**1**
Norway	**5**	**382**
Other and unknown	**0**	**875**
Poland	**240**	**2,837**
Portugal	**47**	**340**
Refugee	**0**	**1**
Romania	**116**	**2,183**
Russia	**0**	**1**
Slovakia	**18**	**242**
Slovenia	**4**	**150**
South Africa	**0**	**2**
Spain	**97**	**404**
Sweden	**31**	**196**
Switzerland	**7**	**41**
Uganda	**0**	**1**
Ukraine	**0**	**2**
United States	**0**	**4**
Grand Total	**1,366**	**14,251**

Outcomes of applications Frontier Worker – Permits Issued		
Country of nationality	**1 Jan 2020 – 31 Dec 2020**	**1 Jan 2021 – 31 Dec 2021**
Austria	**1**	**73**
Belgium	**22**	**205**
Bulgaria	**17**	**203**
Croatia	**17**	**255**
Cyprus	**2**	**16**
Czech Republic	**13**	**162**
Denmark	**7**	**343**
Estonia	**19**	**86**
Finland	**3**	**35**
France	**59**	**393**
Germany	**32**	**857**
Greece	**17**	**168**
Hungary	**17**	**227**
Iceland	**0**	**7**
Ireland	**1**	**9**
Italy	**58**	**493**
Latvia	**35**	**566**
Lithuania	**32**	**343**
Luxem-bourg	**0**	**4**
Malta	**5**	**46**
Netherlands	**87**	**856**
Norway	**3**	**299**
Poland	**111**	**1,995**
Portugal	**28**	**276**
Romania	**55**	**1,248**
Slovakia	**9**	**193**
Slovenia	**3**	**132**
Spain	**65**	**330**
Sweden	**14**	**161**
Switzerland	**6**	**35**
Grand Total	**738**	**10,016**

Outcomes of applications Frontier Worker – Permits Refused		
Country of nationality	**1 Jan 2020 – 31 Dec 2020**	**1 Jan 2021 – 31 Dec 2021**
Austria	**0**	**9**
Belgium	**0**	**19**
Bulgaria	**0**	**145**
Croatia	**0**	**57**
Cyprus	**0**	**3**
Czech Republic	**0**	**129**
Denmark	**0**	**100**
Estonia	**0**	**22**
Finland	**0**	**10**
France	**0**	**63**
Germany	**0**	**145**
Greece	**0**	**66**
Hungary	**0**	**54**
Iceland	**0**	**2**
Ireland	**0**	**4**
Israel	**0**	**1**
Italy	**0**	**119**
Latvia	**0**	**277**
Lithuania	**0**	**179**
Malta	**0**	**16**
Netherlands	**0**	**141**
Norway	**0**	**79**
Poland	**0**	**937**
Portugal	**0**	**74**
Romania	**1**	**936**
Russia	**0**	**1**
Slovakia	**0**	**57**
Slovenia	**0**	**19**
South Africa	**0**	**1**
Spain	**0**	**97**
Sweden	**0**	**48**
Switzerland	**0**	**9**
Ukraine	**0**	**1**
Grand Total	**1**	**3,820**

Outcomes of applications Frontier worker – Permits Withdrawn		
Country of nationality	**1 Jan 2020 – 31 Dec 2020**	**1 Jan 2021 – 31 Dec 2021**
Australia	**0**	**1**
Austria	**0**	**2**
Belgium	**0**	**1**
Bulgaria	**0**	**3**
Canada	**0**	**1**
Croatia	**0**	**2**
Cyprus	**0**	**1**
Czech Republic	**0**	**2**
Denmark	**0**	**4**
Estonia	**0**	**1**
Finland	**0**	**1**
France	**1**	**4**
Germany	**0**	**17**
Greece	**0**	**3**
Guyana	**0**	**1**
Hungary	**0**	**4**
India	**0**	**1**
Italy	**0**	**12**
Latvia	**0**	**9**
Lithuania	**0**	**4**
Malta	**0**	**1**
Netherlands	**0**	**11**
Nigeria	**0**	**1**
Norway	**0**	**2**
Poland	**0**	**30**
Portugal	**0**	**4**
Refugee	**0**	**1**
Romania	**0**	**34**
Russia	**0**	**1**
South Africa	**0**	**1**
Spain	**0**	**3**
Sweden	**0**	**4**
Uganda	**0**	**1**
Ukraine	**0**	**1**
United States	**0**	**4**
Grand Total	**1**	**173**

Notes regarding the data

Data up to 30 June 2021 is taken from the EUSS June quarterly report, to include all in-time applications. Data up to the end of the reporting year of 2021 is taken from the EUSS quarterly report up to 31 December 2021. * = 1 to 9

1. EUSS application figures are rounded to the nearest 10 and may not match overall totals
2. Figures in these tables have been derived from live management information systems and are provisional and subject to change.
3. Total applications received by nationality include small numbers of records (less than 0.01%), in which nationality is not currently in an analysable from from live systems.
4. For EUSS outcomes, invalid, withdrawn or void are not subsets of refusal figures
5. While the IMA is not responsible for monitoring the UK-Swiss Citizens' Rights Agreement, applications from Swiss nationals have been included in the figures because they are part of our published statistics.
6. For EU, EEA and Swiss citizens and their family members resident in the UK by the end of the transition period, the deadline for applications to be made to the EUSS was 30 June 2021.
7. In-time applications include online applications received by 9am on 1 July 2021 and paper applications received by midnight 07 July 2021.
8. As data is taken from a live management information system, there may be differences to previous publications.
9. Late application figures are taken from provisional management information and therefore subject to change. Figures are rounded to the nearest 100.
10. Figures from the Private Testing Phase 1 and 2 (28 August 2018 – 30 March 2019) are included in first reporting year (28 August 2018 – 31 December 2019)
11. The statistics include applications from cohorts able to apply as a result of domestic policy decisions (e.g. Zambrano cases) that are not covered by the Citizens' Rights Agreements or monitoring by the IMA.
12. EUSS family permit figures include a small number of EUSS travel permits
13. For EUSS family permits, grants and refusals do not include applications withdrawn or lapsed
14. Data for EUSS family permits can be found in the Immigration Quarterly report up to December 2021 (VIS_D01 and VIS_D02)

Immigration Statistics up to 31 December 2021

Frontier Workers
Data is taken from the Immigration Quarterly report up to 31 December 2021

Data can be found in table VIS_D01 and VIS_D02
Invalid, withdrawn and void applications are not subsets of refusals.

ANNEX 2

Northern Ireland Executive

The following Departments have provided nil responses:

Department for Agriculture, Environment and Rural Affairs (DAERA) – there are no areas of responsibility for the Department

Department for Communities (DfC) – the Department have advised they are content any relevant content has been captured by DWP

Department for Infrastructure (DfI) – the Department have not introduced any legislative amendments in the RPQ area and have no policy responsibilities in the other fields

Department of Health (DoH) – Health figures are captured at a UK level

Department of Education (DE) – nil

Department of Justice (DoJ) – nil

Department for the Economy (DfE) – nil

Department of Finance (DoF) – nil

The Departmental Solicitors Office have also provided a nil response.

Nil return from the Executive Office

1) Residence rights

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

d. Key domestic jurisprudence from the reporting year

Summary of judgment – In re Jim Allister and others (EU Exit) – CA – 1403222.pdf (judiciaryni.uk)

In the high court of justice in Northern Ireland (Judiciaryni.uk)

Summary of judgment – In re SPUC Pro-Life Ltd (Abortion) – 080222.pdf (judiciaryni.uk)

e. Statistical data

N/A

2) Rights of workers and self-employed

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data on the frontier worker scheme

N/A

3) Co-ordination of social security schemes

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

N/A

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

N/A

4) Recognition of professional qualifications

a. Key legislative instruments implementing the Withdrawal Agreement

N/A

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

N/A

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

N/A

ANNEX 3

Scottish Government

1) Residence rights

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

N/A

2) Rights of workers and self-employed

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data on the frontier worker scheme

N/A

3) Co-ordination of social security schemes

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

The Social Security Co-ordination (EU Exit) (Scotland) (Amendments etc.) Regulations 2020

b. Key legislative instruments adopted or amended in the reporting year

Best Start Grants (Scotland) Regulations 2018

Welfare Foods (Best Start Foods) Scotland Regulations 2019

Funeral Expense Assistance Scotland Regulations 2019

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

N/A

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

N/A

4) Recognition of professional qualifications

a. Key legislative instruments implementing the Withdrawal Agreement

N/A

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

Benefits if you leave Scotland or travel abroad

Help and advice for EU citizens in Scotland – mygov.scot

Help and advice for EU students studying in Scotland – scot_saas_EU RESIDENCE GUIDE – TUITION FEE STATUS OF STUDENTS STARTING STUDIES IN 2021-22_v4 [2021_03_11].pdf (ukcisa.org.uk)

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

N/A

ANNEX 4

Welsh Government

1) Residence rights

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement and EEA EFTA Separation Agreement

Since 2019 the Welsh Government has provided funding for the provision of EUSS Advice Services, including specialist legal advice on immigration/ EU Settlement for EU citizens.

The Welsh Government's internal 'Policy Handbook' has been updated to include information on the requirement to measure the impact of any policy decision on the rights of EU citizens[15].

Subsequently an internal 'Integrated Impact Assessment' has been developed.

Immigration specialist lawyers, Newfields Law, have been procured to provide internal training for Welsh Government colleagues on EU citizens' rights.

Links to the information provided on the Independent Monitoring Authorities' website have been added on to the Welsh Government's Preparing Wales website.

Dr Kate Chamberlain, CEO IMA, has attended the Welsh Government's EUSS co-ordination group meetings to update the group on the work of the IMA and importance of upholding EU citizens' rights.

15. References to "EU citizens" should be taken to include EEA citizens as appropriate

The Welsh Government has developed a contact portal i.e. email address where concerns on EU citizens' rights can be raised – cohesion@gov.wales. The Welsh Government has uploaded factsheets on all EU citizens' rights to the **Welsh Government's Preparing Wales website**.

The Welsh Government has also developed a **'Sanctuary' website** that contains information for all migrants, including EU citizens, on various topics.

The Welsh Government has developed a section on EU Citizens' Rights on the internal staff website and circulated the link in the all-staff newsletter.

Training has been provided to all Local Authorities on migrant rights and entitlements, including rights of European citizens with settled status and pre-settled status.

There continues to be communications from the Welsh Government to external stakeholders on various topics that may have an impact on EU citizens i.e. rights, EUSS etc.

Research commissioned by the Welsh Government, undertaken by Alma Economics for the EU Citizens' Rights project: Equality of opportunity and outcome for EU Citizens living in Wales. Published in Dec 2020.

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

N/A

2) Rights of workers and self-employed

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

N/A

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement and EEA EFTA Separation Agreement

The Welsh Government has uploaded a fact sheet on the Preparing Wales website on employment rights of EU Citizens – **Right of EU Citizens in Wales – Rights to Work** (gov.wales)

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data on the frontier worker scheme

N/A

3) Co-ordination of social security schemes

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

Legislation to implement the TCA/Withdrawal Agreement and ensure that existing healthcare entitlements for specific EEA and Swiss residents are preserved following EU exit and that our domestic legislation reflects the UK-Switzerland Convention implemented at the UK level in November 2021:

The National Health Service (Charges to Overseas Visitors) (Amendment) (Wales) (EU Exit) Regulations 2020 – CIF 21 Dec 2020

The National Health Service (Charges to Overseas Visitors) (Amendment) (Wales) (EU Exit) Regulations 2021 – CIF 26 March 2021

The Education (Student Finance) (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2021 are relevant. These were made on 19 April 2021 and provide for the principal amendments to the regulations which provide for financial support for those undertaking a course of higher education, and eligibility for home fee status and the tuition fee cap when studying in certain institutions in Wales. The eligibility of those who started a course before IP completion day[16] was maintained, and those who were granted leave to remain under the various withdrawal agreements were made eligible.

b. Key legislative instruments adopted or amended in the reporting year

Also to reflect the discontinuation of the cross border health arrangements between the UK and EU/EEA countries (under the Cross Border Directive (2011/24/EC) other than for transitional cases in progress on 31 December 2020) following EU Exit under the terms of the TCA/Withdrawal Agreement, the National Health Service (Cross-Border Healthcare) (Wales) (Amendment) Directions 2021 and the National Health Service (Reimbursement of the Cost of EEA Treatment) (Wales) (Amendment) Directions 2021 were made on 25 March 2021:

https://gov.wales/national-health-service-cross-border-healthcare-wales-amendment-directions-2021

https://gov.wales/national-health-service-reimbursement-cost-eea-treatment-wales-amendment-directions-2021

16. IP completion day refers to the ending of the 11-month period from 31 January 2020 during which the UK continued to be subject to EU rules.

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

We have advised Local Health Boards of the changes following EU Exit and the implementation of the TCA/Withdrawal Agreement. We have produced guidance for S2 planned treatment, but this is then adopted individually by Local Health Boards.

The 'Preparing Wales' pages provide guidance on education **https://gov.wales/preparing-wales-brexit/education-and-skills**.

We have also provided specific administrative guidance for student finance at **https://gov.wales/student-finance-wales-information-notice-eu-exit-html**.

The Welsh Government's internal 'Policy Handbook' has been updated to include information on the requirement to measure the impact of any policy decision on the rights of EU citizens.

Subsequently an internal 'Integrated Impact Assessment' has been developed.

Immigration specialist lawyers, Newfields Law, have been procured to provide internal training for Welsh Government colleagues on EU citizens' rights.

Links to the information provided on the independent Monitoring Authorities' website have been added on to the Welsh Government's Preparing Wales website.

Dr Kate Chamberlain, CEO IMA, has attended the Welsh Government's EUSS co-ordination group meetings to update the group on the work of the IMA and importance of upholding EU citizens' rights.

The Welsh Government has developed a contact portal i.e. email address where concerns on EU citizens' rights can be raised – cohesion@gov.wales.

The Welsh Government has uploaded factsheets on all EU citizens' rights to the Welsh Government's Preparing Wales website – **https://gov.wales/eu-citizens-rights**.

The Welsh Government has also developed a 'Sanctuary' website that contains information for all migrants, including EU citizens, on various topics **https://wales.cityofsanctuary.org/get-involved**.

The Welsh Government has developed a section on EU Citizens' Rights on the internal staff website and circulated the link in the all-staff newsletter. Training has been provided to all Local Authorities on migrant rights and entitlements, including rights of European citizens with settled status and pre-settled status.

There continues to be communications from the Welsh Government to external stakeholders on various topics that may have an impact on EU citizens i.e. rights, EUSS etc.

We have advised Local Authorities of the changes prior to and following EU Exit and the implementation of the TCA/Withdrawal Agreement.

The Welsh Local Government Association (WGLA) commissioned and provided guidance to Local Authorities to help them prepare for the implementation of the withdrawal agreement – via dashboard information and toolkits – **Resources – EU Transition Exposure Dashboards** – WLGA and Resources – **WLGA/Grant Thornton Toolkits – WLGA**.

Local Government 'EU Transition co-ordinators' – funded by Welsh Government, one in each authority –these posts and network were essential for capacity and two-way communication across all LA service areas.

The Local Government EU Transition Preparedness Advisory Panel. This was a strategic group made of regional Local Authority representative Chief Executives, service leads, WLGA and Welsh Government. It has met monthly since Jan 2019, helping to ensure a consistency of approach to preparedness, sharing of knowledge and messages and now an overview of the implementation / impacts of the post transition period. The group had its final meeting Jan 2022.

WLGA EU Transition Programme – funded by Welsh Government – providing tools, analysis, research – avoiding authorities have to duplicate efforts and resource and providing consistent, quality advice and information. The coordinators, along with community cohesion officers did a lot of local work to increase EUSS applications in the locality.

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

N/A

4) Recognition of professional qualifications

a. Key legislative instruments implementing the Withdrawal Agreement

N/A

b. Key legislative instruments adopted or amended in the reporting year

N/A

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

N/A

d. Key domestic jurisprudence from the reporting year

N/A

e. Statistical data

N/A

ANNEX 5

Government of Gibraltar

1) Residence rights

Gibraltar operates a residence scheme in accordance with Article 18(4) of the Withdrawal Agreement and Article 17(4) of the EEA/EFTA Separation Agreement ("the Agreements").

EU and EEA/EFTA nationals who are exercising residence rights under the Agreements are issued with a blue civilian registration card. Persons connected with these nationals (who are within the scope of the Agreements) may also apply for a blue civilian registration card (which is substantially in the EU's uniform physical format) under regulation 5 of the **Electronic Identity Card Regulations 2015**. Provided that the person can prove their entitlement, there is no time limit for application.

The blue civilian registration card serves as proof that the recipient is registered as resident in Gibraltar and may be used as a form of ID. As such, the card may be used to access provisions relating to residence.

Where a person had a blue civilian registration card before IP completion day[17] (issued under EU law) that person can continue to use that card to access provisions for the remainder of their residence in Gibraltar.

Gibraltar has not put in place more favourable residence conditions.

Gibraltar has not made use of derogations from equal treatment under Article 23(2) of the Withdrawal Agreement.

The fee for the card is £25.00 on first issue, and £10.00 on renewal.

17. IP completion day refers to the ending of the 11-month period from 31 January 2020 during which the UK continued to be subject to EU rules.

Key legislative instruments in Gibraltar are:

European Union (Withdrawal) Act 2019;

European Union (Withdrawal Agreement) Act 2020;

Electronic Identity Card Regulations 2015;

The following instruments are also relevant to the implementation of the Withdrawal Agreement and the EEA EFTA Separation Agreement.

Immigration, Asylum and Refugee Act;

Civilians Registration Act;

European Union (Civilian Registration) (EU Exit) Regulations 2021;

Notice of Prescribed Fees.

All of the legislation listed above implements both the Withdrawal Agreement and the EEA EFTA Separation Agreement.

a. Key legislative instruments adopted or amended in the reporting year

The European Union (Civilian Registration) (EU Exit) Regulations 2021 were published and came into force on 25 February 2021.

b. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement and EEA EFTA Separation Agreement

Technical Notice (10) Guidance to EU/EEA/Swiss Residents of Gibraltar is the key administrative document giving guidance on both the Withdrawal Agreement and the EEA/EFTA Separation Agreement.

c. Key domestic jurisprudence from the reporting year

No jurisprudence has arisen in the reporting year.

d. Statistical data

A	Estimated number of resident beneficiaries of the Withdrawal Agreement and EEA EFTA separation Agreement
Total EU	1,396
Total EEA	7
Total	1,403

B	Number of residence applications made in the reporting year
Total EU	691
Total EEA	3
Total	694

B1b	Number of applications granted as permanent residence
Total	0

B1c	Number of applications refused
Total	0

B1c1	Out of B1c, number of applications invalid
Total	0

B1c2	Out of B1c, number of applications that were withdrawn by applicants
Total	0

2) Rights of workers and self-employed

In Gibraltar, beneficiaries of the Withdrawal Agreement are not obliged to apply for a document identifying their frontier workers' rights. Frontier Workers were provided a dedicated government electronic platform on which they could (and still can) corroborate whether the Gibraltar Government considers them to be frontier workers covered by the personal scope of the Withdrawal Agreement. Since the 1 January 2021 the platform has included a facility, free of charge, which allows for frontier workers to request a letter certifying that they are frontier workers covered by the scope of the Withdrawal Agreement. This facility has only been used a total of 6 times therefore, only 6 such letters have been issued. This could be because the Government has been very clear that what will establish a frontier workers' status in Gibraltar is their inclusion in the electronic list kept by the Gibraltar Government's Department of Employment and not the production of this letter.

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

Key legislative instruments in Gibraltar are:

European Union (Withdrawal) Act 2019;

European Union (Withdrawal Agreement) Act 2020;

The following instrument is also relevant to the implementation of the Withdrawal Agreement and the EEA EFTA Separation Agreement.

Immigration, Asylum and Refugee Act;

All of this legislation implements both the Withdrawal Agreement and the EEA EFTA Separation Agreement.

b. Key legislative instruments adopted or amended in the reporting year

No further legislative instruments have been adopted this year.

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement and EEA EFTA Separation Agreement

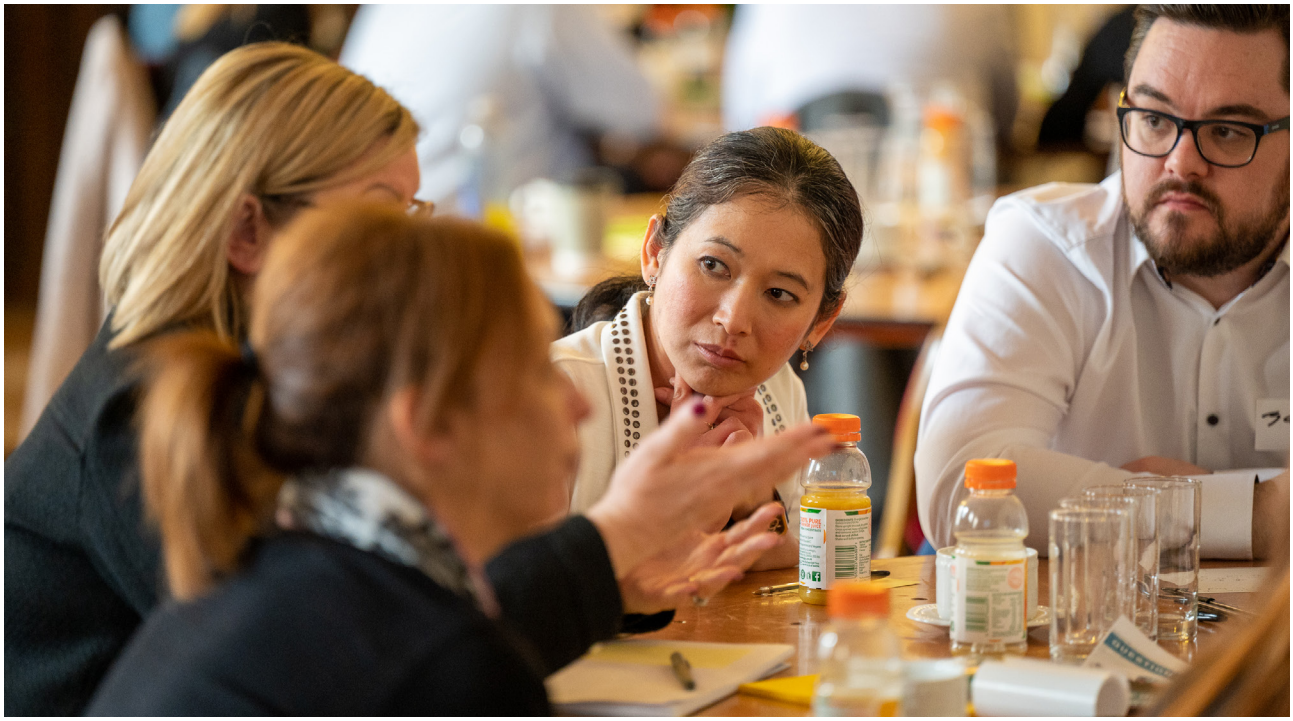
Technical Notice (11) Guidance to EU/EEA/Swiss Frontier Workers is the key administrative document giving guidance on both the Withdrawal Agreement and the EEA/EFTA Separation Agreement.

d. Key domestic jurisprudence from the reporting year

No jurisprudence has arisen in the reporting year.

e. Statistical data on the frontier worker scheme

The government maintains details of every frontier worker in Gibraltar.
On 31.12.2020 there were 12,142 frontier workers registered in Gibraltar.
Of these 12,140 were EU citizens falling under the UK-EU Withdrawal Agreement and 2 EEA nationals falling under the UK EEA EFTA Separation Agreement.



3) Co-ordination of social security schemes

No special implementation choices have been made in respect of Gibraltar

a. Key legislative instruments implementing the Withdrawal Agreement and EEA EFTA Separation Agreement

Key legislative instruments in Gibraltar are:

European Union (Withdrawal) Act 2019;

European Union (Withdrawal Agreement) Act 2020;

Healthcare (International Agreements) and Social Security Coordination Act 2019;

Healthcare (European Economic Area and Switzerland Arrangements) (EU Exit) Regulations 2020;

Each of these pieces of legislation implement both the Withdrawal Agreement and the EEA EFTA Separation Agreement.

b. Key legislative instruments adopted or amended in the reporting year

No further legislative instruments have been adopted this year.

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

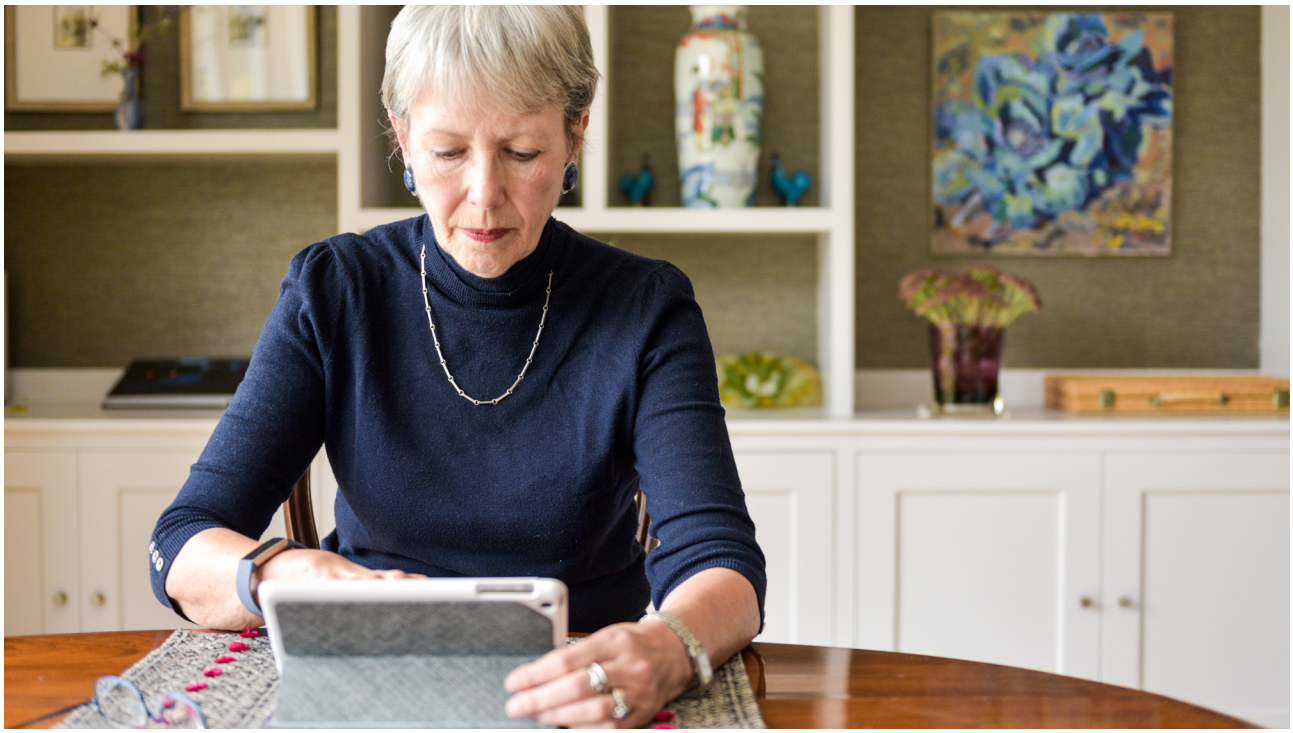
Technical Notice (16) Getting ready for the end of the Transition Period – Social Security Coordination is the key administrative document giving guidance on both the Withdrawal Agreement and the EEA/EFTA Separation Agreement.

d. Key domestic jurisprudence from the reporting year

No jurisprudence has arisen in the reporting year.

e. Statistical data

Applicable legislation (Portable Document A1)	33
Cross-border health care (EHIC, Portable Documents S1 and S2)	
EHIC	1,411
S1	10,011*
S2	31
Pensions	
Old age pension	96*
Survivor's pension	4
Unemployment benefits (Portable Documents U1 and U2)	
U1	561*
U2	0
Family benefits	
Maternity allowance	79*
Maternity grant	205*



*These figures are subject to verification

4) Recognition of professional qualifications

No special implementation choices have been made in respect of Gibraltar.

a. Key legislative instruments implementing the Withdrawal Agreement

Key legislative instruments in Gibraltar are:

European Union (Withdrawal) Act 2019;

European Union (Withdrawal Agreement) Act 2020;

Recognition of Professional Qualifications and Services (Amendments and Miscellaneous Provisions) (EU Exit) Regulations 2020.

b. Key legislative instruments adopted or amended in the reporting year

No further legislative instruments have been adopted this year.

c. Key administrative documents giving guidance on the implementation of the Withdrawal Agreement

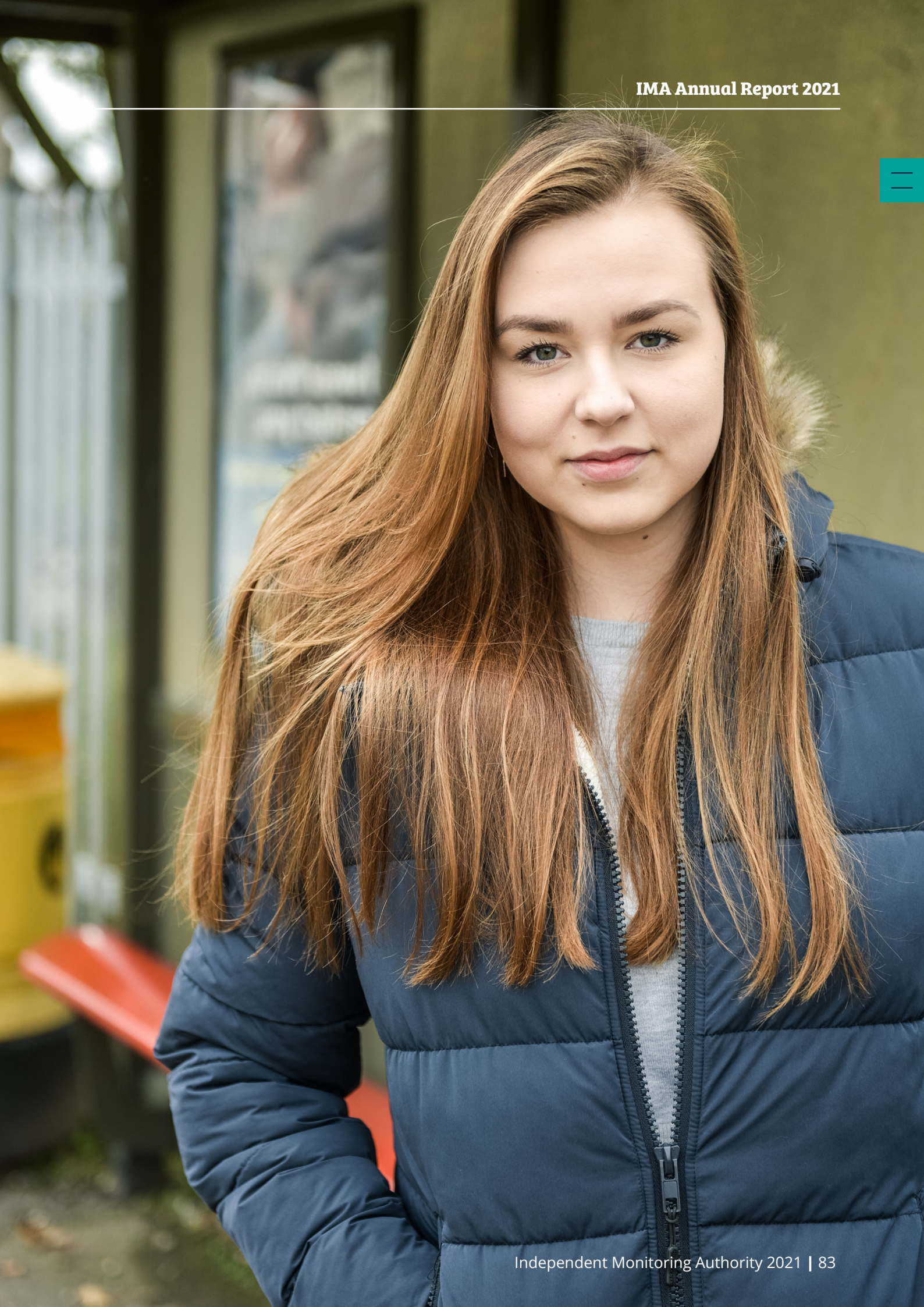
Technical Notice – No Deal Brexit – Recognition of professional qualifications is the key administrative document giving guidance on both the Withdrawal Agreement and the EEA/EFTA Separation Agreement.

d. Key domestic jurisprudence from the reporting year

No jurisprudence has arising in the reporting year.

e. Statistical data

		Medical practitioners	Nurses, Midwifes and Health Visitors	Dentists	Pharmacists
A	Number of applications under Article 28 of the Withdrawal Agreement made in the reporting year (2021)	21	14	1	2
A1	Number of applications granted	2	14	1	1
A2	Number of applications refused	0	0	0	0
A2a	Out of A2, number of applications that were invalid	19	0	0	1
A2b	Out of A2, number of applications that were withdrawn by applicants	0	0	0	0
A3	Number of applications that are still pending at the end of the reporting year	19	0	0	1



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ESA | EFTA Surveillance Authority

2021 ESA Annual Report to the Joint Committee established under the Separation Agreement

1 Introduction

This report is prepared in accordance with Article 64(3) of the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union ("the Separation Agreement/the Agreement"),[1] and Article 2 of Protocol 9 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Surveillance and Court Agreement"/"SCA").[2] It aims to provide a general overview of the various measures undertaken by the EFTA Surveillance Authority ("ESA") to implement procedures in order to ensure effective monitoring of, and compliance with Part Two of the Separation Agreement, as well as a summary of the correspondence received from UK nationals in the EFTA States falling under the personal scope of the Agreement. The report also provides information concerning measures undertaken by the EEA EFTA States (that is, in Iceland, Liechtenstein, and Norway) to implement and to comply with Part Two of the Agreement.

[1] This report is submitted to discharge the obligation set out in Article 64(3) of the Separation Agreement, which provides that *"The EFTA Surveillance Authority …shall … annually inform the Joint Committee on the implementation and application of Part Two in the EEA EFTA States…"*
[2] Article 2(2) of Protocol 9 of the Surveillance and Court Agreement states: *"The EFTA Surveillance Authority shall annually inform the Joint Committee established by Article 65 of the Separation Agreement on the implementation and application of Part Two of the Separation Agreement in the EFTA States. The information provided shall, in particular, cover measures taken by the EFTA States to implement or comply with Part Two and the number and nature of complaints received."*

ESA has been tasked with overseeing the implementation and application in the EEA EFTA States of Part Two of the Separation Agreement, which is entitled "Citizens' Rights".

Article 64(2) of the Agreement empowers ESA *"to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the EEA EFTA States and to receive complaints from United Kingdom nationals and their family members for the purposes of conducting such inquiries".* The same article provides that ESA is to have *"the right to bring a matter before the EFTA Court pursuant to the Surveillance and Court Agreement".*

Article 64(3) of the Separation Agreement provides that *"The EFTA Surveillance Authority…shall…annually inform the Joint Committee on the implementation and application of Part Two in the EEA EFTA States …. The information provided shall, in particular, cover measures taken to implement or comply with Part Two and the number and nature of complaints received."*

This is the first annual report prepared by ESA and reports on the 12-month period commencing from the end of the Transition Period, at midnight CET (11pm GMT) on 31 December 2020.

In addition to the prescribed matters on which ESA is obliged to report, the report also contains information that is relevant to ESA's activities in relation to the Agreement during this period.

The report is submitted to the Joint Committee established under Article 65(1) of the Agreement.

2 ESA's role under the Agreement

ESA took up its new functions with respect to the Agreement as of midnight CET (11pm GMT) on 31 December 2020. While ESA's counterpart with respect to the rights of the nationals of the EEA EFTA States in the UK, the UK Independent Monitoring Authority ("UK IMA") is a newly-established and bespoke body that is tasked with ensuring that the rights of EU and EEA EFTA citizens and their family members living in the UK and Gibraltar as at the 31 December 2020 are upheld following the departure of the UK from the EU, ESA's genesis pre-dated the Agreement by more than a quarter century.

ESA's principal task, and that for which it was originally established, involves monitoring compliance with the Agreement on the European Economic Area ("EEA Agreement") in Iceland, Liechtenstein and Norway; the EFTA States that are parties to the EEA Agreement ("EEA EFTA States"), allowing them to participate in the Internal Market of the European Union ("EU"). The EEA Agreement, broadly speaking, extends the EU's four economic freedoms to the EEA EFTA States.

ESA operates independently of the EEA EFTA States and seeks to protect the rights of individuals and market participants who find their rights infringed by rules or practices of the EEA EFTA States or companies within those states. ESA monitors the timely implementation of EEA law (such as directives and regulations) by the EEA EFTA States and may investigate whether national legislation or practices are in line with EEA law. Such an investigation may lead to the launching of formal infringement proceedings against an EEA EFTA State, a three-step procedure which may result in ESA referring the case to the EFTA Court.

With respect to the Separation Agreement, this is the first time that ESA has been tasked with the oversight of a new international treaty completely separate from the EEA Agreement. While there are significant similarities in terms of ESA's monitoring tasks under the EEA Agreement on the one hand, and the Separation Agreement, on the other, there are also important distinctions.

ESA's role is restricted to the monitoring of Part Two of the Separation Agreement, entitled "Citizens' Rights". This entails that ESA is responsible for monitoring rights of UK nationals in the EEA EFTA States falling under this Part of the Separation Agreement. Broadly speaking, the rights falling under Part Two reflect rights previously held by UK nationals (that is, by natural persons holding UK nationality, as defined by Article 2(d) of the Agreement)[3] on the basis of the EEA Agreement, until the end of the Transition Period (that is, until 31 December 2020). However, the rights due to UK nationals are significantly more circumscribed than those previously available under the EEA Agreement. The territorial, material, and personal scope of ESA's monitoring obligations under the Separation Agreement

[3] Article 2(d) of the Agreement provides that *""United Kingdom national" means a national of the United Kingdom, as defined in the New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland of 31 December 1982 on the definition of the term 'nationals' [OJ C 23, 28.1.1983, p. 1] together with Declaration No 63 annexed to the Final Act of the intergovernmental conference which adopted the Treaty of Lisbon [OJ C 306, 17.12.2007, p. 270.]."*

are all distinct from those obtaining under EEA law. However, under Article 2 of Protocol 9 to the SCA, ESA's powers that follow from the EEA Agreement shall apply to the Separation Agreement *mutatis mutandis*. This includes the power to receive complaints, and to bring cases before the EFTA Court.

Personal scope

Articles 8, and 9 of the Separation Agreement jointly determine the definitions and personal scope for the purposes of the application of Title II of Part Two of the Separation 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 Separation Agreement consist of EEA EFTA nationals and UK nationals having exercised the right to reside or work in accordance with EEA 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 EEA EFTA national and UK national are set out in Article 2(c) and (d) of the Agreement. Importantly, this entails that UK nationals who arrive in the EEA EFTA States after the end of the Transition Period, and who are not family members of other UK nationals who derive rights from the Separation Agreement, cannot themselves fall under the personal scope of the Separation Agreement, and are thus outside the scope of ESA's monitoring obligation.

Further information concerning the personal scope of the Agreement can be found in ESA's Guidance Note (Doc No 1186826), annexed to this Report.

Territorial Scope

While Article 3(2) provides as a general rule that *"any reference in this Agreement to EEA EFTA States, or their territory, shall be understood as covering the territories of Iceland, Liechtenstein and Norway to which the EEA Agreement applies,"* the territorial scope of the Separation Agreement is more circumscribed than the EEA Agreement would be in similar circumstances, as free movement rights between the EEA EFTA States – or between EU Member States, on the one hand, and the EEA EFTA States, on the other – are not covered by the Separation Agreement.

As a result, the territorial scope must be read in tandem with the personal scope of the Agreement. UK nationals who derive rights from the Agreement in Iceland, for example, are generally not entitled to use those rights in Norway, or indeed, in Germany or France.

Material Scope

As noted, the material scope of Part Two of the Agreement is confined to "Citizens' Rights". This entails that other issues contemplated by the Agreement, including, but not limited to:

(a) goods placed on the market, including ongoing customs procedures;

(b) intellectual property;

(c) ongoing police and judicial cooperation in criminal matters;

(d) data and information processed or obtained before the end of the Transition Period or on the basis of the UK-EU Withdrawal Agreement ("The Withdrawal Agreement");

(e) ongoing public procurement and similar procedures; and

(f) ongoing judicial procedures (representation before the EFTA Court)

all fall outside the scope of ESA's monitoring obligations under the Separation Agreement. Moreover, in relation to goods specifically, Article 41 of the Agreement provides that *"The market surveillance authorities of the EEA EFTA States and the market surveillance authorities of the United Kingdom shall exchange without delay any relevant information collected with regard to the goods referred to in Article 39(1) in the context of their respective market surveillance activities. They shall, in particular, communicate to each other and to the EFTA Surveillance Authority any information relating to those goods presenting a serious risk, as well as any measures taken in relation to non-compliant goods, including relevant information drawn from networks, information systems and databases established under the provisions of the EEA Agreement or United Kingdom law in relation to those goods."* While this does not establish a monitoring obligation for ESA *per se*, it does entail

an additional responsibility, namely to receive communications from the market surveillance authorities in the EEA EFTA States under the Separation Agreement. The “Citizens’ Rights” provisions extend, broadly, to the following categories of rights, which may be exercised by UK nationals covered by the personal scope of the Separation Agreement and their family members:

(a) Residency: this means the right to live in Iceland, Liechtenstein or Norway (depending on in which of the EEA EFTA States the UK national in question was established prior to the end of the Implementation Period). It also includes the right to enter and exit Iceland, Liechtenstein, or Norway.
(b) The right to work: this means the right to work, including self-employed work and also the right to continue to be a frontier worker.
(c) Mutual recognition of professional qualifications: this means the right to have qualifications that have already been recognised before 31 December 2020 (or that were in the process of being recognised at that juncture) to continue to be recognised in Iceland, Liechtenstein, or Norway.
(d) Co-ordination of social security systems: this means that individuals who have lived in both the UK and the EEA EFTA States before the end of the transition period can continue to be able to access pensions, benefits and other forms of social security.
(e) Equal treatment and non-discrimination: within scope of the rights set out above, UK nationals and their family members are entitled to be treated equally with the citizens of the EEA EFTA States and not to be discriminated against on the grounds of their nationality. This includes ensuring access to certain public services such as education, healthcare and certain benefits.

With respect to ESA’s mandate under the Separation Agreement, ESA monitors the EEA EFTA States and their public institutions and actors exercising public functions to ensure that they adequately and effectively implement the rights provided for by the Agreement. ESA promotes the adequate and effective implementation and application of the Agreement by holding public bodies to account where there is not full compliance, and by engaging in dialogue and correspondence to ensure early and where possible amicable and informal case resolution. In addition, Article 2 of Protocol 9 to the SCA provides that ESA’s powers that follow from the EEA Agreement shall apply *mutatis mutandis* to the Separation Agreement. This entails

that ESA can begin infringement proceedings against the EEA EFTA States, and can bring matters before the EFTA Court.

As to the scope of ESA's powers, these are framed by the rights set out in the Agreements. These rights are extensive and were designed to broadly provide UK nationals and their family members the same entitlements to work, study and access public services and benefits as they enjoyed before the UK left the EU, subject to the limitations set out by the material scope of the Agreement. These powers reflect, to a significant degree, the powers allotted to ESA in terms of its monitoring obligations under the EEA Agreement and the Surveillance and Court Agreement.

In summary, ESA's specific powers are as follows:

2.1 ESA's power to receive complaints and correspondence

ESA can receive complaints and other correspondence from persons who claim to have a right under the Separation Agreement. Complaints may report where one of the EEA EFTA States has failed to comply with the Agreement, or a public body has acted or is proposing to act in a way that prevents the person exercising the right in question.

Although ESA does not generally dispense legal advice to members of the public, ESA will nonetheless assess all correspondence received in relation to potential rights arising under the Separation Agreement to assess whether such correspondence indicates a potential breach of the Agreement. ESA will further consider whether any potential breach may be a general or systemic failing, and will decide, *inter alia*, on this basis whether to pursue the case further. Individual complaints and correspondence may be particularly useful in providing information or alerting ESA to possible issues of a general or systemic nature.

ESA will, in all cases, log any information received (in accordance with its Data Protection Policy) as it may help form part of a wider set of information gathered over time which could indicate a systemic failing.

2.2 ESA's power to conduct inquiries

ESA's power to conduct inquiries is set out in Article 64(2) of the Agreement. This provides that ESA may conduct inquiries on its own initiative concerning alleged

breaches of Part Two by the administrative authorities of the EEA EFTA States and to receive complaints from UK nationals and their family members for the purposes of conducting such inquiries. In this regard, Article 64(2) states that ESA *"shall have equivalent powers as those that follow from the EEA Agreement and the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Surveillance and Court Agreement")."*

This entails that, by and large, ESA's responsibilities under the Separation Agreement mirror those under the EEA Agreement and the SCA. As such, and as shall be explained in greater detail below, ESA has determined that the best *modus operandi* for the exercise of its functions under Article 64(2) is to, wherever possible, follow pre-established procedures that replicate those under the EEA Agreement and SCA. This has the advantage of leaning on ESA's quarter century of experience, and of minimising costs and administrative complications associated with the implementation of new procedures for a new international treaty monitoring regime.

ESA may decide to conduct such inquiries either as a result of information received via correspondence from a member of the public, or of its own initiative.

When considering whether to carry out an inquiry, ESA will consider the importance of addressing general or systemic failings. ESA may not carry out an inquiry unless it has reasonable grounds to believe that the inquiry may conclude that a failure to comply with the Separation Agreement has occurred or that a public body has acted or is proposing to act in a way that prevents a person from exercising their rights under the Agreement.

To inform this assessment, ESA may, in certain cases, carry out pre-inquiry investigations. This may involve informal consultations with the EEA EFTA States. In carrying out such investigations ESA may be able to resolve any issues in a more timely way than proceeding to a full inquiry.

To date, ESA has not started any inquiries confined specifically to the Separation Agreement. However, a number of cases undertaken by ESA concern parallel matters pertaining to Part Two of the Separation Agreement, on the one hand, and rights of EEA nationals under the EEA Agreement, on the other. In such circumstances, the *modus operandi* on the part of ESA has been to open a single case, with the principal legal framework that of the EEA Agreement, and any

annotations or adjustments relevant to UK nationals covered by the Separation Agreement noted thereafter. Given that, at present, very little of the substantive EEA secondary law relevant to rights mirroring those under the Separation Agreement has been amended, this method will likely serve ESA well in the majority of such cases for the foreseeable future, though this situation will of course evolve as time progresses, and the EEA legal order incorporates new secondary legislation in relevant areas, whereas the Separation Agreement will remain static in most areas. However, it should be noted that, under Article 34 of the Agreement, two important Regulations (No 883/2004 and No 987/2009) relevant to rights in the area of social security coordination may evolve dynamically in tandem with provisions of the EEA Agreement.[4]

Pre-inquiry investigations are proceeding and have concluded with regard to a number of issues which are outlined in Section 4.3, below, in relation to the emerging themes of some of the corrrespondence ESA has received to date. This has also involed early stage case resolution via informal contact with the EEA EFTA States on individual issues, without the need to open formal inquiry cases.

2.3 ESA's power to bring matters before the EFTA Court

Article 64(2) of the Agreement also provides that ESA shall also have the right to bring a matter before the EFTA Court pursuant to the SCA in respect of cases arising under the Separation Agreement. This also follows from Article 2 of Protocol 9 SCA, which provides that ESA's powers under the EEA Agreement shall apply to the Separation Agreement *mutatis mutandis*.

Bringing a matter before the EFTA Court will generally follow a full inquiry involving formal correspondence with the EEA EFTA State that ESA determines to be in breach of its obligations under the Separation Agreement. The stages of escalation

[4] Specifically, Article 34(1) provides that "Where Regulations (EC) No 883/2004 and (EC) No 987/2009 are amended or replaced after the end of the transition period and where amendments or replacements to those Regulations are incorporated into and in force under the EEA Agreement, references to those Regulations in this Agreement shall be read as referring to those Regulations as amended or replaced under the EEA Agreement, in accordance with the acts listed in Part II of Annex I to this Agreement.
The Joint Committee shall revise Part II of Annex I to this Agreement in order to align it to any act amending or replacing Regulations (EC) No 883/2004 and (EC) No 987/2009, provided that:
(a) the EU-UK Withdrawal Agreement has been aligned accordingly; and
(b) the act has been incorporated into and is in force under the EEA Agreement.
The Joint Committee shall revise Annex I as soon as the second of the events in points (a) and (b) has been completed.

in this regard will follow established procedures developed by ESA in its quarter century of existence in relation to breaches arising under the EEA Agreement.

To date, ESA has not brought any matters before the EFTA Court on a matter confined specifically to the Separation Agreement. Moreover, ESA has not brought any cases to the EFTA Court on a matter that pertains both to UK nationals falling under the scope of the Separation Agreement and to EEA nationals falling under the scope of the EEA Agreement.

In the latter instance, while the facts – and the relevant secondary legislation under the EEA Agreement and Separation Agreement – may be identical in certain cases, the context of the agreements will be divergent, as will the impact of EEA law provisions that may fall outside the scope of the Separation Agreement, but that may impact upon the analysis undertaken in respect of the case under the EEA Agreement. As such, it may be the case that the EFTA Court will choose to make divergent conclusions with respect to certain issues in certain cases. While the purpose of the Separation Agreement is to ensure the continuity of certain rights obtaining under EEA law to persons falling under its scope post-2021 (entailing an effective requirement of homogenous interpretation of certain provisions of the Separation Agreement with their EEA counterparts), and while Article 4(3) of the Separation Agreement requires that the provisions of Part Two of the Separation Agreement shall be interpreted in conformity with the provisions of Part Two of the EU-UK Withdrawal Agreement, in so far as they are identical in substance, this two-dimensional homogeneity objective is not absolute, and it will be for the EFTA Court to determine its boundaries.

It is, in any event, appropriate to afford the Court the opportunity to examine cases under the Separation Agreement alone, also with a view to developing a corpus of case law with respect to the Agreement, which may guide the Court, the EEA EFTA States, and ESA in the future with respect to the Agreement's interpretation and application.

It should further be noted that, given the novelty of the issues referred to above, in respect of both the approach to parallel cases before the EFTA Court and parallel case handling procedures, ESA will undertake periodic reviews to determine whether and to what extent its means of approaching parallel cases is fit for purpose.

3 Measures Taken on the Implementation and Application of Part Two of the Agreement

3.1 Internal measures

In order to enable ESA to comply with its monitoring obligations in the most effective and efficient way possible, ESA's Internal Market Affairs Directorate undertook a mapping exercise of tasks that needed to be undertaken in order to ready ESA for its new mandate. In this regard, the following measures were taken:

(a) the Rules of Procedure were updated;

(b) ESA's website was updated, with new pages added for UK nationals covered by the Separation Agreement;

(c) a new complaints and correspondence portal and new email address were established (UKnationals@eftasurv.int);

(d) a detailed Guidance Note[5] concerning the Separation Agreement, ESA's powers thereunder, and the rights of UK nationals and their families falling under its scope was compiled (also accessible via the website);

(e) new templates were agreed with ESA's registry for cases falling under the Separation Agreement;

(f) training took place for ESA's case handlers who are likely to handle cases that may touch upon issues under the Separation Agreement; and

(g) an informal internal review process was established to monitor and evaluate the fitness for purpose of ESA's internal procedures with respect to the Separation Agreement as time progresses.

In addition to the above, ESA has constructed a typology of case types that are likely to arise under the Separation Agreement, in order to manage and classify the case load as it develops over time. Three principal types of cases are expected:

[5] https://www.eftasurv.int/cms/sites/default/files/documents/gopro/ESA%20Guidance%20Note%20on%20the%20UK%20EEA%20Separation%20Agreement.pdf (also annexed to the present report)

(a) 'Parallel' cases: these cases are likely to be very common initially, and will arise where EEA law and Separation Agreement law are substantively identical. Such cases can effectively be handled together. Case 85895 concerning COVID measures undertaken by Norway is a good example of such a case.

(b) 'Divergent' cases: these cases will arise when post-2021 secondary legislation has been implemented into the EEA Agreement. The Separation Agreement legal order, on the other hand, will rely on the 'old' EEA law as it stood on 1 January 2021, except in matters relating to social security co-ordination under Regulations (EC) No 883/2004 and (EC) No 987/2009, and under the conditions set out in Article 34 of the Agreement. Case 87307, concerning COVID vaccination certificates, is a good example of such a case, because in this instance, the COVID certificates in question were regulated by secondary legislation implemented into the EEA Agreement after 1 January 2021. As such, the rights of UK nationals, on the one hand, and those of EEA nationals, on the other, were subject to differing legal frameworks.

(c) 'Transitional' cases: such cases are likely to involve measures adopted by one or more of the EEA EFTA States to implement the Separation Agreement into their domestic legal orders. Such cases may relate to changes in the documentary requirements for UK nationals, formalities related to the acquisition and maintenance of rights under the Agreement, et cetera. As of yet, ESA has not opened any inquiries related to such issues, and it would seem that the three EEA EFTA States have invested quite some time and energy into ensuring that the transition from EEA national status to the status of persons falling under the Separation Agreement has been smooth and comparatively problem-free for UK nationals and their families.

3.2 External measures

In order to comply with its obligations, arising *inter alia* from Article 64 of the Agreement, ESA has liaised both formally and informally with UK IMA, with either

side keeping the other regularly apprised of developments with respect to their respective monitoring obligations. A fruitful relationship has begun in this regard, and it is hoped that many further such meetings will take place in the future.

In addition, ESA has liaised with the European Commission in respect of the Withdrawal Agreement. As noted above, Article 4(3) of the Separation Agreement provides that the provisions of Part Two of the Separation Agreement shall be interpreted in conformity with the provisions of Part Two of the Withdrawal Agreement, in so far as they are identical in substance.[6] This entails that there is a close relationship between the law of the Separation Agreement, on the one hand, and that of the Withdrawal Agreement, on the other, and while the Separation Agreement does not provide for any formal role for the European Commission, ESA has found it useful to develop links on this axis in order to take account of any issues encountered by the European Commission in its work.

ESA and UK IMA have also informally discussed the potential establishment of a tripartite working group in this regard.

4 Measures undertaken by the EEA EFTA States to implement and to comply with Part Two of the Agreement

As noted above, Article 64(3) requires that ESA should annually inform the Joint Committee on the implementation and application of Part Two in the EEA EFTA States, and that the information provided should, in particular, cover measures taken to implement or comply with Part Two and the number and nature of complaints received. While Section 5 of the present report deals with complaints and other correspondence received by ESA during 2021, the present section will discuss the measures undertaken by the EEA EFTA States.

4.1 **Norway**

The Norwegian Government has implemented a comprehensive system of legislative and regulatory amendments to domestic law, that aim to implement

[6] Much of the respective texts are either identical or very similar, while adaptations and adjustments have been made where differences between the two agreements entail or require divergences in implementation and application of provisions of the Separation Agreement compared to those in the EU-UK Withdrawal Agreement.

Norway's obligations under the Separation Agreement. Norway has also provided a significant amount of publicly-available information for UK nationals and their families concerning rights arising under the Agreement.

4.1.1 Information for UK nationals

The Norwegian Directorate of Immigration ("UDI") has compiled an online portal (in English and Norwegian), which provides essential information concerning residence rights for UK nationals falling under the personal scope of the Separation Agreement and their family members.[7] This portal makes it clear that UK nationals (described at "British citizens"; terminology which should ideally be corrected)[8] and their family members who had a right of residence before the transition period expired are still entitled to reside and work in Norway. Such persons have the opportunity to apply for a special "Brexit Permit". The application deadline for such a permit was 31 December 2021. However, it is still possible to apply at a later date, if there were particular reasons for not applying within the deadline.

From 1 January 2022, all UK nationals and their family members who wish to settle in Norway must apply for a permit through ordinary regulations.

The Norwegian Labour and Welfare Administration ("NAV") has also established a separate portal for UK nationals falling under the personal scope of the Separation Agreement and their family members.[9] This provides information concerning Brexit and how this may affect the social security rights of UK nationals and their families, whether or not they fall within the personal scope of the Separation Agreement.

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[7] The portal is available at https://www.udi.no/en/word-definitions/brexit/#link-18875

[8] Given that, under the Separation Agreement, UK nationals are specifically defined in Article 2(d) as *"national[s] of the United Kingdom, as defined in the New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland of 31 December 1982 on the definition of the term 'nationals' …together with Declaration No 63 annexed to the Final Act of the intergovernmental conference which adopted the Treaty of Lisbon",* this distinction has the potential to cause significant confusion, particularly with respect to persons who may be either UK citizens or nationals, but who may fall outside of this definition. Further, while the term "Britain" is often used in the vernacular to refer to the UK, it excludes Northern Ireland, and may lead to further confusion, given the special status enjoyed by Northern Ireland on the basis of the Protocol on Ireland and Northern Ireland ("Northern Ireland Protocol") to the Withdrawal Agreement. It should be observed that, notwithstanding the Northern Ireland Protocol, the rights of UK nationals from Northern Ireland, and those from Great Britain under the Separation Agreement are identical.

[9] The portal is available at https://www.nav.no/en/home/rules-and-regulations/brexit-information

4.1.2 Legal provisions

Norway's principal legislative enactment in relation to arrangements connected to the United Kingdom's departure from the EU and the EEA is the so-called "Brexit Act."[10] Section 2 of the Act stipulates that the following provisions should apply as law in Norway:

- Articles 22 (equal treatment), 23 and 24 (rights of workers and self-employed) and 29 to 34 (coordination of social security systems) of the Separation Agreement; and
- Annex VI (Social security), part III (United Kingdom Nationals) of the EEA Agreement, covering social security co-ordination.

Residence rights

With respect to the residence rights of UK nationals and their family members, in accordance with Section 19-33(1) of the Immigration Regulation[11] (added by Regulation of 9 December 2020; in force as of 1 January 2021), UK nationals who were residing in Norway before the end of 2020, and who continue to live there, have, subject to an application, a right of residence if the conditions of Section 112 Immigration Act are fulfilled. The latter provision mirrors the conditions laid down by Article 7 of Directive 2004/38/EC.

Family members of such individuals, who had a right of residence before the end of 2020 also have a right to reside, subject to an application, if the conditions for residence in Sections 113 (replicating the conditions for residence applicable to family members of EEA citizens in Norwegian law) or 114 (conditions for residence applicable to family members of non-EEA citizens) are fulfilled. The same applies to family members who did not previously have a right of residence in Norway, but who established the family relationship before the end of the Transition Period. Section 19-33(2) of the Immigration Regulation provides that the same applies to children of UK nationals born or adopted after the end of the Transition Period.

[10] Act on transitional rules etc. upon the United Kingdom's departure from the European Union/Lov om overgangsregler mv. ved Storbritannias uttreden fra Den europeiske union (brexit-loven), https://lovdata.no/pro/auth/login#document/NL/lov/2020-11-27-131?searchResultContext=2081&rowNumber=1&totalHits=626

[11] https://lovdata.no/dokument/SF/forskrift/2009-10-15-1286/KAPITTEL_19-16#%C2%A719-33

Section 19-33(3) of the Immigration Regulation stipulates that the conditions of Chapter 13 of the Immigration Act (covering EEA nationals) apply *mutatis mutandis* to the persons falling within the personal scope of the provisions discussed in the previous paragraphs.

In terms of documentary requirements, Section 19-33(4) stipulates that those who were not registered in Norway before the end of the Transition Period are required to provide the same documents as those required by EEA nationals and their family members. Those who were registered before that date will merely be subject to a identity check, unless there are reasons to believe that the individual in question has provided false information or do not fulfil the conditions for residence.

Per Section 19-33(7), the right of residence is given for a duration of up to five years, and may be renewed. This residence forms a basis for permanent residence. No fees apply to the first-time application for, nor the renewal of, this residence.

Frontier workers

This area is regulated by Section 19-34 of the Immigration Regulation.[12] UK nationals who at the end of 31 December 2020 are employed or self-employed in Norway, but who do not reside here, and continue to carry out such activities after 31 December 2020, are entitled to a residence permit upon application. This also applies to their family members. Such a residence permit is granted for up to one year at a time and can be renewed. The residence permit does not form the basis for a permanent residence permit. When applying for a residence permit and for its renewal, no fee is payable.

Permanent residence

This area is regulated by Section 19-35 of the Immigration Regulation.[13] UK nationals and their family members who had a right of permanent residence by the end of the Transition Period, or who fulfil the conditions for such residence, have a right to permanent residence, subject to a formal application. The period for the submission of applications was the end of the Transition Period. This application

[12] https://lovdata.no/dokument/SF/forskrift/2009-10-15-1286/KAPITTEL_19-16#%C2%A719-34
[13] https://lovdata.no/dokument/SF/forskrift/2009-10-15-1286/KAPITTEL_19-16#%C2%A719-35

entailed only an identity check, unless there were reasons to believe the individual had provided false information, or do not fulfil the conditions for permanent residence.

Social security

With respect to social security, as noted above, Articles 29 to 34 of the Separation Agreement; and Annex VI, part III of the EEA Agreement, covering social security co-ordination were incorporated into the Norwegian legal system by reference via the Brexit Act.

Recognition of professional qualifications

Section 2 of the Regulations on authorisation, license and specialist approval for health care personnel with professional qualifications from other EEA states or from Switzerland[14] stipulates that the regulations apply to the processing of applications from applicants who completed their education in the UK before the end of the transition period. This also entails retention of recognition for those persons who have already had their qualifications recognised.

4.2 **Iceland**

The Icelandic Government has, like its Norwegian counterpart, undertaken a comprehensive programme of measures that serve both to implement its obligations under the Separation Agreement, and to inform UK nationals and their family members falling under the personal scope of the Agreement of their rights and how they may avail of them. However, ESA notes that a certain amount of the guidance refers to "Britain", rather than the United Kingdom, and to "British citizens" rather than "UK nationals." This terminology should ideally be corrected.[15]

[14] Forskrift om autorisasjon, lisens og spesialistgodkjenning for helsepersonell med yrkeskvalifikasjoner fra andre EØS-land eller fra Sveits, https://lovdata.no/dokument/SF/forskrift/2008-10-08-1130

[15] Given that, under the Separation Agreement, UK nationals are specifically defined in Article 2(d) as *"national[s] of the United Kingdom, as defined in the New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland of 31 December 1982 on the definition of the term 'nationals' …together with Declaration No 63 annexed to the Final Act of the*

4.2.1 Information for UK nationals

The Icelandic Government has established an online portal on matters related to Brexit.[16] This provides important information and relevant links to other sites, and make it clear that the position of the Icelandic Government is that UK nationals registered as residents in Iceland before the end of the Transition Period will be able to keep broadly the same rights as they previously enjoyed. It highlights that it is important that all UK nationals living in Iceland register their domicile with the Civil Registry *(Þjóðskrá Íslands)*, which confirms their right to reside in Iceland.

4.2.2 Legal provisions

The legal provisions pertaining to the rights of UK nationals are dispersed between a number of government departments, each of which provides information on its own web portal. The main Brexit portal on the Icelandic Government's website provides helpful links to many of these sites.

Residence rights

The Directorate of Immigration has compiled an information page devoted to information for UK nationals ("British citizens").[17] This notes that the Directorate of Immigration will issue residence permit cards for UK nationals that had the right to reside in Iceland prior to the end of the Transition Period. In order to qualify for such a card, UK nationals must simply make an appointment to have their picture taken for the residence permit card, and must present their passport as evidence of their identity. However, the same portal provides that *"[i]f you registered your right of residence at Registers Iceland (Þjóðskrá Íslands) before the end of the transition period (31 December 2020), you do not need to meet any new requirements in*

intergovernmental conference which adopted the Treaty of Lisbon", this distinction has the potential to cause significant confusion, particularly with respect to persons who may be either UK citizens or nationals, but who may fall outside of this definition. Further, while the term "Britain" is often used in the vernacular to refer to the UK, it excludes Northern Ireland, and may lead to further confusion, given the special status enjoyed by Northern Ireland on the basis of the Protocol on Ireland and Northern Ireland ("Northern Ireland Protocol") to the Withdrawal Agreement. It should be observed that, notwithstanding the Northern Ireland Protocol, the rights of UK nationals from Northern Ireland, and those from Great Britain under the Separation Agreement are identical.

[16] https://www.government.is/topics/foreign-affairs/iceland-in-europe/brexit/

[17] https://utl.is/en/information-for-british-citizens

order to retain your right of residence." As such, the (post-Brexit) residence card would not appear to be required to retain residence *per se*. Rather, the card is merely a practical document for evidentiary purposes. The Directorate's website provides:

"From 1 January 2021, British citizens will need to apply for a residence and work permit to have the right to live and work in Iceland.

A residence permit card confirms that you already have this right; that your stay in Iceland is legal and that you are allowed to work here. It can therefore be a good idea to have a residence permit card to demonstrate your right to reside and work in Iceland."

The website also provides, with respect to family members that:

"children who are born or adopted after the transition period ends (31 December 2020) will also be covered by the Separation Agreement."

It further provides that:

"If you are a British citizen residing in Iceland and registered your right of residence in Iceland with Registers Iceland before the end of the transition period, your spouse will still be able to apply for family reunification under the current rules for EU/EEA citizens, if you were married before the transition period ended (31 December 2020)."

Frontier workers

It would appear that situations concerning frontier workers who are UK nationals falling under the personal scope of the Separation Agreement will be assessed on an individual basis by the Directorate of Immigration. The Directorate's website provides that:

"If you are a worker who is employed in Iceland, since before 31 December 2020, and returns each day or at least once a week to Britain, and you do not have a registered domicile in Iceland, you will need to contact the Directorate of Immigration for registration."

Recognition of professional qualifications

The website of the Directorate of Health[18] provides a portal for the recognition of professional qualifications. Informal correspondence between ESA and the Directorate indicates that as a matter of practice, Regulation on the recognition of professional qualifications of healthcare practitioners from other Member States of the European Economic Area or Switzerland for the pursuit of an activity in Iceland, No. 510/2020[19] will be applied with respect to the processing of applications for recognition of qualifications from applicants who completed their education in the UK before the end of the transition period. This also entails retention of recognition for those persons who have already had their qualifications recognised.

4.3 **Liechtenstein**

The Government of Liechtenstein has, like those of Iceland and Norway, undertaken a programme of measures that serve both to implement its obligations under the Separation Agreement, and to inform UK nationals and their family members falling under the personal scope of the Agreement of their rights and how they may avail of them. However, owing to the distinctions in the way in which Liechtenstein incorporates international law into its domestic legal system, less legislative and regulatory intervention has proven necessary.

4.3.1 Information for UK nationals

The Office of Foreign Affairs has established an online portal on matters related to Brexit.[20] This provides important information and relevant links to other sites, as well as links to the text of the Separation Agreement as it has been incorporated into Liechtenstein domestic law.[21] Also included is a comprehensive report regarding the withdrawal of the UK from the EU and EEA Agreement.[22] However, the Separation Agreement is referred to as the *"Austrittsabkommen",* which

[18] https://www.landlaeknir.is/english/
[19] https://www.government.is/library/04-Legislation/Regulation%20on%20the%20recognition%20of%20professional%20qualifications%20of%20healthcare%20practitioners%20from%20other%20Member%20States%20of%20the%20European%20Economic%20Area%20or%20Switzerland%20for%20the%20pursuit%20of%20an%20activity%20in%20Iceland.pdf
[20] https://www.llv.li/inhalt/118946/amtsstellen/zukunftige-beziehungen-mit-uk
[21] https://www.gesetze.li/konso/2020051000
[22] https://bua.regierung.li/BuA/default.aspx?nr=139&year=2019&backurl=modus%3dnr%26filter1%3d2019

translates as “Withdrawal Agreement”. This may lead to confusion with the EU-UK Withdrawal Agreement, referred to above. It is suggested that referring to the Separation Agreement as the *“Trennungsabkommen”* might be preferable in this regard.

4.3.2 Legal provisions

Liechtenstein’s incorporation and implementation of the Separation Agreement is significantly different from that of the other two EEA EFTA States. Liechtenstein, as a monist State, uses the ‘incorporation doctrine’ for the implementation of international treaties. Therefore, the Separation Agreement, in addition to the Protocol 9 of the SCA, became an integral part of Liechtenstein’s domestic law following their respective ratifications and entry into force. Within the hierarchy of norms within the Liechtenstein legal order, the Separation Agreement, as an international treaty, at a minimum enjoys at least the status of statutory law in the domestic legal order and takes precedence over earlier laws (*lex posterior*). However, according to Liechtenstein’s Constitutional Court in its decision StGH 1996/34 (LES 1998, 80), international law, or at least the most important international treaties to which Liechtenstein is a party, including the EEA Agreement and the European Convention on Human Rights, have the character of *"supplementary constitutional law".* Given that the Separation Agreement is intended to facilitate the continued enjoyment of rights previously covered by the EEA Agreement, it remains to be seen whether the Separation Agreement will also enjoy this status.

5 Complaints and own initiative cases pursued

5.1 **Divergent and transitional cases**

ESA receives complaints and other correspondence concerning alleged violations of rights that are protected by the Separation Agreement. In its capacity as the surveillance authority for the EEA Agreement, ESA also receives complaints and other correspondence concerning issues under the EEA Agreement that correspond directly to rights in the Separation Agreement, which may also concern UK nationals falling within the personal scope of the Separation Agreement, as the rights covered in the two agreements are, in certain areas, identical or very similar.

ESA received approximately ten communications from members of the public that related specifically to the Separation Agreement over the course of 2021. These consisted of emails via the dedicated email address or through ESA's Registry, and telephone calls. None of these were escalated to the level of an inquiry. Rather, all were resolved informally. Communications received related exclusively to Iceland and Norway, with no correspondence received relating to Liechtenstein. The majority related to minor issues of public administration, such as exchanges of driving licences, inquiries concerning deadlines for exchange of documents, or a lack of publically available information on the pages of the relevant ministries of the respective EEA EFTA States. A number of the communications originated from third country nationals with UK family members who fell outside the personal scope of the Agreement.

It should be noted that ten communications is a low number. However, given that, as noted in Section 3.1, the performance of the EEA EFTA States with respect to transitional issues between the end of the Transition Period and the period thereafter has generally been smooth and comparatively problem-free for UK nationals and their families, it is perhaps unsurprising that the amount of correspondence received in relation to issues pertaining exclusively to the Separation Agreement has been small. In addition, the absolute number of UK nationals falling within the personal scope of the Agreement and living in the EEA EFTA States is quite low, meaning that in any event, complaints are likely to be quite infrequent.

Moreover, the Separation Agreement and the EEA Agreement did not substantially diverge from one another in almost any relevant area (with perhaps the sole significant exception of vaccination certificates) during 2021. This means that ESA did not need to open separate own initiative cases into issues pertaining to the Separation Agreement, rather incorporating issues under the Separation Agreement into cases principally undertaken on the basis of the EEA Agreement.

Despite the above, it might perhaps be argued that greater awareness of the Separation Agreement might potentially result in a greater volume of correspondence. However, ESA notes that Article 35 of the Agreement, entitled "Publicity", which is modelled on Article 34 of Directive 2004/38/EC, imposes an obligation on the EEA EFTA States and the UK to disseminate information and

create awareness of the Agreement. It does not impose any obligation on others, such as on employers, the Joint Committee, or indeed ESA.

5.2 **Parallel cases**

As shall be described below, ESA pursued three own initiative cases, principally on the basis of the EEA Agreement, that involved significant consideration of rights under the Separation Agreement. Such cases are important, as it is considered likely that, at least in the initial years of the Separation Agreement's existence, this will constitute the bulk of ESA's case work in relation to the Separation Agreement. These are described below.

Case 85895: Own initiative case concerning Norwegian entry restrictions and COVID-19

This case was opened – initially solely on the basis of the EEA Agreement – in November 2020. The case concerned the (then constantly and rapidly evolving) suite of measures imposed by the Norwegian Government in order to counter the COVID 19 pandemic. These measures, justified by Norway on the basis of the protection of public health, included entry restrictions to Norway and quarantine restrictions that differentiated, in law and in fact, between EEA nationals on the one hand, and Norwegian nationals on the other.

By the time ESA sent a Letter of Formal Notice (Doc No 1199663) in May of 2021, it was necessary to consider parallel impacts upon UK nationals covered by the Separation Agreement as well as EEA nationals as falling within the scope of the case, as such persons were, in many cases, similarly impacted. For example, UK nationals resident in Norway who had travelled back to the UK and who wished to re-enter Norway, were often impeded from doing so, in a manner that contradicted their rights, *inter alia*, under provisions of the Separation Agreement mirroring the rights provided for under Articles 5, 6, 7, 8, 27, 28, 29, 30 and 31 of Directive 2004/38/EC, although the frame of reference for EEA nationals in the case was significantly broader, also entailing *inter alia*, rights with no analogues under the Separation Agreement, including Article 36 of the EEA Agreement, and Articles 9 and 16 of Directive 2006/123/EC.

The facts of the case – in particular those related to measures adopted by Norway – are quite complex due to the fact that the measures in question evolved so often and were regulated by a multi-layered system of permanent and temporary laws, administrative regulations, circulars, and administrative practices. However, they significantly impeded the free movement of persons, both for EEA nationals and for UK nationals falling under the scope of the Separation Agreement.

It was determined by ESA that there was no need to open a new case with respect to the issues faced by UK nationals falling under the Separation Agreement (largely Articles 11, 12-17, and 23-25 thereof). Rather, all rights enjoyed by UK nationals would also be enjoyed by EEA nationals under the EEA Agreement (who, as noted above, also enjoyed certain rights not enjoyed by UK nationals, due to the EEA Agreement's broader scope). As such, it was decided instead to broaden the case – initially opened solely on the basis of the EEA Agreement – to cover the Separation Agreement – via the insertion of an explanatory paragraph into the Letter of Formal Notice:

"*For the purposes of the present case, it should be noted that [ESA] is also responsible for oversight of the rights of UK nationals covered by the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union ("the Separation Agreement"). In general, UK nationals covered by the Separation Agreement are in an equivalent situation to EEA nationals with respect to the rules in question. As such, the conclusions expressed above in relation to EEA nationals under the EEA Agreement should be seen to cover UK nationals who fall under the Separation Agreement mutatis mutandis."*

Norway has since significantly relaxed its restrictive measures adopted to deal with the COVID-19 pandemic, and in particular, has withdrawn the measures with which ESA had taken issue in its Letter of Formal Notice in the case in question, and ESA has not found it necessary to send further correspondence in the case in question. The case, however, remains open, due to the continuing pandemic and the prospect that further measures may be adopted in the future.

The Letter of Formal Notice submitted in this case is annexed to the present report as an example of ESA's case handling in such cases.

Case 86978: Own initiative case concerning the obligation of air carriers to inspect COVID-19 certificates in international flights to Iceland

This case was opened in June 2021, again, initially purely on the basis of the EEA Agreement. Here, ESA took issue with the compatibility of Law No 41 of 28 May 2021 amending Act No 60/1998 ("*Lög um breytingu á lögum um loftferðir, nr. 60/1998*, *með síðari breytingum* (*skyldur flugrekenda vegna COVID-19)"*) concerning the obligations of air carriers to take measures due to COVID-19, in tandem with the related national Regulation No 650/2021 of 1 June 2021 *("Reglugerð um skyldu flugrekenda til að kanna vottorð vegna COVID-19 í millilandaflugi"*), with EEA law. In particular, ESA's concerns pertained to the obligation of air carriers to deny boarding to passengers who did not possess the required documentation relating to COVID-19, and the fact that the Icelandic domestic legal provisions in question stated that denial of boarding in such circumstances shall not constitute "denial of boarding" under Article 4 of Regulation (EC) No 261/2004.

While the case was initially opened on 'narrow' transport grounds (outside the scope of the Separation Agreement), the remit of the case broadened following correspondence with Iceland. After having examined the relevant legislation and regulations, as well as the explanations received from Iceland, ESA determined that by maintaining in force the rules in question, Iceland had failed to fulfil its obligations arising from EEA law, specifically Article 4 of the EEA Agreement, Articles 5, 6 and 7 of Directive 2004/38/EC, and Article 4 in combination with Article 2(j) of Regulation (EC) No 261/2004. Articles 5, 6 and 7 of Directive 2004/38/EC have been implemented into Articles 12-17 of the Separation Agreement, while Article 4 of the EEA Agreement is substantially replicated by Article 11 of the Separation Agreement (though the latter is reduced in substantive scope). As such, UK nationals resident in Iceland and covered by the Separation Agreement could potentially have been impacted by the Icelandic rules, in violation of their rights under the Separation Agreement.

These issues were noted by ESA. However, as ESA had in any event heard from Iceland that the legislative provisions in questions were to be immediately amended, it was decided to expedite the Letter of Formal Notice in the case (omitting the provisions concerning the Separation Agreement) in the interests of speedy delivery, since much of the legal analysis undertaken in writing the letter would otherwise have been useless. It was also noted that a supplementary Letter of Formal Notice, noting the concerns with respect to the Separation Agreement, could always be sent if the legislative amendments enacted by Iceland did not address the issues raised in the context of the case. Ultimately, these issues (including those related to the Separation Agreement) were resolved by the legislative amendments in question, and ESA's assessment since then has been that there is no need to send further correspondence to Iceland in the case.

Case 87307: Own initiative case concerning eligibility and procedures applicable to certain categories of EEA nationals in Norway who wish to receive a COVID-19 vaccination certificate

This case, opened in September 2021, on the basis of both the EEA Agreement and the Separation Agreement (though with the EEA Agreement constituting the principal frame of reference), concerned the application of the procedures pertaining to the acquisition of a certificate providing proof of having been vaccinated against COVID-for EEA nationals in Norway. It may properly be described as a 'hybrid' case, having both characteristics of a parallel case and of divergent cases, and may point at the complexities that may arise in respect of the EEA Agreement's interaction with the Separation Agreement moving forward as the two legal orders diverge.

Here, ESA was concerned about situations involving EEA nationals living in Norway who did not have either a National Identification Number, or a D-number. Such persons were ineligible for the same facilitated procedures for acquiring vaccination certificates as Norwegian citizens. Indeed, an initial assessment by ESA indicated that such EEA nationals, while offered the opportunity to receive a vaccine while living in Norway, were unable to acquire a vaccination certificate using *any* of the methods provided by the Norwegian Government. Given the increasing requirement for such certificates to be presented in order to travel throughout the

EEA and receive services, ESA then noted that the lack of such a certificate has the potential to restrict the free movement of EEA nationals. On this basis, ESA drew the attention of the Norwegian Government to *inter alia* Articles 28 and 36 of the EEA Agreement, and Articles 5, 6 and 7 of Directive 2004/38/EC. These provisions are, in part, replicated by the Separation Agreement.

However, complicating the case was the fact that post-2021 secondary legislation was also applicable in the context of the EEA Agreement, specifically Articles 3(1) and (2), and 5(1) of Regulation (EU) 2021/953. This Regulation, dealing with the parameters for, and mutual recognition of, vaccine certificates in the European Union (extended to the EEA EFTA States), had been enacted after the end of the Transition Period. As such, UK nationals falling under the scope of the Separation Agreement were not covered by the Regulation, and could not derive rights on the basis of the Separation Agreement from the Regulation. However, such UK nationals would still have more general free movement and residence rights under Articles 12-17 and 23-25 of the Separation Agreement (largely replicating the provisions of Articles 28 and 36 of the EEA Agreement, and Articles 5, 6 and 7 of Directive 2004/38/EC), that would still be relevant to the case. As such, the two frames of reference would have been significantly different enough, in ordinary circumstances, to justify the opening of a second, 'divergent', case on the basis of the Separation Agreement.

Despite the above, no second case was opened. Rather, the two issues were addressed in parallel (though it should be noted that the case was never escalated beyond a Request for Information, Doc No 1224350). This was due to the fact that the secondary legislation adopted under the EEA Agreement post-2021 – rather unusually – created parallel rights for Third Country Nationals ("TCNs") largely identical to those for EEA nationals. These rights included identical rights for residents of EEA States, whether EEA nationals or TCNs, to receive a vaccination certificate that would be accepted for travel and other purposes by the governments of EEA States. This essentially entailed that UK nationals resident in the EEA EFTA States were considered TCNs under the Regulation, but that, in essence, their rights were identical to those of EEA nationals. It represented a rare instance in which UK nationals could derive rights from the EEA Agreement after the end of the Transition Period. As a result, via a combination of the Separation Agreement (substantively replicating the rights under the EEA Agreement until 31 December

2020) and the EEA Agreement (and Regulation (EU) 2021/953, adopted thereunder), the rights of UK nationals falling under the scope of the Separation Agreement were substantively the same as those of EEA nationals.

On the basis of the foregoing, the following text was inserted into ESA's Request for Information:

"The Directorate further notes that the obligations flowing from the EEA Agreement itself, as well as Directorate 2004/38/EC also apply in respect of UK Nationals in an analogous position to EEA nationals who are covered by the UK-EEA Separation Agreement, and that in respect of such persons, Regulation (EU) 2021/954 is further applicable."

This passage obviated the necessity to open a second "divergent" case exclusively under the Separation Agreement, and the two legal frameworks were instead addressed in tandem via a single parallel case.

The case will likely soon be closed, as the issue would seem to have been resolved.

5.3 Correspondence not meeting the threshold for being treated as a complaint

Most instances of correspondence received from members of the public ostensibly in relation to the Separation Agreement have not reached the threshold to be treated as complaints. Nor have such instances prompted ESA to undertake an inquiry on its own initiative. This has been for a number of reasons.

Firstly, some correspondence raised issues that did not fall within the scope of the Separation Agreement. TCNs with no ostensible link to either the EEA EFTA States or the UK contacted ESA to ask about their rights under the Agreement. This happened particularly with respect to a number of persons from Nepal, Bangladesh and India.

Secondly, there were some instances of individuals seeking independent legal advice, something which ESA does not dispense. In such circumstances, ESA typically replies with a standard email to inform members of the public that this is not its role.

Thirdly, ESA was contacted by UK nationals and families of UK nationals who had visas refused on the basis of having forms filled out incorrectly. ESA took the view

that these were instances of maladministration (which would potentially have been covered by SOLVIT under the EEA Agreement, although there is no similar mechanism under the Separation Agreement), and outside its competence.

Fourthly, ESA was contacted about rights that UK nationals 'lost' after 31 December 2020. A good example of this is the Driving Licences Directive (2006/126), which falls outside the scope of the Separation Agreement. As such, UK nationals who may have arrived in the EEA EFTA States before the end of the Transition Period had no right to request conversion of a UK licence to that of the host EEA EFTA State as a matter of Separation Agreement law, and might, for example, be required to take driving lessons and apply for a new driving test. Any rights to the exchange of driving licences expired at the end of the Transition Period. However, in these instances, ESA contacted the EEA EFTA States in question (Iceland and Norway), and received updates from both in relation to plans concerning facilitation of driving licence exchange for UK nationals.

Fifthly, ESA has been contacted by UK nationals falling outside the scope of the Separation Agreement (for example, by UK nationals living in EU States who wish to move to the EEA EFTA States) to ask about their right to work and provide services under the Agreement.

These lines of correspondence are slightly concerning, as they indicate a good deal of misunderstanding about the substantive content of the Separation Agreement on the part of UK nationals and others. ESA again notes that Article 35 of the Agreement, entitled "Publicity", imposes an obligation on the EEA EFTA States and the UK to disseminate information and create awareness of the Agreement.

6 Exercise of ESA's Functions

6.1 Early Case Resolutions

As has been the case for UK IMA, ESA has endeavoured to resolve issues identified as quickly as possible, so that UK nationals are not disadvantaged, and are denied their rights for as short a time as possible. This particularly pertains to transitional cases (as defined in Section 3.1, above), where there has been no need to escalate correspondence received to the level of a formal complaint, and where

cases have, thus far, been concluded via correspondence with ministries and public bodies in the EEA EFTA States in order to resolve issues as quickly as possible.

This has been done by undertaking early case resolutions which are agreed interventions with public bodies to make improvements or changes to overcome potential issues.

These inquiries have included issues pertaining to the acquisition and maintenance of European Health Insurance Cards (EHIC), documentation required for a change of status from EEA nationals to UK nationals covered under the Separation Agreement, and website issues, including a lack of clear information in the English language and a lack of guidance on where to find such information. Typically, these were resolved at a very early stage via telephone contact.

6.2 **Legislation Monitoring**

ESA does not engage in formal legislation monitoring. However, if ESA is alerted by a member of the public or another actor to any issues with a particular piece of legislation falling under the Separation Agreement, or with relevance to the Agreement, ESA will certainly scrutinise it, as is the case with respect to any information submitted by any inquirer. It should be noted that ESA is occasionally consulted for *ex ante* review of draft legislation by the EEA EFTA States in its role under the EEA Agreement. In this regard, it is germane to note that ESA is certainly willing to continue this activity with respect to any issues that may potentially arise under the Separation Agreement.

6.3 **Litigation**

As noted above in Section 2.3, ESA has yet to exercise its powers to bring a matter pertaining under the Separation Agreement before the EFTA Court pursuant to the SCA. It seems quite unlikely that a divergent or transitional case will give rise to such proceedings in the near future, though the likelihood of this may change over time. With respect to parallel cases, as further noted in Section 2.3, it will be for the EFTA Court to determine whether the two agreements require separate proceedings or joined cases.

7 Annexes

Guidance Note relating to the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union (Doc No 1186826)

Letter of formal notice to Norway concerning Norwegian restrictions upon entry on the basis of COVID-19 (Decision No: 072/21/COL) (Doc No 1199663)

ESA | EFTA Surveillance Authority

Brussels, 17 March 2021
Case No: 78990
Document No: 1186826

Guidance Note relating to the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union

Part Two – Citizens' Rights

This Guidance Note is purely informative and does not supplement or complete the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union ("the Separation Agreement" or "SA"). In the event of any discrepancy or inconsistency between the present Guidance Note and the SA, the latter shall prevail. In addition, it is intended to present an overview of the SA based upon the law – including the relevant applicable case law – as it stands as of 1 March 2021. This Guidance Note may be subject to updates in line with future developments.

This Guidance Note has been drafted on the basis of the European Commission's similar Guidance Note concerning Part Two of the EU-UK Withdrawal Agreement[1], in order to contribute to fulfilling the requirement in Article 4(3) SA that the provisions of Part Two of the Separation Agreement shall be interpreted in conformity with the provisions of Part Two of the EU-UK Withdrawal Agreement, in so far as they are identical in substance. Adaptations and adjustments have been made where differences between the two agreements entail or require divergences in implementation and application of provisions of the Separation Agreement compared to those in the EU-UK Withdrawal Agreement.

The case law of the Court of Justice of the European Union ("the CJEU") is relevant to the interpretation of the European Economic Area (EEA) law upon which the SA is based in accordance with Article 6 of the EEA Agreement and Article 3 of the Court and Surveillance Agreement ("SCA"):

- *Provisions that are identical in substance to corresponding rules of the EU treaties shall in their implementation and application be interpreted in conformity with the relevant rulings of the CJEU given prior to the date of signature of the EEA Agreement, i.e. 2 May 1992.*
- *Due account shall be paid to the principles laid down by the relevant rulings of the CJEU given after the date of the signature of the EEA Agreement and which*

[1] 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 (OJ C 173, 20.5.2020, p. 1–44).

concern the interpretation of provisions that are identical in substance to corresponding rules of the EU treaties.

Further to the above, and without prejudice to cases decided by the EFTA Court on the basis of the SA itself, the case law of the EFTA Court delivered in accordance with Article 108 of the EEA Agreement is highly relevant to the interpretation of EEA law, upon which the SA is based.

While this Guidance Note has been prepared by staff of the EFTA Surveillance Authority and based on the Commission's Guidance Note, the views contained in the Guidance Note should not be interpreted as stating an official position, either of the EFTA Surveillance Authority, or of the European Commission.

The overall objective of Part Two of the Separation Agreement is to safeguard citizens' rights derived from EEA law exercised by EEA EFTA nationals residing or working in the United Kingdom of Great Britain and Northern Ireland (UK) and by UK nationals residing or working in the EEA EFTA States, and their respective family members, by the end of the transition period provided for in the Separation Agreement (31 December 2020), and to provide for effective, enforceable and non-discriminatory guarantees for this purpose.

1. TITLE I – GENERAL PROVISIONS

Articles 8, 9 and 10 of the Separation Agreement jointly determine the personal and territorial scope for the purposes of the application of Title II of Part Two of the Separation 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 Separation Agreement consist of EEA EFTA nationals and UK nationals having exercised the right to reside or work in accordance with EEA 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 EEA EFTA national and UK national are set out in Article 2(c) and (d) SA.

References to EEA free movement rights or rules in this Guidance Note include rights under:

- Articles 28 and 31 of the EEA Agreement;
- 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, as incorporated into the EEA Agreement ("Directive 2004/38/EC"); and
- Regulation (EU) No 492/2011 on freedom of movement for workers within the Union, as incorporated into the EEA Agreement ("Regulation 492/2011").

1.1. *Article 8 – Definitions*

1.1.1. *Article 8(a): Family members*

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 EEA law, family members of EEA nationals *in principle* do not enjoy an independent right to move and reside freely (unless they are EEA nationals themselves or have acquired an independent right of residence as result of their relationship with an EEA national, the source of their free movement rights). In the same vein, family members do not enjoy rights under the Separation Agreement without these rights being derived from the right holder – a person falling under Article 9(1)(a) to (d) SA.

The only exception are family members falling under Article 9(1)(f) who resided in the host State *"independently"* at the end of the transition period as their right of residence under EEA law at that moment was no longer conditional on continuing to be a family member of an EEA national currently exercising EEA rights in the host State.

1.1.2. *Article 8(b): Frontier workers*

Frontier workers are persons falling under the definition of "workers" who, at the same time, do not reside under the condition set out in Article 12 of the Separation Agreement, in the State in which they are "workers".

Both frontier workers in employed (Article 28 EEA) and self-employed (Article 31 EEA) capacity are covered (see Case C-363/89 *Roux* and the guidance for Articles 23 and 24).

Neither the EEA Agreement nor any legislation incorporated into the Annexes of the EEA Agreement gives a definition of the term "worker" or "self-employed person".

According to the jurisprudence of the EFTA Court and the CJEU, the notion of "worker" has, for the purposes of freedom of movement in the EEA, 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.

Established case law 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*). For comparison, self-employed persons perform tasks under their own responsibility and may thus be liable for damage caused as they bear the economic risk of the business, for example in so far as their profit is dependent on expenses incurred on staff and equipment in connection with their activity (C-202/90 - *Ayuntamiento de Sevilla*).

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-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*);
- in return for which they receive remuneration (see for example Cases C-196/87 *Steymann*, C-344/87 *Bettray*, C-27/91 *Hostellerie Le Manoir*).

1.1.3. *Article 8(c): The host State*

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

For UK nationals, the host State is the EEA EFTA State as defined in Article 2(b) SA in which they are exercising their right of residence under free movement rules under the EEA Agreement.

1.1.3.1. Having "exercised their right of residence there in accordance with the EEA Agreement"

The exercise of the right of residence means that a UK national lawfully resides in the host State in accordance with free movement law under the EEA Agreement before the end of the transition period.

All possible situations where the right of residence stems from free movement rules under the EEA Agreement 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 28 EEA 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 EEA law attaches to the right of residence (Case E-4/19 *Campbell*).

Possession of a residence document is not a prerequisite for lawful residence in accordance with EEA law, because under EEA law, the right of residence is conferred directly on EEA nationals by the EEA Agreement and is not dependent upon their having fulfilled administrative procedures (Recital 11 of Directive 2004/38/EC).

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

These notions, which should be read together, incorporate a time stamp that requires that residence in accordance with EEA law qualifies for the purposes of Part Two of the Separation 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 10 SA.

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 8(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 8(e): Rights of custody*

The expression "rights of custody" is defined as rights and duties relating to the care of a child, and in particular the right to determine the child's place of residence. The equivalent right under the EU-UK Withdrawal Agreement makes 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). However, this regulation does not apply under EEA law, nor for the EEA EFTA States in any other context, and a separate definition is therefore employed for the purposes of the Separation Agreement.

Article 8(e) covers rights of custody acquired by judgment, by operation of law or by an agreement having legal effect.

1.2. *Article 9 – Personal scope*

1.2.1. *EEA EFTA nationals and UK nationals: Paragraph (1)(a) to (d)*

The definitions of EEA EFTA nationals and UK nationals are set out in Article 2(c) and (d) SA.

*Dual EEA EFTA/UK nationals, whether by birth or by naturalisation***,** are covered by the Separation 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. Dual EEA EFTA/UK nationals, whether by birth or by naturalisation, are also covered by the Separation Agreement if, by the end of the transition period, they have exercised free movement residence rights in an EEA EFTA State other than that of which the person holds nationality (this is without prejudice to the rights they have as mobile EEA nationals under EEA law on free movement of EEA nationals).

Dual EEA EFTA/UK nationals who have *never exercised their free movement rights* are not covered by the Separation Agreement.

1.2.2. *Out of scope*

1.2.2.1. Posted workers

People relying solely on rights deriving from Article 36 EEA are not covered by the Separation Agreement (see also the guidance on Article 29(1)(e) of Title III of the Separation Agreement).

The Separation 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. Returning EEA EFTA nationals' and UK nationals' right to family reunification: Case C-370/90 *Singh*

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

1.2.3. *Article 9(1)(e) and (f) and 9(2) to (5): Family members*

Paragraph 1(e) and (f) and paragraphs 2 to 5 of Article 9 set out which persons fall within the scope of the Separation Agreement by virtue of their family ties with the right holder (a person falling under any provision of Article 9(1)(a) to (d) SA).

On the basis of Directive 2004/38/EC, the Separation Agreement distinguishes between two categories of "family members": "core" family members (defined in Article 8(a) SA and corresponding to Article 2(2) of Directive 2004/38/EC), and "extended" family members (falling under Article 9(2) to (5) SA and corresponding to Article 3(2) of Directive 2004/38/EC).

1.2.3.1. Article 9(1)(e)(i): "Core" family members residing in the host State

This provision covers "core" family members (defined in Article 8(a) SA) who have resided in the host State at the end of the transition period in their capacity as family

members of an EEA EFTA or UK national exercising free movement rights under the EEA Agreement in the host State.

1.2.3.2. Article 9(1)(e)(ii): "Core" family members residing outside the host State

Family members covered by point (e)(ii) of Article 9(1), who have not moved to the host State before the end of the transition period, may 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 9(1) SA, while direct descendants born after the end of the transition period are covered by point (e)(iii) of Article 9(1) SA.

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 Separation Agreement.

This means, for example, that someone seeking entry as spouse of a right holder in 2025 will be eligible under the Separation Agreement if they were 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 Separation Agreement if they continue 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 Separation Agreement if they are dependent on the right holder when seeking to join the right holder in the host State.

1.2.3.3. Article 9(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 9(1) SA.

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 9(1) SA 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 Norwegian-UK couple residing in Norway): 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 EEA EFTA or UK national 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 9(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 9(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 8(a) SA) 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 EEA EFTA or UK national exercising free movement rights under the EEA Agreement there;
b) later, but still before the end of the transition period, acquired a right of residence on the basis of free movement law under the EEA Agreement that is no longer dependent on being a family member of an EEA EFTA or UK national exercising free movement rights under the EEA Agreement 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 9(1)(f) is the reason why Part Two of the Separation 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 9(2): "Extended" family members already residing in host State

Article 9(2) SA 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 EEA EFTA or UK national exercising free movement rights under the EEA Agreement there. The duration of that residence is immaterial.

The free movement right under the EEA Agreement 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 free movement right under the EEA Agreement 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 9(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 visas or residence documents) have been outstanding at the end of the transition period are protected the same way as under the free movement rules under the EEA 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 the application means that such persons should be considered as persons falling under Article 9(2) SA.

1.2.3.7. Article 9(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 Separation 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 and Case E-1/20 *Kerim*).

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 Separation 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 Separation 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 9(2).

1.2.4. *Article 9(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 9 SA in accordance with its national legislation. Any decision refusing the application should be fully reasoned.

1.3. *Article 10 – Continuity of residence*

Article 10 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 lawful residents and consequently protected by the Separation Agreement. This is consistent with Articles 8 and 9 SA 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 10, referring to the five-year rule of Article 14(3) SA). Those who did not yet reside for five years can only be absent for maximum 6 months a year (first paragraph of Article 10, referring to continuity of residence rules under Article 14(2) SA, which mirrors Article 16(3) of Directive 2004/38/EC).

See further detail in Article 14(2) and (3) SA on the conditions of continuity.

As an example, UK nationals who acquired the right of permanent residence in the host EEA EFTA 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 having "exercised their right of residence in accordance with the EEA Agreement" (even if they 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 17(1)(b) SA.

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, a UK national who has lived for 15 years in Iceland between 1995 and 2010 and then left Iceland is not considered as residing in the UK for the purposes of the Separation Agreement. Such an individual has voluntarily left Iceland and remained outside Iceland ever since, so there is no existing residence right under the Separation 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 11 – Non-discrimination*

Article 11 SA fully mirrors Article 4 EEA and ensures that discrimination on grounds of nationality is prohibited, when:

a) it is within the scope of Part Two of the Separation Agreement – but without prejudice to any special provisions contained in Part Two (such as Article 22(2)); and
b) it is against the beneficiaries of the Separation 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 12 – Residence rights*

2.1.1. *Scope*

Paragraphs 1 to 3 of Article 12 lay down the main substantive conditions that underpin the right of residence in the host State for EEA EFTA nationals, UK nationals and their respective family members, irrespective of their nationality.

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

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 36 SA).

2.2. *Article 13 – Right of exit and of entry*

2.2.1. *Article 13(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 EEA nationals have the right to leave one EEA State and enter another EEA State irrespective of whether they are nationals of those EEA States or their residents.

The right of beneficiaries of the Separation Agreement to be absent, as set out in Article 14 SA, and the right to continue working as a frontier worker, as set out in Articles 23 and 24 SA, 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 13(1) SA 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 Separation Agreement.

As regards the use of national identity cards as travel documents, the second subparagraph of Article 13(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 35 SA, to allow beneficiaries of the Separation Agreement to apply for a compliant national identity card or a valid passport.

2.2.2. *Article 13(2): Holders of documents issued under the Separation Agreement*

EEA EFTA nationals, UK nationals, their family members, and other persons resident in the host State in accordance with the Separation Agreement will have the right to cross the borders of the host State under the conditions set out in Article 13(1) SA where they provide evidence of being a beneficiary of the Separation Agreement.

Holders of documents issued under Article 17 and 25 SA 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 13(3): Entry visas and charging for out-of-country residence applications*

Article 13(3) SA replicates the entry visa facilities Directive 2004/38/EC grants to family members of mobile EEA nationals in recognition of the fact that the right of EEA nationals 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 13(3) should be issued free of charge, the Separation 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 17. In this case, the choice between the entry visa and the residence document lies with the beneficiary of the Separation 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 14 – Right of permanent residence*

2.3.1. *Article 14(1): Eligibility*

Article 14 SA 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 SA. This has the following consequences:

a) residence that is in accordance with free movement rules under the EEA Agreement but not in accordance with the conditions of Directive 2004/38/EC (note that Article 12 SA refers back to Directive 2004/38/EC) does not count for the purposes of the right of permanent residence;
b) holding a valid residence document does not make the residence legal for the purposes of acquisition of right of permanent residence.

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 Separation Agreement. Reference in Articles 14(1) and 15 SA to periods of work in accordance with free movement rules under the EEA Agreement refers to periods of employment in the sense of Article 17 of Directive 2004/38/EC.

2.3.2. *Article 14(2): Residence for less than five years*

As regards continuity of non-permanent residence, Article 14(2) SA 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 Separation Agreement generally – beneficiaries of the Separation 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, UK nationals 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 EEA law on free movement of UK nationals for the purposes of the Separation 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).

2.3.3. *Article 14(3): Residence for more than five years*

Article 14(3) SA 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 10 with respect to beneficiaries who are absent at the moment of the end of the transition period).

The right of permanent residence under the Separation Agreement can also be lost through an expulsion decision lawfully taken on grounds of Article 19 SA.

The right of permanent residence acquired before the end of the transition period to which Article 10 SA refers should be understood as right of permanent residence under EEA law (Articles 16(1) or (2) of Directive 2004/38/EC) that determines whether one is eligible to become beneficiary of the Separation Agreement (it should not be understood as referring to the right of permanent residence acquired under the Separation Agreement).

To reflect the specific context of the Separation 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 SA 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 Separation Agreement when returning to the host State after a period of absence of up to five consecutive years.

As an example, UK nationals who acquired the right of permanent residence in the host State under the conditions set out in the Separation 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 retain their right of permanent residence and all attached rights under the Separation Agreement.

2.4. *Article 15 – Accumulation of periods*

Article 15 SA complements Article 14 SA by covering the situation in which the beneficiaries of the Separation 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 free movement rules under the EEA Agreement 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 15 confers on such beneficiaries the right to acquire permanent residence status later (after accumulating the sufficient period of legal residence).

2.5. *Article 16 – Status and changes*

2.5.1. *Article 16(1): Changing the status*

The first part of Article 16(1) provides that EEA EFTA nationals and UK nationals who have the right of residence in the host State in accordance with Article 12(1) SA can change their status and remain beneficiaries of the Separation Agreement.

Their residence right (permanent/non-permanent) under the Separation Agreement is not affected when they change their status (i.e. the provision of the EEA Agreement on free movement of EEA nationals [and, by implication, UK nationals] on which their right of residence is based), as long as their residence is in accordance with the conditions of Article 12(1) SA (and, via it, EEA law on free movement of EEA nationals). It is also possible to hold multiple statuses (e.g., a student who is simultaneously a worker).

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

The list of "statuses" in Article 16(1) (student, worker, self-employed person, and economically inactive person) is illustrative, not exhaustive.

While Article 16(1) also applies to beneficiaries of the Separation Agreement who have acquired permanent residence status under the Separation 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 12(2) or (3) SA can also change their status and remain beneficiaries of the Separation Agreement.

However, the second sentence of Article 16(1) expressly prevents them from becoming right holders (i.e., persons referred to in Article 9(1)(a) to (d) SA). In practice, this means that they have no autonomous right under the Separation Agreement to be joined by their own family members.

This limitation applies only with regard to those persons whose residence status under the Separation Agreement is *exclusively* derived from their being family members of right holders. 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 UK national son of an UK national worker who also works in the UK) are not covered by the second part of Article 16(1) and, consequently, they enjoy all the rights that right holders enjoy.

2.5.2. *Article 16(2): A child who is no longer dependent*

As under the provisions of the EEA Agreement on free movement of EEA nationals, family members of beneficiaries of the Separation Agreement whose residence status is derived from their being dependent on the right holder do not cease to be covered by the Separation Agreement when they cease to be dependent, for example by making use of their rights under Article 21 to take up employment or self-employment in the host State.

Article 16(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 Separation Agreement whose residence status is derived from their being under 21 years of age remain covered by the Separation Agreement when they become 21 years.

2.6. *Article 17 – Issuance of residence documents*

In a departure from the fundamental principles of free movement rules under the EEA Agreement, Article 17 obliges the host State to make a choice – either to operate a constitutive residence scheme (Article 17(1)), or a declaratory residence scheme (Article 17(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 the EEA Agreement 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 17(1): Constitutive status*

Article 17(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 17(1), a person who files an application must comply with the conditions set out in Title II of Part Two of the Separation 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 17(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 17 requires that the residence document includes a statement that it has been issued in accordance with the Separation Agreement (so that their holders can be distinguished as beneficiaries of the Separation Agreement).

2.6.1.2. Digital or paper form

Article 17(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 Separation Agreement are given means of accessing and verifying their status and sharing the status with interested parties.

2.6.2. *Article 17(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 17(1) upon having assessed whether the conditions under Article 17(1) are fulfilled.

2.6.3. *Article 17(1)(b): Deadlines for and certificate of application*

2.6.3.1. Deadlines

Applications for the new residence status under Article 17(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 17(1)(c) applies (see below). This deadline will need to apply to all beneficiaries of the Separation 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 14(2) and (3) SA.

Family members and partners in a durable relationship who wish to join an EEA EFTA national or UK national beneficiary of the Separation 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 Separation 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 17(1)(b) (last subparagraph of the introductory phrase of Article 17(1), the competent authority should take the following steps:

1) the competent authority issues immediately a certificate of application (last subparagraph of Article 17(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 17(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 17(1)(b)).

A decision to refuse an application is subject to judicial and, where appropriate, administrative redress in accordance with Article 17(1)(r).

An applicant is deemed to enjoy the right of residence under the Separation Agreement until the competent authority has taken a final decision as per Article 17(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 Separation Agreement until the final decision on the application is made (Article 17(3)).

Article 17(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 14(2) and (3) SA).

Out-of-country applications can also be made by family members who are not yet residing in the host State (see guidance to Article 9(1)(e)(ii) and (iii) and Article 9(3) and (4) SA).

2.6.4. *Article 17(1)(c): Technical problems and the notification thereof*

Article 17(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 EEA EFTA States in accordance with the applicable rules. If the technical problems occur in an EEA EFTA State, it is for that EEA EFTA State to make the notification to the UK in accordance with the applicable rules. The deadline for submitting 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 17(1)(c) are not deployed if no notification is made, even if technical problems exist.

In this respect, Article 5 SA 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 17(1)(d).

2.6.5. *Article 17(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 17(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 17 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 17(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 17(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 17(1)(h): Possession of a permanent residence document*

Paragraph 1(h) of Article 17 applies only when the applicant holds a valid permanent residence document, not when they hold 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 17(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 17(1)(i): National identity cards*

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 13(1) SA.

As is the case for Directive 2004/38/EC, paragraph 1(i) of Article 17 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 17(1)(j): Supporting documents in copies*

Article 17(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 the authenticity”.

2.6.10. *Article 17(1)(k) to (n): List of supporting documents*

Articles 8(3) and (5) and 10(2) of Directive 2004/38/EC (see also Recital 14) provide for an exhaustive list of supporting documents the host State can require EEA nationals 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 17(1)(k) to (n) SA 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 Separation Agreement.

Paragraph 1(k) of Article 17 SA 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 17 SA, "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 17 SA 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 17 SA 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 17 SA 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 EEA EFTA or UK nationals) 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 SA) 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 17(1)(o): Help to applicants*

Paragraph 1(o) of Article 17 SA 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 Separation 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 17(1)(p): Criminality checks*

Article 17(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 Separation 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 Separation 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 17 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 17 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 19(1) SA.

Any restrictive measures taken on the grounds of criminality and security checks under paragraph 1(p) of Article 17 must comply with the rules laid down in Article 17(1)(r), and Articles 19 and 20 SA.

2.6.13. *Article 17(1)(q): Statement on the new residence document*

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

2.6.14. *Article 17(1)(r): Redress procedure*

Paragraph (1)(r) of Article 17 ensures that any decision taken for the purposes of an application for the new residence status as per Article 17(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 17(2): Deemed residence rights*

Without prejudice to the restrictions set out in Article 19 SA, 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 17(1)(b).

2.6.16. *Article 17(3): Deemed right to reside until final decision is taken*

Without prejudice to the restrictions set out in Article 19 SA, 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 17(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 17(4): Declaratory procedure*

Paragraph 4 of Article 17 SA 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 Separation Agreement.

2.7. *Article 18 – Issuance of residence documents during the transition period*

2.7.1. *Article 18(1): Applications during the transition period*

It follows from Article 127 of the EU-UK Withdrawal Agreement that Union law continued to apply to and in the UK until the end of the transition period. This included treating the UK as an EU Member State for the purposes of international agreements concluded by the Union, or by the European Union and its Member States jointly. In tandem with this, the EEA EFTA States agreed that, during the transition period, they would continue to treat the UK as an EU Member State for the purposes of the EEA

Agreement and its protocols and annexes.[2] Consequently, EEA law continued to apply as regards the UK until the end of the transition period.

However, applications for the new constituent of rights residence document under Article 17(1), and for the declaratory residence document under Article 17(4), could be made already during the transition period (Articles 18 and 71 SA).

The decision to operate such a voluntary application of the scheme for the new residence status under Article 17(1) did not affect the application of free movement rules under the EEA Agreement.

An application for the new residence status under Article 17(1) of the Separation Agreement during the transition period did not prevent the applicants from applying simultaneously for a residence document under Directive 2004/38/EC.

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

2.7.2. *Article 18(2): Effect of granting or refusing the application*

Lodging an application under the voluntary constitutive scheme could have been 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 could not be withdrawn before the end of the transition period as per Article 18(3)).

It follows from paragraph 2 of Article 18 that decisions – both positive and negative – taken under the procedure set out in Article 17(1), the constitutive scheme, would have no effect until after the end of the transition period, i.e. such decisions were valid but their legal effects were postponed, given that the applicants would enjoy parallel free movement rights.

Similarly, a refusal of an application made under the procedure set out in Article 17(1) could warn the applicant that certain changes were needed to qualify for the new residence status – such changes could be effected until the end of the transition period, and the person could re-apply as set out in paragraph 4 of Article 18.

A residence document granted under Article 17(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 free movement rights of the applicants.

2.7.3. *Article 18(3): No withdrawal of granted residence status during the transition period*

Paragraph 3 of Article 18 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 could only do so on grounds of public policy, public security or

[2] Note Verbale from the Delegation of the European Union to Iceland of 27 January 2020 and Note Verbale from the Ministry for Foreign Affairs of Iceland of 27 January 2020; Note Verbale from the Delegation of the European Union to Liechtenstein of 28 January 2020 and Note Verbale from the Office for Foreign Affairs of Liechtenstein of 29 January 2020; Note Verbale from the Delegation of the European Union to Norway of 27 January 2020 and Note Verbale from the Royal Norwegian Ministry of Foreign Affairs of 27 January 2020. See also Article 44a of and Article 1 of Protocol 9 to the Surveillance and Court Agreement.

public health or abuse or fraud in accordance with the rules of Directive 2004/38/EC that were applicable in parallel.

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

In the scheme under Article 17(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 18(4): Re-applications*

Paragraph 4 of Article 18 ensures that applicants refused the new residence status under Article 17(1) before the end of the transition period could reapply within the deadline set out in Article 17(1)(b).

The right to apply again during the transition period is covered by the redress procedures set out in Article 17(1)(r).

2.7.5. *Article 18(5): Redress*

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

2.8. *Article 19 – Restrictions on the right of residence*

Article 19 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 19 are triggered by the conduct of the persons concerned. The notion of conduct under the Separation 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 19 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 19 establishes a clear obligation ("shall be considered") to apply Chapter VI of Directive 2004/38/EC to certain facts, while paragraph 2 of Article 19 authorises the application of national immigration rules to facts occurring after the end of the transition period.

Therefore, paragraphs 1 and 2 of Article 19 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 19 SA. 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 started before the end of the transition period and continues afterwards*.

In the hypothesis of a continued conduct, the national authorities called upon to decide 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 19 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 19 cannot be adopted;
c) in the case mentioned in (b), the national authorities can nevertheless examine under paragraph 1 of Article 19, 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 19(3) and (4): Abuse of rights or fraudulent or abusive applications*

Paragraphs 3 and 4 of Article 19 authorise the host State to remove from its territory applicants who abused their rights or committed fraud, in order to obtain rights under the Separation Agreement.

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. However, 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 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 their appearance may cause serious troubles to public policy or public security.

2.9. *Article 20 – Safeguards and right of appeal*

This provision covers all situations in which residence rights under the Separation 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 EEA national 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.

Restriction decisions taken in accordance with national legislation must also comply with the principle of proportionality and with fundamental rights protected by EEA law.

2.10. *Article 21 – 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 SA.

2.11. *Article 22 – 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 SA.

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 23 – Rights of workers*

2.12.1. *Article 23(1): Rights*

Article 23(1) SA grants all EEA law-based workers' rights to beneficiaries of the Separation Agreement who are workers, including those who change status to that of worker after the end of the transition period (see also Article 16(1) and Article 21 SA). Other categories of beneficiaries of the Separation 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 28(3) and (4) EEA apply.

The Separation Agreement does not cover employment in the public service as per Article 28(4) EEA. 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 28(4) EEA.

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 28 EEA and Regulation (EU) No 492/2011. As a general rule, rights set out in paragraph 1 of Article 23 SA have the same scope and meaning as defined in Article 28 EEA and Regulation (EU) No 492/2011.

In principle, this entails that the scope and meaning of Article 23 should be interpreted in light of Article 28 EEA and Regulation (EU) No 492/2011 as applicable on 31 December 2020, cf. Article 6 SA.

However, the rights of workers enumerated in paragraph 1 of Article 23 SA are not exhaustive and any development of those rights in the EU may be relevant under the Separation Agreement. This is the case because Article 4(3) SA prescribes that the provisions of Part Two of the Separation Agreement shall, in their implementation and application, be interpreted in conformity with the provisions of Part Two of the EU-UK Withdrawal Agreement, in so far as they are identical in substance. Article 23 SA is identical in substance to Article 24 of the EU-UK Withdrawal Agreement.

2.12.2. *Article 23(2): Right of a child of a worker to complete education*

Article 23(2) SA protects the right of children of workers to complete their education in the host State. Thus, a child whose UK parent used to work in the host State, as a beneficiary of the Separation Agreement, can continue to reside in the host State and complete their 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). 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 their education.

2.12.3. *Article 23(3): Frontier workers*

Frontier workers can continue working in the State of work if they did so by the end of the transition period, i.e. 31 December 2020.

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 23(1)(a) to (h) SA.

Frontier workers retain the status in the State of work, *inter alia,* 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)*.

2.13. *Article 24 – Rights of self-employed persons*

2.13.1. *Article 24(1): Rights*

The rights of paragraph 1 of Article 24 are granted to all beneficiaries of the Separation 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 16(1), which provides for the right to become a self-employed person).

According to established case law (e.g., case 63/86 *Commission v Italy*), self-employed persons falling under Article 31 EEA can enjoy the rights under Regulation (EU) No 492/2011 that apply by analogy. This means, for example, that Article 23(1)(d) SA cannot apply with respect to dismissal, since a self-employed person is, by definition, not in a relation of subordination to an employer and cannot be dismissed.

The rights of paragraph 1 of Article 24 SA 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) (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.[3]

Articles 4(3) and Article 6 SA entail that the notion of self-employed person is interpreted in the same way the EFTA Court and the CJEU has interpreted Article 31 EEA and Article 49 TFEU in relevant case law.

2.13.1.1. Limitations

The rights of Article 24(1) SA are subject to the same restrictions as set out in Articles 32 and 33 EEA.

Consequently, these rights can be subject to limitations justified on grounds of public policy, public security, or public health (Article 33 EEA) 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 32 EEA).

2.13.1.2. Article 24(1)(a): The rights to take up and pursue activities as self-employed persons and to set up and manage undertakings

The Separation 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 31 EEA, under the conditions laid down by the host State for its own nationals.

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

2.13.1.3. Article 24(1)(b): Reference to the non-exhaustive list of rights of Article 23(1)

Self-employed workers enjoy the full panoply of the relevant rights stemming from Article 28 EEA and Regulation (EU) No 492/2011 in the State of work.

2.13.2. *Article 24(2): Right of a child of a self-employed worker to complete their education*

Article 24(2) protects children whose EEA EFTA or UK parent was a worker, but who has ceased to reside lawfully in the host State of the child as per Article 23(2) SA, to the extent provided for by EEA law.

2.13.3. *Article 24(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 23(3) SA, with the same reservations as to relevance as described in the guidance to Article 24(1) (e.g. dismissals).

[3] A person who equips himself with some form of infrastructure in the host State which is necessary for the purposes of performing the activities in that State (including an office, chambers, or consulting rooms) may fall under the provisions on freedom to provide services in the EEA Agreement, 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 and* E-6/00 *Tschannett*).

2.14. *Article 25 – Issuance of a document identifying frontier workers' rights*

Article 25 obliges the State of work to issue frontier workers covered by the SA with a document certifying their status if those frontier workers so request. At the same time, Article 25 also allows the State of work to require frontier workers covered by the SA to apply for such a document.

Unlike the residence document issued under Article 17(1) SA, 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 and can easily demonstrate proof of those rights (notably those related to border crossing under Article 13 SA).

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 23(3) or 24(3) SA (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 Separation Agreement deals with the cases of persons covered by the SA who have obtained, or who were 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 SA guarantees the following:

a) the validity and effectiveness of national decisions recognising their UK or EEA EFTA 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 Separation Agreement any internal market right relating to the provision of services to EEA EFTA States other than their host State or State of work, as appropriate.

The Separation Agreement does not guarantee UK nationals covered by the personal scope of the SA the right to rely on EEA 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 EEA State.

The Separation Agreement does not deal with the treatment of professional qualifications obtained in the UK or in the EEA EFTA States 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 26 – Recognised professional qualifications*

2.15.1. *Overall approach*

Article 26 describes the type of recognition decisions that are grandfathered under the SA, 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 SA), and the effects of the grandfathering of the decisions in the respective states.

What is grandfathered?

In essence, Article 26 SA covers recognition decisions which have been adopted in accordance with four specific EEA 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 26(1)(a) and 26(2): Recognitions under the Professional Qualifications Directive*

The SA 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 26(2)(a) SA:* recognitions of third country professional qualifications which are covered by Article 3(3) of Directive 2005/36/EC.

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

  The SA does not therefore cover the first recognition of third country qualifications in an EEA EFTA 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 26(2)(b):* decisions on partial access under Article 4f of Directive 2005/36/EC.

- *Under Article 26(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 Separation 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. This is the same as under the EU-UK Withdrawal Agreement (see Articles 8 and 29 of that agreement). Access by professionals to the EPC's online interface for information purposes will not however be impaired. Article 27 SA also foresees that the EEA EFTA States and the UK put in place any necessary arrangements to ensure completion of the procedures required for ongoing procedures on recognition of professional qualifications.

A specific effect of the grandfathering offered by the Separation 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 26(1)(b): Recognitions under the Lawyers Establishment Directive*

The Separation Agreement grandfathers, for persons covered by its personal scope, decisions under which EEA EFTA 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 UK nationals, any local nationality requirement that 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 EEA State, the Separation Agreement does not provide for the application of the two relevant directives incorporated into the EEA Agreement, namely Directive 98/5/EC and Directive 77/249/EEC (on temporary cross-border provision of lawyers' services), beyond the host State or State of work concerned.

2.15.4. *Article 26(1)(c): Recognitions under the Statutory Auditors Directive*

As regards the persons covered by the personal scope of the Separation Agreement, approvals in the host State or State of work of statutory auditors who have initially obtained their approval in an EEA EFTA State 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 26(1)(d): Recognitions under the Toxic Products Directive*

As regards the persons covered by the personal scope of the Separation 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 Separation Agreement.

1.1.6. *Overall effects*

The grandfathering effects offered by Article 26 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 EEA law to the beneficiaries as regards the provision of services in territories other than those covered by these specific grandfathering effects.

2.16. *Article 27 – Ongoing procedures on the recognition of professional qualifications*

2.16.1. *Scope*

Article 27 mirrors Article 26 SA as regards its personal and material scope and captures all relevant requests for recognition of professional qualifications that had been formally submitted by, and were 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 EEA provisions until a final decision is taken by the competent authority.

Two specific aspects should be mentioned:

- Article 27 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 27 second subparagraph confirms that they are to be completed under the relevant Union law provisions.

As mentioned under point 2.15.2, the Separation Agreement does not ensure continued access to the relevant underlying electronic network (IMI module, network, and database). Instead, the third paragraph of Article 27 SA foresees that the EEA EFTA States and the UK put in place any necessary arrangements to ensure completion of the procedures required for ongoing procedures on recognition of professional qualifications.

2.16.2. *Effects*

The effects of the proceedings to be completed under Article 27 SA should be identical to the effects of the recognition decisions grandfathered under Article 26 SA and explained above.

2.17. *Article 28 – Administrative cooperation on recognition of professional qualifications*

Article 28 ensures that competent authorities of the UK and of the EEA EFTA 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 27 SA.

This provision also constitutes a general waiver on any national provision that 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.

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 SA;
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 31 SA;
3. persons outside the scope of the Separation Agreement, to whom the coordination rules in the relationship between the UK and the EEA EFTA States will not apply.

3.1. *Article 29 – Persons covered*

3.1.1. *General remarks*

Article 29 SA 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 EEA EFTA State;
- the second paragraph determines the time-limit of the application of Article 29(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 SA are also covered by Title III even if not or no longer under the scope of Article 29(1);
- the fourth paragraph determines the time-limit of the application of Article 29(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 30(2) SA, the notions used under this Title are to be understood by reference to the notions used in Regulation (EC) No 883/2004.

Article 29(1) SA refers to persons who are "*subject to the legislation of*" an EEA EFTA 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 Separation 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 31 SA).

Because the aims of Titles II and III of Part Two of the Separation Agreement are different, terms used in both titles (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 EEA law that they apply and their interpretation in case law.

For instance, the notion of “habitual residence” used in Title III of Part Two of the Separation 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 EEA acts 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 EEA State of origin and are temporarily staying in the EEA State where they study. At the same time, students enjoy, under the conditions of Directive 2004/38/EC, a right of residence in the EEA State where they study.

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

- works and habitually resides in Iceland at the end of the transition period;
- in 2022, acquires the permanent residence in Iceland based on Article 15 SA;
- in 2025, returns to the UK, starts working and moves their habitual residence there;
- at the same time, maintains the permanent residence right under Title II of Part Two of the Separation Agreement in Iceland for the five consecutive years.

As long as that UK national maintains a permanent right of residence in Iceland within the meaning of Title II of Part Two of the Separation Agreement, they will be entitled to benefit from the provisions of Title III if they return to Iceland. Furthermore, as long as that national maintains a permanent right of residence in Iceland, they will have the right to export social security benefits there.

For persons covered by Title III of the SA, 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 Separation 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 29(1): Personal scope (general clause)*

3.1.2.1. Article 29(1)

Article 29(1) SA refers to the following categories of persons:

- *EEA EFTA nationals*– as defined under the national legislation of the respective EEA EFTA States.
- *UK nationals* – as defined under its national legislation.
- *Stateless persons and refugees* habitually residing in an EEA EFTA 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 Separation Agreement if they fulfil the conditions outlined in paragraph 1 of this Article:

Points (a) and (b): EEA EFTA nationals 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 an EEA EFTA 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): EEA EFTA nationals who are subject to the legislation of an EEA EFTA 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): EEA EFTA nationals who pursue a gainful activity in the UK at the end of the transition period, but are subject to the legislation of an EEA EFTA 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 EEA EFTA State.

Points (a) to (f): 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. new-born child or new partner) who are living with the right holder and who are in situation covered by Article 29(1) SA.

Points (a) to (f): 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 31 SA.

3.1.3. *Article 29(2): The meaning of "without interruption"*

The SA 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 EEA EFTA State at the same time without interruption.

Not every change in a situation of the person concerned is to be treated as one. Switches between the different categories mentioned in Article 29(1) SA maintain the status of a person covered by Article 29(1) SA 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 29(1) SA 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 a break of for example one month before starting a new contract (by analogy, Case E-4/19 *Campbell).*

3.1.4. *Article 29(3): Personal scope (residual clause)*

Article 29(3) contains a residual clause by which persons covered by Article 9 concerning the personal scope of Title II of Part Two of the Separation Agreement who are not or no longer under the scope of points (a) to (e) Article 29(1) should also benefit from the provisions on full social security coordination of Title III of Part Two of the SA.

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

If, for instance, a UK national studies in Norway 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 29(1) SA. However, the student maintains a right of residence under Title II of Part Two of the Separation Agreement if, for instance, they gain access to the labour market. In this case, they will then benefit from the provisions of Title III as well pursuant to Article 29(3) SA.

Persons who are both UK nationals and EEA EFTA nationals may also be covered by Article 29(3) SA if they are covered by Title II of the Separation Agreement (see Section 1.2 of this Guidance on Article 9 SA).

This residual clause also applies to family members and survivors of the beneficiaries of Title II of Part Two of the Separation Agreement (see, however, Article 29(5) SA, below).

3.1.5. *Article 29(4): The link to the host State or State of work for persons covered by paragraph 3*

Article 29(4) ensures the application of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to the persons covered by Article 29(3) for as long as the situation concerned remains unchanged: that is, for as long as the persons covered by Article 29(3) retain a right to reside in their host State under Article 12 SA or a right to work in their State of work under Articles 23 or 24 SA.

3.1.6. *Article 29(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 30(2) SA), “family members and survivors” are covered under Article 29 only to the extent that they derive rights and obligations in that capacity in accordance with social security legislation.

3.2. *Article 30 – Social security coordination rules*

3.2.1. *Article 30(1): Material scope*

Article 30(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 29(1).

The coordination rules will be maintained as amended by the Regulations listed in Annex I to the Separation Agreement with the possibility of making any necessary adaptations in the future in accordance with Article 34 SA.

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 Separation Agreement will not change this.

In addition to the Regulations, the EEA EFTA States and the UK shall take due account of all the relevant decisions and take note of 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 Separation Agreement.

3.2.2. *Article 30(2): Definitions*

The notions used in Title III of Part Two of the Separation 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 8 SA 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.

3.3. *Article 31 – Special situations covered*

Article 31 governs special situations in which the rights deriving from the social security coordination rules need to be protected even if the persons are not or are no longer within the scope of Article 29 SA.

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 two regulations, such as for instance non-discrimination or the unicity of the applicable legislation.

3.3.1. *Article 31(1)(a) and (2): Past and future periods*

Article 31(1)(a) protects existing and future rights based on past periods of insurance, employment, self-employment, and residence.

This provision ensures that EEA EFTA nationals 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 EEA EFTA 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 31(1)(a) SA, the special rules under Article 31(2) SA 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 31(1)(a).

Article 31(2) concerning sickness benefits refers to rules on competence for sickness for the person who receives a benefit under 31(1)(a) SA. It covers the situations where there is a change of competence because this person comes back to an EEA EFTA 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 that 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.

3.3.2. *Article 31(1)(b): Ongoing planned treatment*

3.3.2.1. Scope

Article 31(1)(b) SA 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 EEA law if the treatment takes place after the end of that period.

As this provision refers to "persons", it covers EEA EFTA nationals, UK nationals, stateless persons or refugees habitually residing in the UK or an EEA EFTA State.

This provision concerns persons who are not covered by Article 29 SA.

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

Until the end of the treatment, the *persons undergoing planned treatment* who are benefiting from Article 31(1)(b) as described above (patients) have the right to enter and exit the State of treatment in accordance with Article 13 SA (which relates to the right for the beneficiaries of Title II of Part Two of the Separation Agreement to enter and exit the host State), "*mutatis mutandis"* (meaning that Article 13 SA applies with some adjustments to take account of the differences in situation, but the main point remains the same).

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 31(1)(b) SA.

Concretely, a UK national who holds the Portable Document S2 and the necessary travel documents provided for in Article 13(1) SA has the right to enter and exit the State of treatment in accordance with Article 13(2) (i.e. visa free).

Patients benefitting from Article 31(1)(b) SA who are neither EEA EFTA nationals nor UK nationals may, in accordance with applicable legislation, be required to have an entry visa.

In individual cases, patients benefitting from Article 31(1)(b) SA 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 EEA EFTA States and the UK will consider how to provide evidence of the status of accompanying persons and the ensuing rights under the Separation Agreement.

The accompanying person has the right to enter and exit the State of treatment with a valid travel document provided for in Article 13(1) SA. 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 13(3) SA. 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 31(1)(b) SA 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 EEA EFTA 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 17 or 18 SA.

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 31(1)(c): Ongoing unplanned treatment*

The purpose of Article 31(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 30(2) SA). The maximum duration of stay is not determined by law and depends on 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 31(1)(c) SA also after returning again to the State of stay e.g. of studies.

This provision concerns only persons who are not covered by Article 29 SA. If a person is covered by Article 29, 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. Whenever Regulation (EC) No 883/2004 is mentioned, by virtue of Article 6(4) SA, the relevant provisions in Regulation (EC) No 987/2009 apply accordingly.

3.3.4. *Article 31(1)(d): Export of family benefits*

This provision fills a gap left by Article 29 SA for cases in which the person opening entitlements is not in a cross-border situation between an EEA EFTA State and the UK, but the family members of such a person are. In the situations set in Article 31(1)(d)(i) and (ii) SA, *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.

Article 31(1)(d) SA 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 31(1)(e): derived rights as family members*

Article 31(1)(e) also protects 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 that exist at the end of the transition period, whether they are exercised or not.

It concerns situations set in Article 31(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 31(1)(e), even if the couple has no children and no family benefits are paid based on Article 31(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.

3.3.6. *Article 31(2): Changes of competence*

The first sentence of Article 31(2) ensures that persons who have been subject to the legislation of an EEA EFTA State or of the UK before the end of the transition period and who, based on rules of Article 31(1)(a) SA, 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 31(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 State accordingly to the concerned persons.

Underpinned by a similar logic, the second sentence of Article 31(2) 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 31(2) could be illustrated by the following example:

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

See also further explanations on this Article in Section 3.3.1 above as the provision operates in conjunction with Article 31(1) SA.

3.4. *Article 32: European Union citizens*

According to Article 32, Title III of Part Two of the Separation Agreement applies not only to UK nationals and EEA EFTA nationals but also to citizens of the EU Member States, under the following two cumulative conditions:

- the European Union must have concluded and applies a corresponding agreement with the UK which applies to EEA EFTA nationals; and
- the European Union must have concluded and applies a corresponding agreement with the EEA EFTA States which applies to UK nationals.

Article 32(2) states that, if those agreements enter into force, the Joint Committee is empowered to take a decision setting out the date from which Article 32 will apply. Such agreements have been entered into by the European Union with the UK and the EEA EFTA States, respectively.[4] At the first meeting of the Joint Committee on 18 December 2020, it set the date of application for the so-called “triangulation” to 1 January 2021.[5]

The aim of Article 32 is to protect the rights of the citizens of the EU Member States as provided under Title III of the Separation Agreement just as if these citizens were nationals of an EEA EFTA State or the UK, in situations where there is a triangular situation (e.g. an EEA EFTA State, the UK, and, as applicable, one of the EU Member

[4] As regards the UK: Decision No 2/2020 of the Withdrawal Joint Committee on the triangulation of social security coordination between the UK, EU, European Free Trade Agreement (EFTA) States, available online at https://www.gov.uk/government/publications/social-security-coordination-between-the-uk-eu-and-efta-states. As regards the EEA EFTA States: Decision No 210 of 2020 of the EEA Joint Committee amending Annex VI (Social Security) to the EEA Agreement, available online at https://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2020%20-%20English/210-2020.pdf.

[5] See press release dated 18 December 2020, available online at the website of the EFTA Secretariat at https://www.efta.int/EEA/news/First-meeting-EEA-EFTA-UK-Joint-Committee-under-Separation-Agreement-521341.

States). In the same vein, rights of UK nationals and EEA EFTA nationals 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 31(1)(a) SA.

For instance, a French citizen who:

- worked in France between 2005-2007;
- worked in Norway between 2007-2018;
- worked in the UK between 2018-2020; and
- in 2021 claims benefits based on their previous periods of insurance,

would be covered by Article 32 SA (if the conditions for the application of that Article are met) and would thus be assimilated to an EEA EFTA national or UK national covered by Article 29(1) SA.

3.5. *Article 33: Reimbursement, recovery, and offsetting*

The aim of Article 33 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 that relate to persons not covered by Article 29 SA that occurred before the end of the transition period. It also covers events that occurred after the end of the transition period but relate to persons who used to be covered, when the event occurred, by Article 29 SA or by Article 31 SA.

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 29 SA,
b) events which occurred after the end of the transition period and relate to persons covered by Article 31 SA when the event occurred,
c) events which occurred after the end of the transition period and relate to persons covered by Article 29 SA when the event occurred.

While in most of the cases the persons concerned might have past periods and are covered by Article 31 SA, this is not necessary in order to apply this provision.

The provision concerns “events” that 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 that 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 29 and 31 SA.

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

3.6. *Article 34 – Development of law and adaptations of acts incorporated into and in force under the EEA Agreement*

The Separation Agreement ensures the application of Regulations (EC) No 883/2004 and (EC) No 987/2009 as amended or replaced after the end of the transition period and where amendments or replacements to those Regulations are incorporated into and in force under the EEA Agreement.

Article 34 SA sets out an update mechanism in respect of amendments to these Regulations after the end of the transition period.

The update is done by the Joint Committee, which shall revise Annex I to the Separation Agreement in order to align it with any act amending or replacing the Regulations. This is provided that the EU-UK Withdrawal Agreement has been aligned accordingly, and that the act has been incorporated into and is in force under the EEA Agreement. The revision does not take place until both of these event are completed, cf. the last sentence of Article 34(1).

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

4. TITLE IV – OTHER PROVISIONS

4.1. *Article 35 – Publicity*

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

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

4.2. *Article 36 – 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 Separation Agreement than those laid down in the Separation Agreement.

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

Article 36 provides that Part Two of the Separation 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 EEA State, in order to prevent the complications which could result from overlapping of applicable provisions.

4.3. *Article 37 – Life-long protection*

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

Article 37 provides for an important safeguard that the rights under the Separation Agreement do not have an *“expiry date”*.

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

Article 37 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 Separation 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 Separation Agreement before the end of the transition period remains valid.

Brussels, 26 May 2021
Case No: 85895
Document No: 1199663
Decision No: 072/21/COL

ESA | EFTA Surveillance Authority

Ministry of Justice and Public Security
Postboks 8005 Dep
N-0030 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning Norwegian restrictions upon entry on the basis of COVID-19

1 Introduction

By a request for information letter dated 24 November 2020 (Doc No 1164017), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had opened an own initiative case to investigate the application of the Regulations Amending the Covid-19 Regulations in Norway of 6 November 2020.[1] In particular, the Authority drew attention to Section 5 of the Regulations, dealing with conditions for entry quarantine for those arriving into Norway. The Authority has since received a large volume of correspondence from individuals and economic operators directly affected by these and subsequently enacted rules, which Norway has consistently defended as justified on the grounds of public health protection.

On 28 January 2021, Norway adopted additional measures restricting the entry of foreigners (including EEA nationals) into Norway on the grounds of public health associated with COVID-19.[2] On 1 February 2021, these additional measures were repealed and replaced with a new suite of measures, which amended the Regulations relating to entry restrictions for foreign nationals out of concern for public health.[3] These two changes effectively supplanted the previous system, with a new system, whereby all non-Norwegian nationals who are not covered by one of the exceptions in the Regulations, would be refused entry into Norwegian territory. However, individuals admitted into Norwegian territory would continue to be covered by the pre-existing rules on entry quarantine.

On 27 February 2021, the Norwegian Government issued a circular revising the rules for entry to Norway.[4] This circular revised the means by which EEA nationals could demonstrate that they were resident in Norway in order to benefit from the exception from the ban on entering Norwegian territory. The previous rules – under Circular G-04/2020 –

[1] *Forskrift om endring i covid-19-forskriften.* Determined by Royal Decree no. 6 November 2020 pursuant to Act no. 55 of 5 August 1994 on protection against infectious diseases § 4-3, § 4-3a and § 7-12. The amending regulations entered into force on 9 November 2020.

[2] G-03/2021 – *Revidert rundskriv om ikrafttredelse av forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, available at: https://www.regjeringen.no/contentassets/40fe2b78fecb45108d72d18ee6224f07/revidert-ikrafttredelsesrundskriv-om-innreiserestriksjoner-s2901-iii.pdf

[3] *Midlertidig lov om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, updated on 1 February 2021; see G-04/2021 – *Revidert rundskriv om ikrafttredelse av forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, available at: https://www.regjeringen.no/contentassets/59133294ed314dd9806c6f835efd5652/revidert-ikrafttredelsesrundskriv-om-innreiserestriksjoner-3.2.21.pdf

[4] G-07/2021 – *Revidert rundskriv om ikrafttredelse av forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, available at: https://www.regjeringen.no/contentassets/65effc1cc28747579c7104afbf308cfb/revidert-ikrafttredelsesrundskriv-om-innreiserestriksjoner-27.02.21.pdf

defined residence in Norway («*bosatt i Norge*») as covering both those EEA nationals who were registered on the National Population Register, and/or those who had reported their move to the National Population Register. However, Circular G-07/2021 removed the possibility for persons who had reported their move to the National Population Register to be considered as resident in Norway.

On 17 March 2021, via a revised circular, the Norwegian Government announced additional restrictions on entry to Norway.[5] The revised rules provide that those who travel on 'unnecessary' leisure trips abroad must stay in quarantine hotels when they return to Norway for at least three days, until a negative COVID-19 test result is presented. In addition, existing entry restrictions were extended, which means that only those EEA nationals resident in Norway will be allowed to enter the country.[6]

In light of the changes outlined above, the Directorate addressed three additional requests for information to Norway. The Norwegian Government responded to these letters in turn (see 'correspondence', below), including a recent letter of 21 May 2021, setting out significant new changes to the rules in question.

As noted, Norway has consistently defended the various measures adopted as justified on the grounds of public health protection. As a preliminary observation, the Authority notes that while restrictions upon freedom of movement are not prohibited *per se*, they must be suitable for the fulfilment of the objective pursued, proportionate to that objective, and non-discriminatory.

After having examined the relevant legislation and regulations, as well as the explanations received from Norway, the Authority has now reached the conclusion that by maintaining in force the current rules, Norway has failed to fulfil its obligations arising from EEA law, including, *inter alia*, Articles 4, 28 and 36 of the EEA Agreement, Articles 5, 6, 7, 8, 27, 28, 29, 30 and 31 of Directive 2004/38/EC,[7] and Articles 9 and 16 of Directive 2006/123/EC as will be elaborated upon in the following.

2 Correspondence

By a letter dated 24 November 2020 (Doc No 1164017), the Authority informed the Norwegian Government that it had opened an own initiative case, and invited the Norwegian Government to submit its observations on the issues raised in the letter by 20 December 2020. This time-line was extended until 4 January 2021.

The Norwegian Government submitted its reply on 4 January 2021 (Doc No 1171412, ref. 20/5816 - TRR).

In light of the subsequent changes to the Regulations, on 12 February 2021, the Authority addressed a second letter to Norway, wherein it requested additional information concerning the new regime (Doc No 1179284). The Norwegian Government was invited to submit its observations on the issues raised in the letter by 12 March 2021.

[5] G-08/2021 – *Revidert Rudskriv om Karantenehotell*, available at https://www.regjeringen.no/contentassets/862c40a247734dd6bd4bb9b1d3ad15b7/rundskriv-om-karantenehotell.pdf

[6] In principle, this regime was only intended to subsist until 6 April; however, it should be noted that, to the Authority's knowledge, these restrictions have since been extended.

[7] The Act referred to at point 1 of Annex V to the EEA Agreement (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) as adapted to the EEA Agreement by protocol 1 thereto.

The Norwegian Government replied to this letter on 10 March 2021 (Doc No 1187032, ref. 20/5816 - KKO).

In light of continuing changes to the Regulations and other legal provisions relating to entry to Norway imposed on the basis of the COVID-19 pandemic, on 26 March 2021, the Authority addressed a third letter to Norway, wherein it requested additional information concerning the effects of – and exceptions to – the revised rules (Doc No 1190825). The Norwegian Government was invited to submit its observations on the issues raised in the letter by 26 April 2021.

The Norwegian Government submitted its reply on 22 April 2021 (Doc No 1196218, ref. 20/5816 - KKO).

In order to clarify the Norwegian Government's responses in its reply of 22 April 2021, and in light of evolving issues relating to the rules imposed on the basis of COVID-19, on 3 May 2021, the Authority addressed a fourth letter to Norway, wherein it requested additional information (Doc No 1196735). The Norwegian Government was invited to submit its observations on the issues raised in the letter, as well as any other information it deemed relevant, by 21 May 2021.

The Norwegian Government submitted its reply on 21 May 2021 (Doc No 1202636, ref. 20/5816 - KKO).

2.1 The Norwegian Government's Reply of 21 May 2021

In its Reply of 21 May 2021, the Norwegian Government informed the Authority that it was in the process of updating the rules applicable in respect of entry to Norway on the one hand and quarantine measures for those persons permitted to enter Norway, on the other. While the letter makes it plain that the decision to amend the rules was taken on 20 May 2021,[8] and while the rules themselves are referred to as the new rules 'as of 21 May 2021' in the letter and the relevant Circular,[9] the Authority has observed that repeated publications by the Norwegian Government on its website and elsewhere make it clear that these rules will in fact be applied as of 27 May 2021,[10] while correspondence received from members of the public as late as 25 May 2021 informed the Authority that, as a matter of practice, the new rules were still not being applied as of this date, while the existing rules are clearly affecting a large number of individuals.

Norway's letter of 21 May 2021 explained that the regime in relation to entry restrictions would be amended, providing that *"foreign nationals [including EEA nationals] who are de facto residing in Norway, and can provide sufficient documentation that this is the case, will be allowed re-entry to Norway."* The letter provided details on how *de facto* residence might be demonstrated, including via documents demonstrating home rental or ownership. The Norwegian Government acknowledged that the previous measures had been maintained for a longer duration than had previously been foreseen, and that they could work against the interests of persons who were resident in Norway, but unregistered there. Rather than an outright entry ban for such individuals, the letter indicated that discretion would rest with border control officials, who would examine documents submitted, and make decisions concerning who might be admitted. This

[8] Reply of the Norwegian Government of 21 May 2021 (Doc No 1202636, ref. 20/5816 - KKO), p. 2.

[9] G-15/2021 – *Revidert rundskriv om ikrafttredelse av forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, available at https://www.regjeringen.no/contentassets/d5c9e74d360743889a7bc9febe0022ed/g-15-2021-revidert-rundskriv-om-ikrafttredelse-av-forskrift-om-innreiserestriksjoner-for-utlendinger-av-hensyn-til-folkehelsen.pdf

[10] See, *inter alia*, «Endringer i karantenehotellordningen og lettelser i innreiserestriksjonene» (Pressemelding), 21 May 2021, available at https://www.regjeringen.no/no/aktuelt/endringer-i-karantenehotellordningen-og-lettelser-i-innreiserestriksjonene/id2850375/

measure entails in concrete terms that persons who are resident in Norway, but who have D-numbers rather than National Identification Numbers, for example, may be permitted to enter Norway, provided that they display to the satisfaction of a border control official, documentation attesting to the fact that they are resident in Norway. Such persons were previously entirely prohibited from entering Norway under the previous rules.

However, Norway's letter further makes it clear that *"foreign nationals [including EEA nationals] who wish to move to Norway, will not be granted entry."*

In addition to the above, Norway's letter made it clear that the pre-existing distinction between "unnecessary" and "necessary" journeys would be abolished in relation to subsequent quarantine obligations. Rather, the obligation to stay in a quarantine hotel will instead depend on the infection situation in the state of departure and the results of COVID-19 tests undertaken by the traveller after his or her entry to Norway (taken 3 or 7 days after entry, depending on the infection situation in the state of departure). The required stay will range from 0 days (no obligation to stay in a quarantine hotel) to 7 days. This provision entails that persons undertaking journeys previously deemed "unnecessary" will no longer necessarily be required to quarantine for long periods in hotels.

The Authority observes that the changes proposed by the new rules represent a welcome relaxation of some of the restrictions set out by the previous regime. However, the Authority reserves the right to further evaluate the new measures. As a general note, and particularly in view of the regular updates and changes to the domestic rules and administrative arrangements in question, the Authority will continue to review the Norwegian rules as they evolve and may supplement this letter of formal notice if it considers this necessary. For the purposes of the present letter, the Authority underlines the importance of offering its evaluation of the rules as they presently stand, particularly in light of the great number of individuals directly affected by the rules in question.

3 Relevant national law[11]

3.1 The Population Registration Act[12]

Section 1.2 ("Purpose") of the Population Registration Act (*Lov om folkeregistrering (folkeregisterloven)*) provides:

"The purpose of the Act is to facilitate the secure, correct and efficient registration of basic personal information about the individual, including which persons are resident in Norway. The law shall contribute to the information in the National Register being able to be used for government tasks and public administration, research, statistics and to take care of basic societal needs."

Section 2.2 ("Population Number") provides:

"Upon first registration in the National Register, a person who is resident or born in Norway is assigned a birth number. Birth number can also be assigned to a Norwegian citizen residing abroad. For other persons, a d-number may be assigned in accordance with rules laid down in regulations."

Section 3.1 ("What information can be registered") provides:

"The following information can be registered for each individual birth number or d-number:

[11] The translations from Norwegian in this section are those of the Authority.
[12] LOV-2016-12-09-88, available at https://lovdata.no/dokument/NL/lov/2016-12-09-88

a) name
b) date of birth
c) sex
d) addresses
e) electronic contact information
f) contact information for estate
g) place of birth
h) citizenship
in) parents
j) spouse or registered partner
k) marital status
l) children
m) parental responsibility
n) adoption
o) family number
p) connection to the Sami Parliament's electoral roll
q) Sami languages
r) guardianship
s) confirmed future power of attorney
t) residency status
u) foreign identification number
v) the identification number of the immigration authorities
w) registration status
x) date of death"

3.2 Temporary law on entry restrictions for foreigners for reasons of public health[13]

Section 1 ("Purpose and scope of the Act") provides:

"The law does not apply to Norwegian citizens. The law also does not apply to citizens from another Nordic country who are resident in Norway."

Section 2 ("Entry to Norway and expulsion") provides:

"Foreigners only have the right to enter if
a) the alien is resident in Norway with a residence permit or right of residence under the Immigration Act…"

Section 5 ("Exceptions to other rules") provides:

"Chapters IV and V of the Public Administration Act do not apply to decisions on expulsion pursuant to this Act. The rules on case processing in the Immigration Act, Chapter 11, and the Immigration Regulations, Chapter 17, apply only insofar as they can be reconciled with a simplified and rapid processing of decisions on expulsion. Decisions pursuant to section 3 of the Act on deferred entry for aliens who are granted a residence permit cannot be appealed.
The rules on free legal advice in the Immigration Act § 92 first paragraph do not apply to decisions on expulsion under this Act."

Section 6 ("Simplified case processing for decisions, justification, decision-making authority and appeal") provides:

[13] *Midlertidig lov om innreiserestriksjoner for utlendinger av hensyn til folkehelsen,* LOV-2020-06-19-83, available at https://lovdata.no/dokument/NL/lov/2020-06-19-83

"Decision on expulsion must be in writing. The justification can be short and standardized. The justification shall state the rules on which the decision is based. Information shall be provided on the right of appeal pursuant to the fourth paragraph.

Decisions can be oral if the decision is urgent or in writing for other reasons is not practically possible. When the decision is not in writing, information as mentioned in the first paragraph shall be provided. The decision-making body shall confirm the decision and its reasons in writing if the party so requests.

Decisions on expulsion can be appealed to the Directorate of Immigration, or to the Immigration Appeals Board if the Directorate of Immigration has made a decision in the first instance, in accordance with the rules in the Public Administration Act, Chapter VI."

Section 7 ("Expulsion") provides:

"An alien without a residence permit may be deported pursuant to the Immigration Act § 66 first paragraph letter a when the alien has grossly or repeatedly violated the entry restrictions in §§ 2 or 3, avoids the implementation of a decision which means that he or she must leave the realm, or has given significantly incorrect or obviously misleading information in connection with entry control or later processing of the issue of entry access under the law here."

3.3 Revised Circular on the entry into force of regulations on entry restrictions for foreigners for reasons of public health[14]

Section 2 of the Circular ("The main rule") provides:

"The temporary law on entry restrictions for foreigners for reasons of public health implies that all foreigners who are not covered by one of the exceptions in the law or regulations issued pursuant to the law, will be expelled without further assessment of the risk of infection they individually pose. Foreigners who are expelled must leave the Kingdom…"

3.4 Regulations on infection control measures etc. at the corona outbreak (Covid-19 regulations)[15]

Chapter 2, Section 4 of the Regulations ("Quarantine requirements") provides:

"The following persons are subject to a quarantine obligation:

a. Entry quarantine: persons arriving in Norway from an area with a quarantine obligation as stipulated in Appendix A shall be quarantined for 10 days…"

Chapter 2, Section 5 ("Requirements for those who are to be in entry quarantine or waiting quarantine") provides:

"Persons in entry quarantine must stay in quarantine hotels at the first point of arrival in the kingdom during the quarantine period.
The obligation to stay in quarantine hotels does not apply to persons who meet the conditions in § 4d [undergoing a rapid test at the border] and who:

a. upon entry can document that they are resident in Norway and that the trip was necessary, and who are staying in the home or other suitable accommodation where it is

[14] G-11/2021 - Revidert rundskriv om ikrafttredelse av forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen, available at https://www.regjeringen.no/contentassets/59552a7456ac4dc9b96ce476c51a9ce5/revidert-ikrafttredelsesrundskriv-om-innreiserestriksjoner-26.03.21.pdf

[15] FOR-2020-03-27-470, available at https://lovdata.no/dokument/SF/forskrift/2020-03-27-470#KAPITTEL_2

possible to avoid close contact with others, with private rooms, private bathroom and own kitchen or food service

…

c. upon entry can document that they own or rent a permanent residence in Norway where they can carry out the quarantine in a separate housing unit with bedroom, bathroom and kitchen, and that the trip was necessary. A lease as mentioned in the first sentence must have a duration of at least six months

d. come to Norway to perform work or assignments and who on entry can document that the employer or client provides a suitable place of residence approved by the Norwegian Labour Inspection Authority according to chapter 2A , where it is possible to avoid close contact with others, with private rooms with TV and internet , private bathroom, and separate kitchen or food service…"

Chapter 2, Section 5b ("Duty to register upon entry and entry registration system") provides:

"Persons who arrive in Norway from an area that entails a quarantine obligation as stipulated in Appendix A must, before entering, register information that is necessary to ensure compliance with the quarantine obligation, to strengthen infection control work and contribute to better infection detection. Necessary information on:

a. name, date of birth, language, registered country of residence, contact information and birth number, D-number or any other unique identifier

b. the purpose of the trip abroad and the time of planned entry

…

g. place of residence during the quarantine period and any documentation

h. any exceptions from the entry quarantine..."

Chapter 2.6.b ("Exceptions from the entry quarantine for certain employees and contractors") provides:

"Those who more than once during a period of 15 days arrive in Norway from areas in Sweden or Finland with a quarantine obligation according to Appendix A, as part of travel between workplace and place of residence, are exempt from entry quarantine during working hours if they are tested in Norway for SARS -CoV-2

a. at least every seven days,

b. the first day they arrive in Norway, and then every seven days, if it is more than seven days since they were last tested in Norway for SARS-CoV-2, or

c. for day commuters from Sweden or Finland, cf. regulations on entry restrictions for foreigners for reasons of public health § 2 letter g: within 7 days after they were last tested in Sweden or Finland for SARS-CoV-2."

3.5 Revised Circular on Quarantine Hotels[16]

Section 2.a of the Circular provides:

"Persons who are resident in Norway, and who return to Norway from necessary travel abroad and who have only stayed within the EEA and the Schengen area during the last 10 days before entry, are exempt from the obligation to stay in quarantine hotels if during the quarantine period they stay in the home or another suitable place to stay. If they are staying in a place other than their own home, it is a requirement that in the place of residence, it is possible to avoid close contact with others, and that there is a private room, private bathroom and a private kitchen or food service. For persons who carry out the quarantine in their registered housing, such a requirement does not apply concerning private rooms, etc.

[16] G-13/2021 – *Revidert Rudskriv om Karantenehotell*, available at https://www.regjeringen.no/contentassets/09d300e165fc4a38b231a04f9e0ed6dc/revidert-rundskriv-om-karantenehotell-g13_2021-til-publisering_endelig.pdf

"Resident in Norway" means persons who are registered as resident in Norway. This can for example be documented by referring to information about registered residence from the tax authorities."

Section 5 of the Circular provides:

"A deductible has been set for the individuals who use the hotel. The deductible for employers or clients and private individuals over the age of 18 is NOK 500 per day."

4 Relevant EEA law

4.1 The EEA Agreement

Article 4 of the EEA Agreement provides:

"Within the scope of application of this Agreement…any discrimination on grounds of nationality shall be prohibited."

Article 28 provides:

"1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of EC Member States and EFTA States for this purpose;
(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there."

Article 33 provides:

"The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

Article 36 provides:

"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended."

Article 39 provides:

"The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter [i.e. in respect of the freedom to provide services]."

4.2 Directive 2004/38/EC.[17]

Article 5 ('Right of Entry') of Directive 2004/38/EC reads:

"1. …Member States shall grant Nationals of EC Member States and EFTA States leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport."

Article 6 ('Right of residence for up to three months') provides:

"1. Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport."

Article 7 ('Right of residence for more than three months') provides:

"1. Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
(a) are workers or self-employed persons in the host Member State; or
(b)have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
(c)—are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
—have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
(d)are family members accompanying or joining a National of an EC Member State or EFTA State who satisfies the conditions referred to in points (a), (b) or (c)."

Article 8 ('Administrative formalities for Union citizens') provides:

"1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Nationals of EC Member States and EFTA States to register with the relevant authorities.

2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. For the registration certificate to be issued, Member States may only require that

[17] The Act referred to at point 1 of Annex V to the EEA Agreement (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) as adapted to the EEA Agreement by protocol 1 thereto.

Nationals of EC Member States and EFTA States to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;

Nationals of EC Member States and EFTA States to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein;

Nationals of EC Member States and EFTA States to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). Member States may not require this declaration to refer to any specific amount of resources."

Article 27 ('General principles') provides:

"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Nationals of EC Member States and EFTA States and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends."

Article 28 ('Protection against expulsion') provides:

"1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security."

Article 29 ('Public health') provides:

"1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory."

Article 30 ('Notification of decisions') provides:

"1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State.

Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification."

Article 31 ('Procedural safeguards') provides:

"1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health."

4.3 Directive 2006/123/EC, The Services Directive

Article 4 ('Definitions') of the Services Directive provides:

"For the purposes of this Directive, the following definitions shall apply:

1) 'service' means any self-employed economic activity, normally provided for remuneration[…]

6) 'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;

7) 'requirement' means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the […] States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;

8) 'overriding reasons relating to the public interest' means reasons recognised as such in the case law […], including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives…"

Article 9 ('Authorisation Schemes') provides:

"1. EC Member States and EFTA States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:
(a) the authorisation scheme does not discriminate against the provider in question;
(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;
(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective."

Article 16 ('Freedom to Provide Services') provides:
"1. EC Member States and EFTA States shall respect the right of providers to provide services in a State other than that in which they are established.
The State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

EC Member States and EFTA States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:
(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the State in which they are established;
(b)necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
(c)proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. EC Member States and EFTA States may not restrict the freedom to provide services in the case of a provider established in another State by imposing any of the following requirements:
(a)an obligation on the provider to have an establishment in their territory;
(b)an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of EEA law;
(c)a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;
(d)the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;
(e)an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;
(f)requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;
(g) restrictions on the freedom to provide the services referred to in Article 19…"

5 The Authority's assessment

5.1 Introduction

As noted above, while the Authority has taken cognisance of the fact that the rules in question will, as of 27 May 2021, change substantially, and while the Authority, in principle, welcomes any changes that amount to relaxations of the restrictions imposed by the current legal regime, the present analysis is principally confined to the regime prior to the changes described by the Norwegian Government in its Reply of 21 May 2021. As set out below, having examined the relevant legislation and regulations, as well as the explanations received from Norway in the correspondence outlined above, the Authority has reached the conclusion that by maintaining in force the current rules, Norway has failed to fulfil its obligations arising from EEA law, including, *inter alia*, Articles 4, 28 and 36 of the EEA Agreement, Articles 5, 6, 7, 8, 27, 28, 29, 30 and 31 of Directive 2004/38/EC, and Articles 9 and 16 of Directive 2006/123/EC. These failures relate to a number of distinct measures, which will be examined in turn.

5.2 Restrictions upon initial registration in Norway

Section 2 of the Temporary Law on entry restrictions for foreigners for reasons of public health ("Temporary Law") provides that foreigners – including EEA nationals and their family members – only have the right to enter Norwegian territory if they are resident in Norway with a residence permit or right of residence under the Immigration Act. The Temporary Law was enacted in June 2020, and has been updated a number of times since. In particular, on 28 January 2021, Norway adopted measures restricting the entry

of foreigners (including EEA nationals) into Norway.[18] On 1 February 2021, these additional measures were repealed and replaced with a new suite of measures, which amended the regulations further.[19] These two changes effectively entailed that all non-Norwegian nationals not covered by one of the exceptions in the relevant regulations would be refused entry into Norwegian territory.

While Norway's Letter of 21 May 2021 sets out a number of changes with respect to entry to Norway (including removing the distinction between 'necessary' and 'unnecessary' journeys and changing the assessment criteria for determining residence in Norway), the letter is clear that in respect of initial entry to and registration in Norway, the new rules do not involve any changes, as *"foreign nationals [including EEA nationals] who wish to move to Norway will not be granted entry."*[20]

The Authority notes that Article 5 of Directive 2004/38 provides that "*Member States shall grant Nationals of EC Member States and EFTA States leave to enter their territory with a valid identity card or passport.*" This provision, entitled 'Right of entry', entails that additional conditions may not be required by EEA States to permit entry to their territory.[21]

The right of entry into an EEA State is not absolute, and may be limited, *inter alia*, on the grounds of public health, as set out in Articles 27 and 29 of the Directive. However, any derogations to the free movement of persons must be interpreted restrictively.[22] The Norwegian measures, as they presently apply, effectively constitute an outright ban on EEA nationals entering Norway for the first time, for example to take up work, to seek work, to study, or to register themselves as resident in Norway.

This ban is justified by the Norwegian Government on public health grounds. The Authority observes that, while a State may opt for a high level of public health protection, the measures taken in order to secure this objective must be consistent. In this regard, when a measure constitutes a restriction on the fundamental freedoms of EEA law, it falls to the party imposing the restriction to demonstrate that the measure is suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner.[23] The Authority notes that many EEA nationals being denied access to Norway are, as a matter of fact, temporarily admitted to Norwegian territory, and placed in quarantine hotels pending their subsequent expulsion to their States of nationality. Given that these EEA nationals are thus placed in the same environment as other EEA nationals who arrive in Norway and who, under the domestic regulations, are permitted to enter Norwegian territory, it is not entirely clear how their subsequent expulsion reflects a genuine concern to attain the aim of public health protection in a consistent and systematic manner.

In any event, whether or not the measure in question is suitable for attaining the objective of protecting public health, it must also be assessed whether it goes beyond what is necessary in order to attain that objective. This implies that the chosen measure must not

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[18] G-03/2021 – *Revidert rundskriv om ikrafttredelse av forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, available at: https://www.regjeringen.no/contentassets/40fe2b78fecb45108d72d18ee6224f07/revidert-ikrafttredelsesrundskriv-om-innreiserestriksjoner-s2901-iii.pdf

[19] *Midlertidig lov om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, updated on 1 February 2021; see G-04/2021 – Revidert rundskriv om ikrafttredelse av forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen, available at: https://www.regjeringen.no/contentassets/59133294ed314dd9806c6f835efd5652/revidert-ikrafttredelsesrundskriv-om-innreiserestriksjoner-3.2.21.pdf

[20] Reply of the Norwegian Government of 21 May 2021 (Doc No 1202636, ref. 20/5816 - KKO), p. 2.

[21] Case C-157/03 *Commission v. Spain*, ECLI:EU:C:2005:225, paras 29 and 30.

[22] Case E-15/12 *Jan Anfinn Wahl*, [2013] EFTA Ct. Rep. 534, para 117.

[23] Case E-8/17 *Kristoffersen*, [2018] EFTA Ct. Rep. 383, para 118.

be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.[24]

As such, it must be determined whether, in accordance with the principle of proportionality, a less restrictive means would have been available to the Norwegian Government, in order to achieve the same outcome. In this regard, it should again be noted that other EEA nationals – as well as third-country nationals – arriving from the same origin countries, will be permitted to enter Norwegian territory, provided that they satisfy the criteria for one of the categories of persons permitted to enter Norway per Section 2 of the Temporary Law, in particular, if they are resident in Norway with a residence permit or right of residence under the Immigration Act. Given that such individuals are, in any event, under an obligation to quarantine – either at home, in another suitable residence, or in a quarantine hotel – it is not clear why EEA nationals arriving in Norway for the first time, or those who are non-residents, cannot do likewise. There is no apparent basis for determining that the latter group pose a greater risk to public health than the former. According to established case law, it is for the party that invokes a derogation from one of the fundamental freedoms to show in each individual case that its rules are necessary and proportionate to attain the aim pursued.[25] Norway has not demonstrated that EEA nationals arriving in Norway for the first time from the same origin countries as those who are arriving in Norway, but who are also registered as resident in Norway, pose a greater degree of risk. As such, the prohibition on entry for this group does not comply with the principle of proportionality.

The Authority notes, again, that Norway's letter of 21 May 2021 is clear that in respect of initial entry to and registration in Norway, the new rules described therein do not involve any changes, as *"foreign nationals [including EEA nationals] who wish to move to Norway will not be granted entry."*[26] As such, the reasoning described in the present section will also apply in respect of the new regime.

In light of the foregoing, the Authority must conclude that by maintaining in force the current measures, Norway has failed to fulfil its obligations arising from Articles 28 and 36 of the EEA Agreement and Article 5 of Directive 2004/38/EC.

5.3 The distinction between EEA nationals with National Identification Numbers and those with D-numbers

As noted above, on 27 February 2021, the Norwegian Government issued a revised circular, updating the rules for entry to Norway.[27] This circular revised the means through which EEA nationals could demonstrate that they were resident in Norway in order to benefit from the exception from the ban on entering Norwegian territory. Previously, Circular G-04/2020 defined residence in Norway («*bosatt i Norge*») as covering both those EEA nationals who were registered on the National Population Register, and/or those who had reported their move to the National Population Register. However, Circular G-07/2021 removed the possibility for persons who had reported their move to the National Population register to be considered as resident in Norway. As such, individuals who are living in Norway, and who may be in possession of other documents to demonstrate their residence (such as rental contracts and/or identity documents), and who have reported their move to Norway to the National Population Register, will not be considered to be resident in Norway unless they are registered on the National

[24] Case E-8/20 *N,* not yet reported, para 94.
[25] Case E-8/17 *Kristoffersen*, cited above, para 123.
[26] Reply of the Norwegian Government of 21 May 2021 (Doc No 1202636, ref. 20/5816 - KKO), p. 2.
[27] G-07/2021 – *Revidert rundskriv om ikrafttredelse av forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, available at: https://www.regjeringen.no/contentassets/65effc1cc28747579c7104afbf308cfb/revidertikrafttredelsesrundskriv-om-innreiserestriksjoner-27.02.21.pdf

Population Register. This will prevent such persons from being permitted to enter Norway from abroad. It should further be noted that waiting times for registration on the National Population Register are often several months in duration, and that the Authority has received a significant volume of correspondence from persons impeded from entering Norway due to the revised definitions until as late as 25 May 2021, indicating that the Norwegian administration have, in practice, been strict in their adherence to the restricted criteria for demonstrating residence.

While Circular G-07/2021 was later superseded by Circular G-11/2021 of 26 March 2021, it would seem that the criteria for determining residence in Norway were retained from Circular G-07/2021.[28]

In its letter of 26 March 2021 (Doc No 1190825), the Authority drew attention to the changes brought about by Circular G-07/2021. In its Reply of 22 April 2021 (Doc No 1196218), the Norwegian Government referred to Articles 27, 28 and 29 of Directive 2004/38/EC, noting that per Article 27, States may restrict freedom of movement, *inter alia* on grounds of public health, and further noting that per Article 29 (1) *"The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation [WHO]…"* It noted, further, that the WHO had declared COVID-19 to have epidemic potential over a year previously.

In justifying the distinction drawn between those EEA nationals who were registered on the National Population Register, and those who had reported their move to the National Population Register, the Norwegian Government noted that it *"is considered necessary to have a definition that does not require an exercise of discretion as to the nature of residency and quality of documentation; such discretion entails a risk of circumvention that is not acceptable in the current situation."*

However, as a matter of practice, the Authority notes that those persons who report their move to Norway to the National Population Register, but who do not receive a National Identification Number, and are thus not considered resident in Norway («*bosatt i Norge*») for the purposes of Circular G-11/2021 generally receive a D-number. Such persons are permitted by Norwegian law to hold the D-number in lieu of a National Identification Number for up to 5 years, and may pay taxes, work, receive benefits, open bank accounts, and purchase property with a D-number. As such, their ability to function as residents of Norwegian society is not diminished by their possession of a D-number instead of a National Identification Number. In addition, per Section 3.1 of the Population Registration Act, the information collected by the Norwegian Government in respect of persons who receive a National Identification Number, on the one hand, and a D-number on the other, appears to be identical. Given the similarity of the information collected in each case, it is not clear how or in what circumstances a risk of circumvention such as that referred to by the Norwegian Government (above) would arise.

Further, in the course of the Authority's Case 80333 against Norway, relating to the issuance of tax cards to EEA nationals and third-country national family members, and in particular the Reply of the Norwegian Ministry of Finance to the Directorate's supplementary request for information of 7 September 2020 (Doc No 1151157, ref. 17/1987), the Norwegian Government repeatedly recognises that the right to reside in Norway is unconnected to entry on the National Population Register. Rather, the Norwegian Government repeatedly stated during correspondence relating to Case 80333

[28] While the Authority notes that the Reply of the Norwegian Government of 21 May 2021 (Doc No 1202636, ref. 20/5816 - KKO) provides that the criteria in question have been amended, it is the Authority's understanding that the rules set out in the letter and in Circular G-15/2021 have not yet been implemented in practice. Moreover, the new rules leave the decision concerning entry on the basis of residency at the discretion of the individual border control officer, raising questions concerning legal certainty.

that registration does not affect the right of EEA nationals to reside in Norway. Instead, registration in Norway is described as being "used by public administration, researchers, for statistics and related to basic social needs."[29] This would also seem to be confirmed by the wording of Section 1.2 ("Purpose") of the Population Registration Act.

Directive 2004/38/EC, upon which Norway has sought to rely in justifying the measures in question, provides, at Article 7, that EEA nationals shall have the right of residence on the territory of another EEA State for a period of longer than three months, subject to the conditions of working, being self-employed, or possessing sufficient resources and comprehensive sickness insurance. This right applies regardless of the domestic legal status of the individual. As noted by the EFTA Court in *Campbell*, *"Once an EEA national has [satisfied the conditions under Article 7], no other conditions for the right of residence exceeding three months are required."*[30] In other words, domestic legal provisions pertaining to the acquisition of residence status are immaterial in respect of whether an EEA national is considered to have acquired the right of residence for more than three months. In the present case, this would apply equally to EEA nationals in possession of a National Identification Number, and those in possession of a D-number.

Norway has drawn attention to Article 29 of the Directive, wherein it is stated that only diseases recognised by the WHO as having epidemic potential may justify restrictions upon freedom of movement on public health grounds. However, the Authority notes that the same article further provides that *"Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory."* It is clear from the language employed – arrival, rather than entry – that this provision, read in light of Article 28(1), entails an absolute ban on expulsion from the territory after the EEA national has lived and satisfied the conditions under Article 7 in the EEA State for at least three months. A contrary reading would entail that he or she would run the risk of exclusion every time he or she crossed the border and returned.[31] Moreover, the fact that such persons may have undertaken trips away from Norway does not deprive them of the full assortment of rights arising from the Directive. As noted by the EFTA Court in *Campbell*, Article 7 does not require physical presence and allows temporary absences as part of the enjoyment of the right of residence itself. This is confirmed by the fact that Chapter III of the Directive, which regulates the right of residence, does not contain a conditional requirement that an EEA national's presence in the host State be wholly without temporary absences to enjoy residence rights.[32] In the present context, it is germane to note that many EEA nationals being denied access to Norway are, as a matter of fact, temporarily admitted to Norwegian territory, and placed in quarantine hotels pending their subsequent expulsion to their States of nationality. As such, EEA nationals resident in Norway, but possessing D-numbers rather than National Identification Numbers, are subjected to expulsion within the meaning of the Directive, in violation of the absolute prohibition upon this practice in Article 29, read in conjunction with Article 7 and Article 28(1) of Directive 2004/38.

It has come to the Authority's attention that Norway has been interpreting Circular G-11/2021 so as to prevent EEA nationals in possession of D-numbers from entering its territory, and is submitting those who arrive at its borders to expulsion within the meaning of the Directive. Such individuals are registered in Norway; Norway possesses an equal amount of information about such individuals as registered residents. Many such

[29] Reply of the Norwegian Ministry of Finance to the Directorate's supplementary request for information of 7 September 2020 (Doc No 1151157) in Case 80333, p. 6.
[30] Case E-4/19 *Campbell*, not yet reported, para 39.
[31] Such a reading is further confirmed by one of the forerunners of Directive 2004/38/EC, namely Directive 64/221 / EEC of 1964, which stated in Article 4 (2) that diseases "which occur after the first proof of residence has been issued cannot provide grounds for […] expulsion from the territory". Pursuant to Article 5 (1) of the 1964 Directive, such a first residence permit had to be issued no later than six months after the application for a permit.
[32] Case E-4/19 *Campbell*, paras 65-66.

individuals, moreover, are resident in Norway for longer than three months, thus qualifying for the rights arising under Article 7 of Directive 2004/38/EC. Per Article 29(2) of the Directive, there is an absolute prohibition upon the expulsion of such individuals. This measure therefore is not susceptible of justification.

Prior to concluding its reasoning in respect of this measure, the Authority notes that the new rules referred to in the Norwegian Government's letter of 21 May 2021 entail that the distinction between EEA nationals and their family members who are residents of Norway and who possess D-numbers, on the one hand, and those who possess National Identification Numbers, on the other, will be replaced by a system in which proof of residence may be shown to border officials by a variety of means, with the latter disposing of discretion as to whether to admit the EEA nationals and family members in question.[33] In principle, the Authority welcomes this change, insofar as it removes the automatic barrier for EEA nationals disposing of rights under Article 7 of Directive 2004/38, but who do not have National Identification Numbers, to enter Norway. However, it remains to be seen how the discretion afforded to border control officials will be exercised in practice, taking into account, in particular, the need for individuals to be able to determine whether they will be permitted to enter Norway, and the principle of legal certainty.

In light of the above, the Authority must conclude that by maintaining in force the current measures, Norway has failed to fulfil its obligations arising from Articles 5 and 7 of Directive 2004/38/EC and Articles 28 and 36 of the EEA Agreement.

5.4 Procedural rights of EEA nationals denied entry to Norway

Section 2 of Circular G-11/2021 provides that all EEA nationals who are not covered by one of the exceptions in the law or regulations issued pursuant to the law, will be expelled without further assessment of the risk of infection they individually pose. This Circular must be read together with Sections 5, 6 and 7 of the Temporary Law. Section 5 provides that normal procedural guarantees related to expulsion from Norwegian territory under the Immigration Act "*apply only insofar as they can be reconciled with a simplified and rapid processing of decisions on expulsion,"* and that free legal advice, which is otherwise available in such circumstances, will not be made available. Section 6 provides that decisions on expulsion must be in writing. However, "*the justification can be short and standardized.*" Moreover, a decision can be given orally "*if the decision is urgent or in writing for other reasons is not practically possible."* Section 6 further makes clear that *"decisions on expulsion can be appealed to the Directorate of Immigration, or to the Immigration Appeals Board."* Section 7 sets out the circumstances in which expulsion may occur, notably when an individual, the foreigner, *"has grossly or repeatedly violated the entry restrictions."* In practice, it appears that arriving in Norway without fulfilling one of the exceptions to the entry restriction is treated as a gross violation under Section 7, as such persons are subject to expulsion within the meaning of the Directive.

The Authority notes that Article 30 of Directive 2004/38 provides that persons concerned shall be notified in writing of any decision taken under Article 27(1) to restrict their freedom of movement on the grounds of public health, and that notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the EEA State. Moreover, the Authority further notes that Article 30, in addition, provides that *"save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification."*

[33] See Reply of the Norwegian Government of 21 May 2021 (Doc No 1202636, ref. 20/5816 - KKO).

It has come to the Authority's attention, *inter alia*, on the basis of correspondence received from individuals affected by the measures in question, that many EEA nationals who are denied entry to Norwegian territory, are confined to quarantine hotels for a number of days (usually less than a week) until such time as they are expelled. As noted in Section 5.2, above, there is no apparent reason why such EEA nationals present a higher risk profile than any other persons arriving from the same origin countries who are permitted to enter Norway (due to being registered on the National Population Register, for example). Moreover, a higher level of risk cannot be presumed *en masse.* Rather, individual assessments are required. As such, there is no obvious "*duly substantiated…urgency"* requiring that they be removed from Norwegian territory substantially less than one month from the date of notification of the decision not to admit them. In assessing the nature of any potential urgency that may be argued to arise, the Authority wishes to remind Norway in relation to the justification advanced that derogations from the free movement of persons must be interpreted restrictively.[34]

Furthermore, the provision in Section 6 of the Temporary Law that such a decision can be given orally "*if the decision is urgent or in writing for other reasons is not practically possible"* – which, to the Authority's knowledge, has happened in practice – cannot be reconciled with Article 30(1) of the Directive, which requires a decision in writing.

In addition, the provision in Section 6 that "*the justification can be short and standardized"* is incompatible with Article 30(2) of the Directive, which provides that such persons "*shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security."* Since there are no State security interests involved in the present case, an informed, precise and exhaustive written explanation of any decision to restrict the freedom of movement of an EEA national is required.[35]

Finally, Section 5 of the Temporary Law removes the right of free legal advice for persons who are the subject of expulsion decisions in such circumstances. It has come to the Authority's attention that, in practice, EEA nationals who are subjected to restrictions of their freedom of movement in this manner, are often not informed of their rights, including their right to appeal against the measures in question, while their expedited removal from Norway may serve to frustrate any appeal in practice. This practice is incompatible with Article 31 of the Directive, which provides that such persons "*shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of…public health."*

The Authority notes that the new legal regime foreseen by Circular G-15/2021 does not provide for substantial changes in relation to procedural guarantees available to those EEA nationals.[36] The Circular maintains the practice whereby normal procedural guarantees related to expulsion from Norwegian territory under the Immigration Act apply only insofar as they can be reconciled with a simplified and rapid processing of decisions and that free legal advice will not be made available. The Circular further maintains the practice whereby the justification for written decisions can be short and standardized, and provides that a decision can be given orally in certain circumstances. As such, procedural guarantees do not appear to have garnered any additional protection under the new rules.

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[34] Case E-15/12 *Jan Anfinn Wahl*, cited above, para 117.
[35] See also Joined Cases 115/81 and 116/81 *Adoui* and *Cornuaille* [1982] ECR 1665, para 13.
[36] G-15/2021 – *Revidert rundskriv om ikrafttredelse av forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, available at: https://www.regjeringen.no/contentassets/d5c9e74d360743889a7bc9febe0022ed/g-15-2021-revidert-rundskriv-om-ikrafttredelse-av-forskrift-om-innreiserestriksjoner-for-utlendinger-av-hensyn-til-folkehelsen.pdf

On the basis of the foregoing, the Authority must conclude that by maintaining in force the current measures and practices, Norway has failed to fulfil its obligations arising from Articles 30 and 31 of Directive 2004/38/EC.

5.5 Discrimination between Nordic citizens and other EEA nationals

Section 1 of the temporary law on entry restrictions for foreigners for reasons of public health states that *"The law…does not apply to citizens from another Nordic country who are resident in Norway."* Norway's Reply of 22 April 2021 (Doc No 1196218), explained that this provision entails that *"Nordic citizens are exempt from the requirement of a residence permit in order to take up residence or employment in the realm."* However, the Reply further stated that *"the distinctions between Nordic citizens and EEA citizens in the [law] does not entail a distinction in the right to enter. Both citizens from Nordic states and citizens from other EEA states are exempt the entry restrictions if they are resident ("bosatt") in Norway."*

Despite the above, it is germane to note the means through which Nordic citizens, on the one hand, and EEA nationals, on the other, may become resident ("*bosatt*") in Norway are different. As noted previously, Circular G-07/2021 restricted the definition of residence for the purposes of being afforded an exemption to the entry restrictions, meaning that only those EEA nationals who were registered on the National Population Register could be considered resident in Norway. This significantly diminished the scope for EEA nationals to enter Norway.

Citizens of the Nordic countries, on the other hand, seem to be subject to a different test in order to determine whether they are resident in Norway, exempting them from a requirement of a residence permit and registration on the National Population Register.

In its Reply of 22 April 2021, the Norwegian Government recognised the long processing times for registration on the National Population Register, and that this further affects individuals' possibility to travel. In essence, this entails that Nordic nationals living and working in Norway may undertake trips away from Norway, and will be readmitted to Norwegian territory, whereas other EEA nationals will be prevented from doing so unless they have received a National Identification Number, for which they may have to wait for up to eight months (or up to five years, if they are instead provided with a D-number). This clearly has the potential to restrict the freedom of movement of the latter group.

The effect of the provisions in question is that the circumstances in which Nordic nationals may be permitted to enter Norwegian territory are, in practice, significantly broader than those in which nationals of other EEA States may enter Norwegian territory.

The Authority notes that Article 4 of the EEA Agreement provides that *"any discrimination on grounds of nationality shall be prohibited"* within the Agreement's scope. It should further be noted that the discrimination in question need not be overt. The prohibition in question extends to any forms of discrimination that *"by the application of other criteria of differentiation, lead to the same result."*[37] As such, it is immaterial for the present purposes whether the measures in question were intended to function in tandem in a manner more favourable to certain EEA nationals (that is, Nordic citizens) than others. Rather, it is the effect of the provisions in practice that is decisive. The effect of the present measures is that it is, in practice, easier for Nordic nationals to exercise their freedom of movement, *inter alia*, under Articles 28 and 36 of the EEA Agreement,[38]

[37] Case E-5/10 *Kottke*, [2009-2010] EFTA Ct. Rep. 320, para 29.

[38] It is further to be noted that the provisions of Directive 2006/123/EC may also be relevant in this context.

whereas nationals of other EEA States are subject to a restriction of their freedom of movement in identical circumstances.

Such discriminatory measures can only be justified if they are based on objective considerations independent of the nationality of the persons concerned, and are proportionate to the legitimate aim of the provisions in question.[39] In the present circumstances, while the protection of public health clearly represents a legitimate aim, questions may be raised about the suitability of the measure in question. Norway has advanced no evidence that Nordic nationals pose a lower level of risk than nationals of other EEA States, and indeed, in circumstances in which the two groups might, for example, share an aeroplane from the same origin airport, it is difficult to imagine how such a distinction would be suitable for the purposes of public health protection. As such, in the Authority's view the measure is not susceptible to justification on this basis.

In any event, whether or not the measure in question is suitable for attaining a legitimate objective under EEA law, it must also be assessed whether it goes beyond what is necessary in order to attain the chosen objective. This implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.[40]

As such, it must be determined whether, in accordance with the principle of proportionality, a less restrictive means would have been available to the Norwegian Government, in order to achieve the same outcome. Given that Nordic residents who are permitted to enter Norway will in any event be obliged to quarantine upon arrival – thus shielding them from the general populace and avoiding further viral dissemination – it is unclear why other EEA nationals who are also resident (albeit unregistered on the National Population Register) could not be permitted to enter the country on the same basis. In the Authority's view, this points to the clear availability of a less restrictive measure that could have been employed in these circumstances in order to obviate any discrimination on the grounds of nationality.

On this basis, the Authority must conclude that by maintaining in force the measures set out above, Norway has failed to fulfil its obligations arising from Articles 4, 28 and 36 of the EEA Agreement.

Finally, the Authority notes that, contrary to previous information received, in its Reply of 21 May 2021,[41] the Norwegian Government asserts that, as a matter of fact, no distinction in practice subsists between Nordic citizens living in Norway without being registered as residents and other EEA nationals in a similar position. Rather, such individuals were, *"like other foreign nationals, and for the same reasons, not allowed to enter the realm."* The Authority observes that, if this is in fact the case, and no distinction between Nordic and other EEA nationals subsists, then *in the alternative to the above,* the previous reasoning outlined, notably in Sections 5.2 and 5.3, should apply to Nordic nationals also, and that by maintaining in force the current measures, Norway has failed to fulfil its obligations in respect of such individuals arising from Articles 5 and 7 of Directive 2004/38/EC and Articles 28 and 36 of the EEA Agreement.

5.6 The Norwegian quarantine rules

The Norwegian quarantine rules apply to those EEA nationals who are exempted from the entry restrictions, and who are thus permitted to enter Norway. Chapter 2, Section 4 of the Covid-19 Regulations provides for a 10-day quarantine period for such persons.

[39] Case E-16/11 *ESA v Iceland ("Icesave")*, [2013] EFTA Ct. Rep. 4, para 218.
[40] Case E-8/20 *N,* cited above, para 94.
[41] Reply of the Norwegian Government of 21 May 2021 (Doc No 1202636, ref. 20/5816 - KKO), p. 2.

Chapter 2, Section 5 of the Regulations sets out a general rule that those arriving must stay in quarantine hotels. Stays in quarantine hotels are subject to a daily charge of NOK 500 for adults.

Chapter 2, Section 5 then provides for a series of categories of persons who are exempted from the requirement to quarantine in hotels, subject to their undertaking a rapid COVID-19 test at the border. These exceptions include: persons who can document that they are resident in Norway, that the trip was necessary, and that they are staying at home or in another suitable accommodation; those who own or rent (on a lease of at least six months) a permanent residence in Norway that is suitable for quarantine; and those who come to Norway to perform work or assignments and who on entry can document that the employer or client provides a suitable place of residence approved by the Norwegian Labour Inspection Authority (*Arbeidstilsyne*t). In relation to the latter category of exempted persons, Chapter 2A, Sections 8a, 8d and 8e provide that accommodation must be approved in advance by the Arbeidstilsynet, that the Arbeidstilsynet shall keep a publicly available register of such approved accommodation, and that a fee for processing each accommodation of NOK 2,000 shall be payable to Arbeidstilsynet.

The Authority notes that Article 28 of the EEA Agreement provides for free movement of workers, and that this shall, subject to limitations imposed on grounds, *inter alia,* of public health, include the right to move freely within the territory of EEA States for this purpose. The Authority further notes that Articles 5 and 6 of Directive 2004/38/EC provide that non-economically active EEA nationals may also enter and reside on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. The Authority notes in addition that Article 36 of the EEA Agreement prohibits restrictions on the freedom to provide services in respect of EEA nationals who are established in another EEA State, as well as restrictions upon the freedom to travel to other EEA States to receive services.

5.6.1 'Necessary journeys'

The quarantine rules[42] provide that EEA nationals who are registered as resident in Norway, and who undertake journeys that are deemed 'necessary,' will be permitted to quarantine at home upon their return to Norway, whereas EEA nationals who are registered as resident in Norway and who undertake journeys that do not qualify as 'necessary' under the rules in question, will be obliged to quarantine in hotels, thus incurring expense and inconvenience. This distinction has the clear potential to dissuade the exercise of freedom of movement for the latter group, whether for work, tourism, or other purposes.

In its Reply of 22 April 2021, the Norwegian Government justified this distinction on the basis of Article 29(1) of Directive 2004/38, noting that *"preventing the spread of the Covid-19 pandemic clearly constitutes a legitimate aim that may justify restrictions on free movement."* The Authority notes that while the protection of public health may indeed justify restrictions upon freedom of movement in certain circumstances, when such measures are imposed, it falls to the party imposing the restriction to demonstrate that the measure is suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner.[43]

The effect of the quarantine rules as they are presently constituted is that registered residents – and Norwegian citizens – who travel for 'necessary' reasons (including

[42] G-13/2021 – *Revidert Rudskriv om Karantenehotell*, available at: https://www.regjeringen.no/contentassets/09d300e165fc4a38b231a04f9e0ed6dc/revidert-rundskriv-om-karantenehotell-g13_2021-til-publisering_endelig.pdf

[43] Case E-8/16 *Netfonds Holdings and others*, [2017] EFTA Ct. Rep. 163para 117.

business travel, and temporary work and study abroad)[44] are exempted from the obligation to quarantine in quarantine hotels, and may quarantine at home or in another suitable location upon returning to Norway, whereas registered residents and Norwegian citizens travelling for any other purpose (including tourism or for family, work or study reasons beyond those listed) are obliged to quarantine in hotels. The latter group are therefore subjected to an additional cost (NOK 5000 for ten days) despite the fact that they also have a home in Norway where quarantine could be undertaken, and are significantly more restricted in terms of how they may spend their time during this period, potentially incurring other ancillary costs (such as childcare) which would not arise were they permitted to quarantine at home.

Given that business travellers on the one hand, and tourists, on the other, may return from the same location, having spent a similar amount of time there, it is not obvious why one group presents a greater risk profile than the other, and why, therefore, tourists are subject to additional costs, which are likely to disincentivise freedom of movement to receive services. According to EEA law, an EEA State must not take measures that would run counter to the achievement of a given national measure.[45] While Norway is free to adopt measures to protect public health, requiring that one group of travellers stay in quarantine hotels for public health reasons while another group presenting a similar risk profile is permitted to quarantine at home or in another suitable location fails to satisfy the principle of consistency. If the risk associated with returning tourists is so high that hotel quarantine is required, imposing a looser regime for persons returning from business travel from the same location would seem to run contrary to the achievement of the high level of protection of public health associated with the hotel quarantine regime.[46]

It is settled case law that it is for the competent national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show *in each individual case* that the measure is appropriate to attain the objective relied upon and does not go beyond what is necessary to attain it.[47] Neither in its correspondence with the Authority, nor in the legislation and circulars cited, has the Norwegian Government justified the distinction in question, which clearly has the potential to dissuade freedom of movement, *inter alia,* to receive tourist and other services in other EEA States.[48]

In any event, whether or not the measure in question is suitable for attaining a legitimate objective under EEA law, it must also be assessed whether it goes beyond what is necessary in order to attain the chosen objective. This implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.[49] If the Norwegian Government is satisfied that having returning business travellers quarantine at home is sufficient for the protection of public health, then the less restrictive solution of allowing returning tourists and others undertaking journeys not deemed 'necessary' would also satisfy the *desideratum* of public health protection, while representing a less restrictive means to achieve the same outcome.

Prior to concluding its reasoning in this section, the Authority notes that the Norwegian Government has made it clear that, as of 27 May 2021, the distinction between journeys deemed 'necessary' and 'unnecessary' will cease to apply as a matter of law for the

[44] See Reply of the Norwegian Government of 22 April 2021 (Doc No 1196218, ref. 20/5816 - KKO) pp. 1-3.
[45] See Case E-1/06 *ESA v Norway ("Gaming Machines")* [2007] EFTA Ct. Rep. 8, paras 28, 31, 39, 40 and 43.
[46] Reply of the Norwegian Government of 21 May 2021 (Doc No 1202636, ref. 20/5816 - KKO), p. 2.
[47] Case E-8/17 *Kristoffersen*, cited above, paras 121-122.
[48] See Joined Cases 286/82 and 26/83 *Luisi* and *Carbone* ECLI:EU:C:1984:35, para 16; Case 186/87 *Cowan* ECLI:EU:C:1989:47, para 15.
[49] Case E-8/20 *N,* cited above, para 94.

purposes of determining the quarantine obligations of Norwegian citizens and EEA nationals admitted to Norway.[50] The new rules will instead determine an individual's quarantine obligations on the basis of a risk assessment based upon COVID incidence rates at his or her point of departure when travelling to Norway. This system is likely to significantly easier to justify than the measures described above, though the Authority will scrutinise the implementation of the new regime as it evolves in practice.

On the basis of the foregoing, the Authority must conclude that by maintaining in force the distinctions described above, Norway has failed to fulfil its obligations arising from Article 36 of the EEA Agreement.

5.6.2 'Home' versus 'suitable accommodation'

Section 2.a of Revised Circular G-13/2021 on quarantine hotels provides that EEA nationals who are registered as resident in Norway, who return to Norway from necessary travel abroad, and who have only stayed within the EEA and the Schengen area during the last 10 days before entry, are exempt from the obligation to quarantine in hotels if, during the quarantine period, they stay in the home or another suitable place. Section 2.a further provides that if such persons "*are staying in a place other than their own home, it is a requirement that in the place of residence, it is possible to avoid close contact with others, and that there is a private room, private bathroom and a private kitchen or food service. For persons who carry out the quarantine in their registered housing, such a requirement does not apply concerning private rooms, etc."* These requirements do not apply to quarantine undertaken at home. This distinction in practice entails that individuals who stay at home when they return from trips abroad are not subjected to the same sanitary requirements as those persons who stay in another location.

The requirement entails, in essence, that individuals who may not be able to quarantine at their own home (for example because they have let the property to tenants in the meantime, or because they have a vulnerable relative who should not be exposed to a person undertaking quarantine), in order to avoid the obligation to quarantine in hotels, are obliged to secure accommodation in a location with sanitary facilities (such as a private bathroom and private kitchen) that significantly exceed those typically available in many homes. Acquiring such a location for quarantine for a period of ten days is likely to incur significant costs, in many cases exceeding those associated with hotel quarantine.

The effect of the rules, therefore is that persons who are unable to quarantine at home are subjected to additional costs beyond merely sourcing accommodation. Rather, they must source *appropriate* accommodation that meets prescribed sanitary standards. The price difference between basic accommodation and accommodation meeting these standards is likely to be considerable. However, the requirements that accommodation be *appropriate* in sanitary terms are not imposed when such persons are able to quarantine at home. That is, such persons may live alone with a private kitchen and bathroom, or in a crowded house with shared facilities. However, their circumstances are not examined in respect of individuals' homes, only in respect of accommodation sourced for quarantine purposes.

As was the case in Section 5.6.1, above, there is no obvious difference in terms of risk profile between registered residents who quarantine at home and registered residents who quarantine at another suitable location. However, the latter are subjected to higher sanitary standards, which will likely result in greater costs, and which may dissuade freedom of movement for travel for business and other purposes deemed 'necessary' under the Covid-19 Regulations. Given that, as noted, an EEA State must not take

[50] See, *inter alia*, «Endringer i karantenehotellordningen og lettelser i innreiserestriksjonene» (Pressemelding), 21 May 2021, available at https://www.regjeringen.no/no/aktuelt/endringer-i-karantenehotellordningen-og-lettelser-i-innreiserestriksjonene/id2850375/

measures that would run counter to the achievement of a given national measure,[51] requiring that one group of travellers to satisfy high sanitary standards while another group presenting a similar risk profile is not required to do so fails to satisfy the principle of consistency.

The Authority notes that, in its Reply of 21 May 2021,[52] the Norwegian Government asserts that the distinction between necessary and unnecessary journeys will be removed from the rules, and that the relevant press releases make it clear that this will occur on 27 May 2021.[53] As noted previously, the Authority, in principle, welcomes any change that results in a relaxation of restriction upon freedom of movement, though it reserves the right to comment further on the new rules. Nonetheless, as previously observed, the present letter represents an analysis of the rules prior to these proposed amendments.

The Authority notes that it is for the national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show *in each individual case* that the measure is appropriate to attain the objective relied upon and does not go beyond what is necessary to attain it.[54] Neither in its correspondence with the Authority, nor in the legislation and circulars cited, has the Norwegian Government justified the distinction in question, which clearly has the potential to dissuade freedom of movement under Articles 28 and 36 of the EEA Agreement.

In any event, whether or not the measure in question is suitable for attaining a legitimate objective, it must also be assessed whether it goes beyond what is necessary in order to attain the chosen objective. This implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.[55] If the Norwegian Government is satisfied that home quarantine for registered residents who return from 'necessary' trips abroad – perhaps in circumstances in which individuals may not have access to an individual kitchen and private bathroom – is sufficient for the protection of public health, then the less restrictive solution of allowing such individuals who cannot or do not wish to quarantine at home to secure alternative accommodation that meets similar (rather than higher) sanitary standards to those of a typical home would also seem to satisfy the objective of public health protection, while constituting a less restrictive means to achieve the same outcome.

Finally, before concluding its reasoning in this section, the Authority wishes to re-iterate, as it did in relation to the previous section, that it has taken cognisance of the new rules effective as of 27 May 2021, and will evaluate the implementation of the new regime as it evolves in practice.

On this basis, the Authority must conclude that by maintaining in force the distinctions described above, Norway has failed to fulfil its obligations arising from Articles 28 and 36 of the EEA Agreement, as well as Article 7 of Directive 2004/38.

5.6.3 Registration

Per Chapter 2, Section 5 of the Covid-19 Regulations, EEA nationals who come to Norway to perform work or assignments and who, on entry, can document that the employer or client has provided a suitable place of residence approved by the

[51] See Case E-1/06 *ESA v Norway ("Gaming Machines")*, cited above, paras 28, 31, 39, 40 and 43.
[52] Reply of the Norwegian Government of 21 May 2021 (Doc No 1202636, ref. 20/5816 - KKO), p. 2.
[53] See, inter alia, «Endringer i karantenehotellordningen og lettelser i innreiserestriksjonene» (Pressemelding), 21 May 2021, available at https://www.regjeringen.no/no/aktuelt/endringer-i-karantenehotellordningen-og-lettelser-i-innreiserestriksjonene/id2850375/
[54] Case E-8/16 *Netfonds Holdings and others*, cited above, para 126.
[55] Case E-8/20 *N,* cited above, para 94.

Arbeidstilsynet, may stay there. Chapter 2A, Sections 8a, 8d and 8e provide that accommodation must be approved in advance by the Arbeidstilsynet, that the Arbeidstilsynet shall keep a publicly available register of such approved accommodation, and that a fee for processing each accommodation of NOK 2,000 shall be payable to the Arbeidstilsynet.

These measures entail, in essence, that while residents of Norway returning from business trips who do not wish to undertake quarantine at home may find themselves a suitable location to quarantine on their own, and may quarantine there, provided that the location in question conforms to the stated sanitary conditions and without inspection or prior authorisation, EEA nationals arriving in Norway to perform work may only quarantine in such accommodation if it has been approved in advance by the Arbeidstilsynet. The cost and inconvenience associated with processing such an application amounts to a significant dissuasive factor, rendering it more expensive and burdensome for workers and service providers to come to Norway to do business. Acquiring such a location for quarantine for a period of ten days will in any event incur significant expenses, while the addition of a further 2,000 NOK fee is a further dissuasive factor. Finally, the requirement of prior authorisation is likely to entail an additional administrative burden, particularly for businesses based outside of Norway that are less familiar with the national administration, while rendering the provision of such accommodation to individuals undertaking work assignments at short notice effectively impossible.

As noted previously, Norway has justified its quarantine rules with reference to the protection of public health.[56] However, given the potential of the prior authorisation scheme in question to dissuade free movement of services and free movement of workers, the Authority again recalls that it is for the competent national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show *in each individual case* that the measure is appropriate to attain the objective relied upon and does not go beyond what is necessary to attain it.[57] Given that registration and inspection of the premises in which quarantine is to take place is required only in the context of workers arriving in Norway from other EEA States, and not in other contexts in which the Norwegian Government has expressed concerns about the maintenance of sanitary standards (such as that referred to in Section 5.6.2, above), it is for the Norwegian Government to demonstrate why such a prior authorisation scheme is required in this context, but not others, and why a less restrictive measure (such as replicating the sanitary requirements for returning registered resident business travellers, without a prior authorisation scheme) would not achieve the same level of public health protection. The Norwegian Government has failed to do so, while the scheme in question clearly has the potential to dissuade the exercise of freedom of movement under Articles 28 and 36 of the EEA Agreement.

Before concluding its reasoning in this section, the Authority wishes to re-iterate, as it did in relation to the two previous sections, that it has taken cognisance of the new rules effective as of 27 May 2021, and will evaluate the implementation of the new regime as it evolves in practice.

On this basis, the Authority must conclude that by maintaining in force the measures described above, Norway has failed to fulfil its obligations arising from Articles 28 and 36 of the EEA Agreement and Articles 9 and 16 of Directive 2006/123/EC.

[56] See Reply of the Norwegian Government of 22 April 2021 (Doc No 1196218, ref. 20/5816 - KKO) pp. 1-3.
[57] Case E-8/20 *N*, cited above, para 94.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force the stated provisions of the Temporary law on entry restrictions for foreigners for reasons of public health, the Regulations on infection control measures etc. at the Corona outbreak (Covid-19 Regulations), the Revised Circular on Quarantine Hotels, and the Revised Circular on the entry into force of regulations on entry restrictions for foreigners for reasons of public health, as well as the associated administrative practices, which entail entry restrictions to Norwegian territory, restrictions upon the right to travel from – and then return to – Norway for certain categories of EEA nationals resident in Norway, and a variety of discriminatory categorisations and exceptions resulting from the quarantine rules, Norway has failed to fulfil its obligation arising from Articles 4, 28 and 36 of the EEA Agreement, Articles 5, 6, 7, 8, 27, 28, 29, 30 and 31 of Directive 2004/38/EC, and Articles 9 and 16 of Directive 2006/123/EC.

For the purposes of the present case, it should also be noted that the Authority is also responsible for oversight of the rights of UK nationals covered by the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union ("the Separation Agreement"). In general, UK nationals covered by the Separation Agreement are in an equivalent situation to EEA
nationals with respect to the rules in question. As such, the conclusions expressed above in relation to EEA nationals under the EEA Agreement should be seen to cover UK nationals who fall under the Separation Agreement *mutatis mutandis.*

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Norwegian Government submits its observations on the content of this letter *by 7 July 2021*.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority,

Bente Angell-Hansen President	Frank J. Büchel Responsible College Member	Högni Kristjánsson College Member

For Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Bente Angell-Hansen, Catherine Howdle.