Professor Charlotte O'Brien – Written evidence (CIT0004)

This memo concerns residence rights of EU citizens resident in the UK before the transition period ended on the 31 December 2020, and who continue to reside in the UK thereafter.

The creation of two parallel rights regimes, in the UK's domestic EU Settled Status scheme and the EU-UK Withdrawal Agreement (WA), gives rise to serious complications and gaps.

Personal scope
The area most likely to be subject to contestation is that of personal scope. The WA imposes certain conditions on the residence rights contained therein. Article 13 awards temporary residence rights to those who are exercising a right to reside under Directive 2004/38. Typically, this means being in work, or being the family member of a worker. Article 15 provides for permanent residence rights under the same conditions as the permanent residence provisions in Directive 2004/38 – i.e. applicants who have been exercising a right to reside under the Directive continuously for five years. The UK's EUSS scheme, in contrast, does not require evidence of a right to reside being, or having been, exercised. It is based primarily on residence – those who can adduce evidence of residence for five years or more should be entitled to settled status (if they meet the conditions as to suitability), while those resident for less than five years can apply for pre-settled status.

Who would do the gatekeeping?
As a result of the different eligibility conditions, it is not currently clear when an EUSS status holder will be considered to fall within the scope of the WA. If the position is taken that someone must meet the conditions contained in the WA before calling upon the protection of that agreement, then that begs the question as to who will take on the administrative burden of assessing lengthy and historical right to reside claims, to ascertain whether the WA is invoked, and whether Article 13 or 15 applies, all before a front-line decision-maker can ascertain whether an applicant is entitled to equal treatment (or other rights provided) under the WA.

Different routes of enforcement
If EUSS and WA are deemed to have different personal scopes, then that opens up different avenues of enforcement – with some EU nationals benefitting from input and support from the Independent Monitoring Authority; and from input from the CJEU, and others excluded from those routes. This would have a disproportionate and detrimental impact upon vulnerable EU citizens, who are more likely to fall outside of the scope of Directive 2004/38, and/or are more likely to have difficulty proving that they fall within it. Parallel enforcement mechanisms would also make it difficult for charitable advice organisations to appropriately advise and support claimants, and would likely lead to confusion as to whether courts and tribunals can refer questions to the CJEU.

If EUSS status does not equate to WA status – what does?
Article 18 WA permits the UK to require EU citizens 'to apply for a new residence status **which confers the rights under this Title** and a document evidencing such status which may be in a digital form'. If the EUSS does not confer the rights under that title, then we have to ask – what does? What document or status will the UK give to EU citizens to certify that they fall within Arts 13 or 15 of the WA? Having exercised the option to create a mandatory constitutive scheme – with the

consequence that there is a hard deadline – it should not be possible to treat the EUSS as merely declaratory for the purposes of the WA, requiring decision makers to go behind the status and check that substantive conditions are also met. The government needs to formally decide whether pre-settled and settled status equate to temporary and permanent residence under the WA – and if not, to lay out its plans to comply with Article 18 WA.

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