

Briefing March 2019

Brexit and Swiss Migration Law: Existing rights protected by a bilateral agreement between Switzerland and the UK

In less than a month, the deadline set out under Article 50 of the Lisbon Treaty on the EU for the United Kingdom (UK) to achieve an agreement on the terms of its withdrawal from the European Union (EU) will lapse. The UK could then leave the EU without any sort of transitional regime under a 'hard Brexit' scenario.

For British nationals as well as Swiss enterprises intending to recruit British nationals the key question in this period of uncertainty therefore is: What will the legal situation be after Brexit in particular with respect to migration law? In this context, the Swiss Federal Council has adopted the so-called "Mind the Gap" strategy, which is described in further detail in this briefing.

"Mind the Gap" in migration matters

Switzerland is neither a Member State of the EU nor the European Economic Area but has used bilateral treaties with the EU to safeguard the free movement of persons between Switzerland and the EU. Following a withdrawal of the UK from the EU, the bilateral treaties concluded between the Swiss Confederation and the EU would no longer apply to the relationship between Switzerland and the UK.

With regard to migration law, this means that the Agreement on the Free Movement of Persons ("AFMP") would no longer apply to British nationals. Until now, without any further formalities, British nationals were free to choose their place of work or residence within Switzerland solely on the basis of their EU citizenship and the applicability of

the AFMP. In addition, short-term stays of up to 90 working days were not subject to authorization but merely to an online registration.

In view of the decision of the UK to leave the EU and the potential bilateral regulatory vacuum after Brexit, the Swiss Federal Council adopted the so-called "Mind the Gap" strategy in October 2016 and subsequently started negotiations with the British government on the conclusion of a bilateral agreement similar to the AFMP. On 25 February 2019, an agreement with the UK on the rights of citizens after Brexit (as well as several ancillary aspects that will not be addressed herein) was signed. Both Swiss and British nationals who have acquired rights in Switzerland or the UK based on the AFMP (e.g. right of residence, social security rights, recognition of qualifications etc.) will benefit from this agreement. Its aim is to

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ensure that rights already acquired under the terms of the AFMP – either in Switzerland or in the UK – are safeguarded, i.e. continue to apply beyond Brexit.

Also recently, Switzerland and the UK entered into a number of other bilateral treaties seeking to mirror a large portion of the trade agreements that govern the economic relationship between Switzerland and the EU in Switzerland's post Brexit relationship with the UK, such as the bilateral trade agreement between the Swiss Confederation and the UK signed on 11 February 2019.

Deal Scenario

If a withdrawal agreement is concluded between the UK and the EU in accordance with the current proposals, a transitional period would run from the date of Brexit until 31 December 2020. During such transitional period, EU treaties and agreements with third countries such as Switzerland would continue to apply to the UK. This means that the bilateral agreements between Switzerland and the EU, such as the AFMP, would initially remain effective in relation to the UK until 31 December 2020. New bilateral agreements between Switzerland and the UK would then only become applicable after the end of the transition period (i.e. from 1 January 2021 onwards).

No-Deal Scenario

If no withdrawal agreement between the EU and the UK can be reached, the so-called 'hard Brexit' would occur. In such a no-deal scenario, there would be no transition period and the aforementioned bilateral agreement on citizens' rights entered into by Switzerland and the UK would apply immediately, i.e. in extremis on 30 March 2019. It should be noted at this point, that such a bilateral agreement only provides legal certainty with regard to the status quo – it would not apply to Swiss or British nationals planning to emigrate to the UK or Switzerland after Brexit.

As a result, new immigrants – both in Switzerland and in the UK – would be considered to be third-country

nationals. Due to the absence of a forward-looking bilateral migration regime between Switzerland and the UK, British nationals intending to emigrate to Switzerland after Brexit would have to comply with the provisions of the Swiss Foreign Nationals and Integration Act ("FNIA") and would qualify as non-EU nationals for such purposes. One consequence of such a qualification regime would be that British immigrants would be subject to an annual quota of permits.

In this regard, the Federal Council decided on 13 February 2019 to grant British nationals a special status in the event of a no-deal Brexit and imposed a separate temporary quota of up to 3,500 permits for the migration of British employees (made up of up to 2,100 residence permits and up to 1,400 short-term residence permits) for the period from 30 March 2019 (or later if Brexit is deferred) until 31 December 2019. This special quota is exempted from the federal approval procedure (Zustimmungsverfahren) and applies to British nationals entering Switzerland for the purpose of gainful employment. For other migrants, such as pensioners, this quota is not applicable. As a further consequence of falling under the provisions of the FNIA, British nationals would be eligible to benefit from the special quota only (i) if they are in higher management positions, specialists or otherwise especially qualified employees and (ii) subject to precedence in favour of domestic employees or employees from the EU (Inländervorrang). For the time being, no work permits would be issued for less qualified positions or if suitable employees were available in the Swiss or in the EU's domestic labour markets.

In this context it should be noted that negotiations are currently underway between the UK and Switzerland on a future bilateral migration regime to fill this regulatory vacuum. However, no specific terms of such migration regime are known at present.

Rights protected

To sum up, rights acquired pursuant to the AFMP will be protected, provided that the respective rights were acquired before the AFMP ceases to apply for

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the UK. The day when the AFMP will no longer be applicable depends on the future course of the UK's withdrawal negotiations, i.e. the approval or non-approval of a withdrawal agreement or a possible extension of the date for leaving the EU. In case of approval of a withdrawal agreement in line with the present state of negotiations, the acquisition of rights under the AFMP would have to have occurred by 31 December 2020 at the latest. In the event of a no-deal Brexit scenario, AFMP-rights would only be safeguarded if they were acquired before the actual Brexit date.

In essence, the following areas of AFMP-rights are protected under the bilateral agreement: residence with gainful employment for employees and self-employed persons, residence without gainful employment, the right to family reunification, frontier workers, the rights of persons providing services (up to 90 days per calendar year), as well as several other aspects which are not addressed herein. Subject to the terms stipulated in the bilateral agreement, such rights acquired under the AFMP will remain valid indefinitely. The acquired rights would expire if the terms of the bilateral agreement were no longer fulfilled.

The situation of persons who currently benefit from AFMP-rights is thus unlikely to be significantly affected in the near future. However, once the AFMP ceases to apply, it may be replaced by a more comprehensive bilateral agreement between Switzerland and the UK, which would potentially entail changes that may be more considerable.

Outlook

British citizens in Switzerland who have already acquired a residence permit, a short stay permit or a cross-border commuter permit before the AFMP ceases to apply to the relationship between Switzerland and the UK do not have to take any action. Their residence entitlements remain valid as long as the relevant terms pursuant to the bilateral agreement executed on 19 December 2018 are met. However, the competent authorities might request the replacement of the physical residence permit card. Swiss citizens in the UK may want to seek legal advice in respect of their status locally (this briefing only covers the subject in relation to Swiss law).

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