



EU Rights and Brexit Hub

Research, Advice and Support on EU Citizens' Rights



THE STATUS OF EU NATIONALS:

Emergency measures needed

Professor Charlotte O'Brien and Dr Alice Welsh

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Executive Summary: Emergency measures needed

Why do we need to analyse the status of EU nationals now?

The deadline for applications to the EU Settlement Scheme (EUSS) (30th June 2021) is imminent. Emergency measures are needed to ensure that many EU nationals are not wrongfully exposed to the hostile environment. This report covers some of the key risks that the deadline for applying to the EUSS poses for EEA+ nationals.

Who is affected?

All EU/EEA nationals and their family members (collectively termed EEA+ nationals) resident in the UK before the transition period for the UK leaving the EU ended on the 31st December 2020, who does not have British citizenship or indefinite leave to remain, will need to have applied to the EUSS by the deadline to avoid a loss of rights to reside. This is true even for long-term, economically contributing residents, and even for EEA+ nationals born in the UK.

How was this research conducted?

The EU Rights & Brexit Hub works with advice organisations around the UK who help EEA+ nationals. We give second tier advice and support on access to public services, and gather evidence of problems encountered. We have conducted an extensive analysis of the changing legislation, rules and guidance covering EEA+ nationals' rights post-Brexit, further informed by findings on the experiences and legal exclusions faced by vulnerable EEA+ nationals pre-Brexit.

What needs to happen next?

This report outlines five key proposals:

- Reaching the not-yet applied

It is now clear that a significant minority of EEA+ nationals will fail to register by the deadline, and who will thus be 'left behind'. If they do not qualify as having a good reason for missing the deadline, they automatically and irreversibly lose their right to reside. They will then be subject to the hostile environment, and potentially to removal. We recommend a scoping exercise and an urgent communications strategy for reaching them.

- Protecting late applicants: a substantive scheme

The new guidance on reasonable grounds for making late applications is expansive, including a range of circumstances that could prevent vulnerable applicants from meeting the deadline. However, the guidance is inevitably incomplete, and will be open to inconsistent interpretations. A less convoluted approach would be to recognise a general right to apply late to the scheme. While wishing to avoid the exclusions that will be created by a hard deadline, we recognise the legitimate concerns of the UK Home Office to ensure timely applications, to avoid long-term non-registration. A substantive scheme could be an effective

compromise. Applicants who meet the substantive conditions for the EUSS could make a late application; those without a good reason could pay a fixed sum application fee, like the late submission of tax returns. This would represent a proportionate penalty for missing a deadline. A substantive scheme like this would: **avoid** the irreversible loss of residence rights; **ensure** timely applications; **fund** the costs of administration for late applications; **protect** those with 'reasonable grounds' from fees; and **avoid** long-term non-registration.

- Protecting late applicants: addressing gaps in the guidance

We recommend that the guidance be amended to address the following problems:

- Caseworkers should not be directed to examine the immigration histories of victims of abuse/slavery;
- Children's rights to apply late should include rights for their primary carers;
- A lack of capacity should in itself be a good reason for a late application;
- Pregnancy/maternity at/around the deadline should be a reasonable ground;
- Having permanent residence, with or without a permanent residence document, should be a good reason for making a late application.

- Avoiding the status gap

Even where an EEA national meets the EUSS criteria *and* has a 'good' reason for a late application, and makes a successful late application to the EUSS, there is currently no provision for them to retain a right to reside in the interim. Employers and landlords may risk facing civil or criminal penalties for not dismissing or evicting them. We recommend that the Home Office provides for a **temporary right to reside from the end of the grace period**, to those eligible to apply late to the EUSS until such a time as the final EUSS decision is produced, to protect applicants, and employers and landlords. We also recommend **the removal of extra conditions** placed upon people who have made in-time applications but whose application has not been determined by the deadline, as the delay is beyond their control.

- Avoiding unnecessary delays

We recommend the publication of Home Office data on average EUSS waiting times, and numbers of EUSS applications with waiting times over three, over six and over twelve months. We further recommend the publication of a regular update to delays seen in the EUSS system and a breakdown of the reasons for these delays would help to spot trends, and to identify where people are at risk of losing the opportunity to reapply.

- Ensuring consistency

We suggest that the Home Office trains all decision makers on working with late application requests, and monitors and moderates all late application decisions, to spot outliers and to ensure consistency in approach.

The status of EU nationals: emergency measures needed

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1. Reaching EEA+ nationals who have not yet applied to the scheme

Background

Back in April 2019, then Home Secretary stated that the funding to assist vulnerable applicants would 'ensure no one is left behind'.¹ It is now clear, however that there will be a significant minority of EEA+ nationals² who fail to register by the deadline, and who will thus be 'left behind'. If they do not qualify as having 'reasonable grounds' for missing the deadline,³ they automatically and irreversibly lose their right to reside, and lose any accrued rights, as registration is part and parcel of the right to reside (it is a constitutive, not declaratory scheme). They will then be subject to the hostile environment, and potentially to removal.⁴

A number of recent studies give considerable cause for concern with regard to the number of EEA+ nationals unaware of the scheme, or of the deadline. JCWI published a report in January 2021 on their survey of 300 care workers.⁵ They found that 1 in 7 did not know, or were not sure what the EUSS was, and 1 in 3 did not know about the deadline. The Social Market Foundation published a report in September 2020, drawing upon 90 interviews with EU migrants in low skilled work. They found that: "Barely half of interviewees were aware of the EU Settlement Scheme (EUSS). Even among those intending to stay in the UK past the cut off point for applying to the Scheme, over 40% said they were unaware of it".⁶ It is not clear, from the new guidance, that just not being aware of the scheme or a need to apply will be enough to be considered 'reasonable grounds' for a late application.

¹ Sajid Javid, Secretary of State for the Home Department, letter to Baroness Kennedy, Chairman of EU Justice Sub-Committee, 17 April 2019, p. 2.

² 'EEA+' is used in this briefing to mean the EU and EEA nationals and their family members who are eligible to apply to the EU Settlement Scheme.

³ Home Office, Guidance, [EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members](#), updated 1 April 2021.

⁴ BBC News. "Brexit: EU citizens who miss registration deadline face deportation— minister, 10 Oct. 2019," quoting Home Office Minister Brandon Lewis in Bolzen, "[Nach dem Brexit droht nicht registrierten Deutschen die Abschiebung](#)", *Die Welt*, 10 Oct. 2019.

⁵ Boswell & Patel, Joint Council for the Welfare of Immigrants, [When the clapping stops: EU Care Workers after Brexit](#), January 2021.

⁶ Thomas. [Best intentions: EU migrant workers in Fenland; A Survey](#). The Social Market Foundation, Sept. 2020.

Proposed communications strategy:

1. Scoping: As the deadline is the end of next month, we recommend urgent action to assess the scale of the problem, and to ascertain the number of people at risk of being unregistered on the 1st July 2021. The Home Office could helpfully report back on the targets set, met and missed by the organisations receiving EUSS community support funding.⁷

2. Using government data: It is to be welcomed that the Department for Work and Pensions has been working with the Home Office to contact all EEA+ nationals currently in receipt of a benefit to inform them of the need to apply, if they have not done so already,⁸ as benefit claimants are disproportionately more likely to be vulnerable.

The Home Office could also contact anyone holding an EEA+ family permit, or permanent residence certificate who has not yet applied.

3. Targeting: An EUSS communications strategy should target both **social and private care homes, retirement homes and supported housing**, as a way of identifying EEA+ national residents at risk of non-registration. Older EEA+ nationals are more likely to be disabled, to suffer technological exclusion, and to have conditions that reduce legal capacity. They may also be long term residents, and so under the misapprehension that their residence status has already been regularised.⁹ Such targeting should also reach the staff there.

Other targets for communications include **social housing landlords**, who could contact their EEA+ tenants to check whether or not they have applied for the EUSS, and to encourage them to do so if not. So far, we only have records of a local authority checking for EUSS status to ascertain eligibility for social housing. **Social services** could identify EEA+ nationals among their clients, and encourage EUSS applications to be made. The government could ask all organisations who see vulnerable individuals – **foodbanks, and homeless shelters** – to signpost the EUSS.

⁷ Home Office, [Guidance, List of Organisations](#), Updated 2 March 2021

⁸ Department for Work and Pensions, [LA Welfare Direct, 3/2021](#), Updated 11 March 2021, para 85.

⁹ Sumption and Fernández-Reino [Unsettled Status – 2020: Which EU Citizens are at risk of failing to secure their rights after Brexit?](#) The Migration Observatory, Report 24 Sept. 2020; Sumption and Kone, [Unsettled status? Which EU citizens are at risk of failing to secure their rights after Brexit?](#), The Migration Observatory, Report 12 April 2018

2. Protecting late applicants

Background

The Home Office's new guidance, updated in April 2021, includes details on what will be considered 'reasonable grounds' for submitting an application after the 30th June 2021 deadline. Caseworkers have been given discretion to consider a wide range of circumstances including where the applicant is a child, lacks capacity or requires care, is a victim of abuse or trafficking, is digitally excluded or whether there were other good reasons based on individual circumstances for missing the deadline. While the flexibility of this guidance is welcomed, it relies strongly on the discretion of individual caseworkers and it is not clear how generous this will be in practice.

The examples given largely focus on applications that are only a few months late. This, along with the guidance that the greater the delay, the harder it will be to show a 'good reason', may lead decision makers to incline towards refusal where the delays are longer – potentially affecting the most vulnerable applicants.

The guidance states that decision makers should give the 'benefit of the doubt' 'for the time being', and promises that 'any change in approach' will be included in revised guidance. Again, this suggests making it harder to apply the longer the delay, again affecting the most vulnerable, and having potentially devastating effects years from now.

It is not clear if simply not knowing about the scheme, or about the deadline, or not realising that it applied to them, will be enough to be considered good reasons. If not, a number of EU Citizens who cannot make a late application will lose their right to reside on the 1st July, and this loss will not be something they can put right. **They may have lived and worked in the UK for decades, but any accrued rights will be irreversibly lost, even if they have previously acquired 'permanent' residence.** This is a disproportionate penalty for a delay in complying with a new administrative requirement.

The guidance states that children will be able to apply late. But: this is not a codified right; the examples are narrowly drawn; and it does not include primary carers.

There are a number of gaps, and potentially problematic hints and directions to case workers in the guidance. There are two proposals that follow from these gaps

Proposal: create a coherent, consistent right to apply after the deadline.

The guidance is inevitably incomplete, and will be open to different interpretations, increasing the likelihood of administrative injustice. The most straightforward way to address the fragmented, incomplete and misleading guidance and examples, and to avoid creating a perilous cliff-edge as a result of discretionary decisions, would be to recognise a general right to apply late to the scheme.

We support organisations calling for the deadline to be effectively scrapped, to establish a purely 'declaratory' system of residence rights for EEA+ nationals, similar to that employed by thirteen EU Member States towards UK nationals,¹⁰ but we recognise the legitimate concerns of the UK Home Office to ensure timely applications, to avoid long-term non-registration,¹¹ that could cause problems decades down the line.

1. Introducing a substantive scheme: A substantive scheme which adopts a proportionate penalty for missing the deadline, but recognises a general right to apply late to the scheme, could be an effective compromise.

2. A late application fee: Late applicants who could not demonstrate a 'good reason' – along the lines of the guidance (with the amendments suggested below) – could be required to pay a late application fee. This would be more in line with penalties for failing to comply with an administrative requirement.

A fixed fee, or one with a few increments, would avoid creating prohibitive fees for very vulnerable applicants years down the line. This would align with residence registration schemes operating in EU Member States for EU migrants under Article 8(2) of Directive 2004/38.

3. Optional Fee Waiver: The system could include a fee waiver, where it was not reasonable for the applicant to pay it.

This is a **substantive scheme**: keeping a meaningful deadline, but avoiding irreversible losses of rights.

¹⁰ Bulgaria; Croatia; Cyprus; Czech Republic; Germany; Greece; Ireland; Italy; Lithuania; Poland; Portugal; Slovakia; and Spain do not require UK nationals covered by the Withdrawal Agreement to register for a new status, and so have no deadline imposed – [Europa.eu](https://european-council.europa.eu/media/en/press-areas/pages/full-report-on-the-impact-of-the-withdrawal-agreement-on-uk-citizens-2019-2020)

¹¹ Evidence of Sajid Javid, Home Affairs Committee [Oral evidence: The work of the Home Secretary](#), HC 434 Wednesday 27 February 2019, 759; 768

Proposal: addressing some of the gaps in the guidance

1. Formalising and codifying the commitment to EEA+ children: We welcome the commitment made to allow late applications for children.

The suggestion that the Home Office will allow any late application (effectively waive the deadline) in respect of children, is positive and pragmatic. **We recommend that this commitment be formalised in the Immigration Rules, Appendix EU.**

We also recommend that such a commitment is **extended to include primary carers of children applying late**.¹² The example scenarios in the guidance focus on children who apply later as adults. But if applying while still a child, and a primary carer is required to demonstrate their own separate 'good reason' for applying late, and is deemed not to do so, then the child's 'automatic' right to apply late will not mean much – they will not be able to exercise their right to settled/pre-settled status without their primary carer.

2. Removing the treatment of victims of abuse as suspicious: There are two mentions in the late application guidance of a need to have regard to 'previous immigration history, particularly where there is evidence that the applicant has made a number of unsuccessful attempts to secure leave to remain in the UK on different grounds'. This direction to caseworkers is when dealing with persons claiming to be victims of modern slavery, or in an abusive or controlling relationship or situation. But this is not mentioned in the context of *other* grounds for late applications, such as 'other compelling practical or compassionate reasons'.

This effectively directs decision-makers to consider whether victims of abuse – as opposed to other claimants – are making 'sham' claims. If such victims have previously tried and failed to regularise their status, and so became even more at the mercy of their abuser, the guidance implies that they are more likely to be sham victims, and less likely to be eligible to make a late application to the EUSS. We suggest that this direction be removed from the guidance.

3. Recognising lack of capacity as an automatically good reason: The guidance states that where an applicant lacks physical or mental capacity (not just where capacity is reduced) that will 'normally' constitute reasonable grounds for a person to make a late application. We suggest that a lack of capacity be considered an automatically good reason for a late application.

¹² See EU Rights & Brexit Hub Briefing, [EU Settlement Scheme: Barriers to Accessing Public Services for Vulnerable Adults](#), March 2021.

4. Treating pregnancy and maternity as a good reason: Currently, the guidance suggests that there must be unusual circumstances for pregnancy or maternity to be a good reason for a late application:

pregnancy or maternity **may be a reason** why a person needs to make a late application to the EU Settlement Scheme, **for example** where a woman has a **difficult child birth** or where a **new-born child is in need of medical treatment**.

However, 'normal' childbirth and a healthy new-born child can both be significantly disruptive for a significant period, especially for single parents. We suggest that pregnancy and maternity at or around the deadline should be good reasons for a late application.

5. Removing the reference to a serious medical condition being a good reason for a child's late application: The guidance on late applications from children suggests that a decision maker does not need to look into the reasons why a parent/guardian/carer did not apply to the EUSS for their child in time.

However, later it states:

Where a person had a serious medical condition (or was undergoing significant medical treatment) in the months before, or around the time of, the deadline applicable to them, **that will also normally constitute reasonable grounds for a late application to the EU Settlement Scheme to be made in respect of a child** or other dependent family member who was reliant on the person to make an application to the scheme on their behalf.

This direction to look behind the reasons for a late application on behalf of a child is confusing and contradictory, and will lead to different approaches between decision makers. It should be removed.

Moreover, under the section on physical/mental capacity and 'care support needs' **there is no mention of the 'reasons' someone else** has not applied for them. We submit that as with children, these reasons are irrelevant for all dependent family members.

6. Including people with permanent residence but no certificate: The guidance recognises that some people will have been issued with a document under the EEA Regulations and not realise that this is insufficient at the end of the grace period.

But the EEA Regs operate as a *declaratory* system compared to the EUSS constitutive one. For example, it has not been necessary to possess a permanent residence certificate in order to have a right of permanent residence under the EEA Regs.

Some EEA+ citizens will know they have permanent residence. For example, they may have had this confirmed when making an application for benefits, but have no document. We cannot easily know how many people fall into this category, and are at risk of missing the deadline, because they assume that permanent residence continues to protect them.

The guidance should make clear that having permanent residence, **with or without a permanent residence document**, is a good reason for making a late application.

Fallback option: extending the deadline

In order to reflect that the past year has significantly reduced opportunities for organisations to reach, communicate with and support EU nationals, an extension to the deadline is advisable. This would reflect that, of the fourteen EU Member States imposing a deadline for UK nationals registering for a new status, two have set the deadline in September 2021, and six in December 2021. Only six out of 27 Member States have chosen to impose a June 2021 deadline.

3. Avoiding the status gap

Background

Even where someone has a good reason for missing the deadline, applies late and is awarded status, they nevertheless stand to lose their status and right of residence in the interim.

This could be devastating. Those affected could face a loss of access to public services, including benefits and housing, and see their rights to work and to rent disappear.

This has knock-on effects upon the obligations and risks faced by third parties. If employers and landlords know or have reason to suspect an employee or tenant has not applied to the EUSS by the deadline, then regardless of potential 'good reasons', as things stand, they risk criminal penalties for not dismissing or evicting those existing employees/tenants – or alternatively, for recruiting, or renting to new ones, it does not matter if they know of a good reason why an EUSS application has not been made in time. If they do not check EUSS status they may open themselves up to civil penalties. This could create a strong incentive to dismiss/refuse to recruit/evict/refuse to rent to EEA+ nationals, who though they have not applied to the EUSS in time, have not, according to the guidance, done anything 'wrong'.

While an applicant's status may later be regularised, they may still have, in the interim, lost their job, home, or more.

Even those who do apply before the deadline, but who haven't had an EUSS decision by then may face a loss of a right to reside.

The 2020 'temporary protection' regulations provide for a continued right to reside in that situation, IF the applicant was exercising a right to reside under the 2016 Regulations (typically being a worker, or had a right of permanent residence) 'immediately before' the end of transition – so on the 31st December 2020.

This means that some EEA+ nationals will be subject to potentially burdensome conditions and checks, and a total loss of status if they do not meet those conditions, purely because the Home Office has not processed their application in time.

This creates an arbitrary difference in treatment, and puts thousands of EEA+ nationals' residence security at risk.

Proposal: providing for temporary rights to reside

1. Provision of temporary right to reside for those eligible to make a late application: We suggest that the Home Office should, as a matter of urgency address the 'status gap' faced by people making late applications, providing for a temporary right to reside, from the end of the grace period, to those eligible to apply late to the EUSS, whether or not they have yet applied, until such a time as the final EUSS decision is produced.

As with the provisions for those encountered by immigration enforcement, at the point that an EEA+ national's failure to apply for the EUSS comes to light, they could be given a 'window' in which to submit a late application, during which they have a temporary right to reside.

This would not only protect the EU nationals in question; it would also protect employers and landlords from civil and criminal penalties, so reducing the imperative to dismiss or evict EU nationals who are in fact eligible for EUSS, and who can demonstrate good reasons for applying after the deadline.

2. Removal of the right to reside condition for those with in time applications: we suggest that the Home Office removes the requirement for applicants who make **in time** applications, but whose application is then delayed beyond the deadline to have been exercising rights to reside under the 2016 regulations on the 31st December 2020. This condition creates an arbitrary difference in treatment as a result of matters outside of the applicants' control – especially in light of potential delays processing decisions discussed in the next section. Instead, **automatic temporary rights should be provided to anyone with a pending EUSS application and until the end of the appeals process for that application.**

4. Avoiding unnecessary delays that push applicants past the deadline

Background

Delays in the EUSS can have significant impact on the rights of EU nationals. As the deadline for EUSS applications approaches, unreasonable delays could push EU citizens past the cut-off point and deprive them of a free and accessible form of redress – a new application.

While the Government website says that 'It usually takes around 5 working days for complete applications to be processed',¹³ there is no public data on average waiting times or detailing how many applications have waited over three months, or over six months. The most recent data available on delays, from a freedom of information request, identifies that on 31st December 2020 over 9,000 applications have been waiting for a decision for over 3 months, nearly 8,000 have waited between 3 and 6 months and over 6,000 applications have waited over a year.¹⁴ This data was lifted from a live database of cases yet to be decided on 31st December 2020. Some of these may have since been decided, but it is also likely that more applications will be caught up in this backlog.

Some of these delays will be a result of requesting further evidence from applicants. The Home Office told the immigration inspector¹⁵ that around 40% of pending cases in June 2019 "could not be resolved until the applicant submitted further evidence". The remaining proportion of delays can be linked to a number of possible reasons including where a paper application is required for derivative rights or a lack of valid ID or passport, where non-EEA family members are applying without a BRP issued under EU law, where there are criminal convictions and pending investigations.

Where there are significant delays in EUSS applications, this can have a knock-on effect for access to benefits.

¹³ Home Office, Guidance, [EU Settlement Scheme: current estimated processing times for applications](#), Updated 22 May 2020.

¹⁴ Data collected by Freedom of Information request to the Home Office 'FOI Reference: 62254' 22 February 2021. Freedom of Information Request made as part of the ESRC funded project: Algorithmic Politics and Administrative Justice in the EU Settlement Scheme (EUSS) based at the University of Exeter.

¹⁵ Bolt, Independent Chief Inspector of Borders and Immigration, [An inspection of Administrative Reviews \(April–August 2019\)](#), February 2020. 6.34.

A Case study

The EU Rights and Brexit Hub has seen an example where a non-EEA mother and her children waited 15 months for an outcome of an application to the EUSS. She had lived in the UK for 7 years when she applied for status. Her application for Universal Credit was refused as she could not establish a right to reside without access to her EEA husbands' work history. Instead, she had to wait until her EUSS application was decided, and she was granted settled status. During this time, she had to rely on charities and foodbanks. By the time her application for settled status was decided she had missed out on over 13 months of Universal Credit payments. She could not appeal the initial refusal as the date of her settled status was awarded at the point of decision rather than the date of application. The length of delay in this case was unreasonable and caused significant hardship to the family affected.

Proposals: data analysis

1. Collecting and publish data on delays: One benefit of moving the application process to a digital platform is the easy production of data which should translate to greater transparency of Home Office processes. We recommend the publication of Home Office data on average EUSS waiting times, and numbers of EUSS applications with waiting times over three, over six and over twelve months.

2. Delay tracking and mitigation of any disproportionate impact: The publication of a regular update to delays seen in the EUSS system and a breakdown of the reasons for these delays would help to spot trends, and to identify where people are at risk of losing the opportunity to reapply. Where trends are spotted, particularly if they have a disproportionate impact on a group of applicants, this could inform the inclusion of further good reasons for a late subsequent application and ensure that this form of redress is not lost due to unreasonable delay.

5. Ensuring consistency in decision making for late applications

Background

While the guidance on reasonable grounds for missing the deadline is potentially expansive, there are a number of drawbacks in terms of legal certainty in relying upon **guidance only**. There has been no attempt to codify the commitments contained therein, or to create 'hard' rights for the vulnerable citizens affected.

It creates a huge set of discretionary powers and responsibilities for decision-makers. There will inevitably be **different interpretations and applications** of this guidance, given that so much is effectively left to decision-maker discretion. This variation is inevitable not least because of the **differences in approach taken elsewhere in the immigration rules** to late applications.

Some decision makers will treat the guidance as 'nearly' exhaustive; some will note the reliance upon examples where applications are only a few months late; others will note that examples involving children involve applications made at or near the age of majority; and each may infer they should refuse those cases that look different. They will take different approaches to longer delays, and give different weights to factors such as past unsuccessful applications made by victims of abuse.

Proposal: Training, monitoring, reporting & recording

1. Training: We suggest that the Home Office trains all decision makers working with late application requests, on the approach to be taken.

2. Monitoring: The Home Office should monitor all late application decisions, to spot outliers and moderate decisions where appropriate to ensure consistency in approach.

3. Reporting: The Home Office should share regular updates on the number of late applications and their success.

The new guidance states that where a late application is made, but deemed to not have 'reasonable grounds' it will be refused on eligibility grounds.

4. Recording: We recommend that such refusals are recorded separately to other eligibility refusals. The Home Office should make sure it is clear how many of the total eligibility refusals are based on the caseworker's decision that the applicant has not demonstrated a 'good reason' for missing the deadline. These statistics will show how many individuals have applied late and how many are being refused due to their application being made after the deadline. This can inform policy changes to reduce the risk of large numbers of EEA+ nationals losing their right to be in the UK.

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<https://www.eurightshub.york.ac.uk/>
Twitter @EURightsHub
Email enquiries to law-eurightshub@york.ac.uk