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EU citizens' rights post Brexit: why direct effect beyond the EU is not enough

(forthcoming in European Constitutional Law Review 2018)

Stijn Smismans

Brexit – EU citizens' rights – direct effect beyond the EU – the Withdrawal Agreement does not protect citizens properly – copying substantive provisions of EU law and parts of the EU's supranational features, such as direct effect, does not provide equal protection for EU citizens once a country is no longer part of the EU – UK-specific implementation measures to be set out in Withdrawal Agreement or Protocol - guarantees also to be set out in primary legislation – the UK Government intends to act to a great extent via secondary legislation – the relationship between the Withdrawal Act and the Withdrawal Agreement and Implementation Bill.

INTRODUCTION

One of the key priorities of the Brexit negotiations has been the protection of the 3.5 million EU citizens already residing in the UK and the more than 1 million British citizens residing in the EU. Much of the debate has focused on the material scope of the rights they will hold after Brexit. The draft Withdrawal Agreement¹ provides for a status that would come close to their current status, although these citizens would be deprived of some of the rights they currently hold, in particular in relation to family reunion and the increased risk of being deported on the basis of criminality for acts committed after Brexit, while the free movement rights of British citizens residing in the EU are only guaranteed in the country in which they are currently residing. The main challenge, however, remains in ensuring that EU citizens in the UK and British citizens in the EU can have access to this new status; as well as guaranteeing proper implementation of the Withdrawal Agreement. This challenge is especially difficult for EU citizens in the UK, as the country will no longer be part of the EU, and will thus fall out of the comprehensive judicial protection provided by EU law. Therefore, this article focuses on the legal status of EU citizens in the UK, rather than that of the British citizens in the EU. In particular, it will analyse the procedural mechanisms needed to guarantee their rights, rather than debate the material scope of their status.²

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¹ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16-19 March 2018, TF50 (2018) 35 – Commission to EU27, 19 March 2018.

² In this article I do not address the concept of EU citizenship. Surprisingly, the conceptual debate on EU citizenship in the context of Brexit has particularly focused on the idea of 'associate

Anxiety about the fate of the 3.5 million EU citizens in the UK has increased in the light of the UK's approach to immigration, which is both draconian and notorious for a high implementation error rate by the Home Office (Ministry of internal affairs). In April 2018, the then Home Secretary (Minister of internal affairs) Amber Rudd resigned as a consequence of the 'Windrush' scandal,³ which brought to light how people from Caribbean origin, who had lived legally in the UK for decades, were suddenly deprived of all entitlements, detained and sometimes deported, because their legal entry into the country decades earlier was suddenly contested. Such treatment is not unique to the Windrush generation, and it is easy to see the parallels with the position EU citizens might find themselves in after Brexit as they were never asked for any proof of their status until now.

It is no surprise then that the EU has sought to ensure that EU citizens would still be able to profit from a certain level of 'supranational protection' after Brexit. Indeed, the draft Withdrawal Agreement states that its section on citizens' rights will have direct effect in the UK, and the preliminary rulings procedure should remain available for 8 years after Brexit. From an international law and national sovereignty perspective, this supranational protection appears extraordinary. Never have these supranational features of EU law reached beyond the EU. However, it would be wrong to assume that EU citizens in the UK now have extraordinary protection. Beside the fact that the promised 'settled status' is inferior to the rights they currently enjoy, the main problem is that many remain at risk of failing to prove entitlement to this status, while tools for monitoring and enforcement are weak. In this article I argue that the EU, and in particular the European Commission, has been too complacent and has taken a formalistic approach to the negotiations, ignoring the particular challenges of implementation in the UK as a country outside of the EU. The EU's approach to citizens' rights in the withdrawal negotiations is based on a double flaw. It takes a cut-and-paste approach to, respectively, EU supranational principles (such as direct effect) and substantive EU law provisions (such as the Citizens' Directive 2004/38/EC), and pretends that the literal transfer of these principles and provisions would offer the same level of protection to EU citizens even in a country that will no longer be a member of the EU. Unfortunately this fails to take into account the particular challenges EU citizens face in the UK, which is due both to the legacy of how the UK has dealt with EU immigration in the past and to the limitations of EU oversight when the UK is out of the EU. As a result,

citizenship', promoted by Guy Verhofstadt, which would guarantee EU citizenship rights for British nationals even if not yet residing in the EU. On the profound conceptual and legal problems of that proposal, see M. van den Brink and D. Kochenov, 'A critical perspective on associate EU citizenship after Brexit', *DCU Brexit Institute Working Paper* (2018) No.5; at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175318. For other interesting contributions on EU citizenship post-Brexit see P. Mindus (2017), *European citizenship after Brexit* (Palgrave 2017); and S. Reynolds, '(De)constructing the road to Brexit: Paving the way to further limitations to the free movement and equal treatment?', in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*, (Hart 2017), p.57. While much remains to be said on EU citizenship conceptually in the light of recent developments, the focus of this paper is on identifying the procedural mechanisms needed to protect EU citizens in the UK properly.

³ The Week, 'Who are the Windrush Generation and how has the scandal unfolded', available at <http://www.theweek.co.uk/92944/who-are-the-windrush-generation-and-why-are-they-facing-deportation>.

and despite the ‘extraordinary’ reference to direct effect and preliminary rulings, the Withdrawal Agreement leaves EU citizens in a very vulnerable position.

In the first section I analyse the key substantive flaw of the Withdrawal Agreement, which consists in copying into the Withdrawal Agreement the same level of discretion for implementation that is built into the Citizens Directive 2004/38/EC. While such discretion may be appropriate for Member States within the EU, it has very different consequences when a country is no longer part of the EU. The combination of introducing a constitutive instead of declaratory registration system, the UK’s ‘hostile environment’ immigration policy and the weak supranational guarantees when out of the EU, means that many EU citizens risk immediate loss of all entitlements to work, healthcare, benefits, and ultimately face deportation. I argue that the only way to guarantee this does not happen is by setting out a detailed procedure within the Withdrawal Agreement, or in a separate Protocol attached to it, on how the UK will organise the registration of EU citizens.

In section 2, I analyse the main procedural flaw of the Withdrawal Agreement, namely the assumption that a simple requirement to apply direct effect to citizens’ rights would provide sufficient protection for EU citizens to retain their current status. I will first analyse the procedural implementation mechanisms described in the Joint Report. The Joint Report was adopted by the UK and the EU in December 2017 to set out the political agreement on what would be written in the Withdrawal Agreement. The Joint Report seems to take into account the particular challenges of implementation in a non-EU country by suggesting a double guarantee, namely direct effect *and* the full incorporation of citizens’ rights into primary legislation. However, the Withdrawal Agreement is less detailed regarding how the UK should implement the Agreement. It appears to assume that by simply copying the principle of direct effect, EU citizens would be properly protected. However, this underestimates the difficulties of implementing the supranational features of EU law in a non-EU country. I will argue why such a double guarantee, namely direct effect and citizens’ rights provisions in primary legislation, is indeed highly desirable.

Having analysed the two main flaws of the Withdrawal Agreement, in the final section I will analyse how this interacts with the legal framework the UK is setting up to take itself out of the EU and implement the Withdrawal Agreement, in particular in relation to the implementation of citizens’ rights. This framework is constituted of the European Union Withdrawal Act (by which the UK takes itself out of the EU, but retains existing EU law until revision by future UK law) (further referred to as Withdrawal Act),⁴ the Withdrawal Agreement and Implementation Bill (further referred to as Implementation Bill), and the proposed registration system (as set out in the Statement of Intent regarding the EU Settlement Scheme).⁵ The proposed legal framework suggests the Government will have considerable leeway to implement EU citizens’ rights. In the absence of proper supranational protection and clear guarantees set out in primary legislation, the residence status of many EU citizens is at risk,

⁴ European Union (Withdrawal) Act 2018 c.16, 26.06.2018.

⁵ Home Office, EU Settlement Scheme: Statement of Intent, 21.06.2018.

particularly when also taking into account the substantive flaw of the Withdrawal Agreement.

I conclude that the EU should set aside its formalistic approach, and acknowledge that copying parts of the EU's supranational principles such as direct effect and substantive provisions of EU law is not the same as maintaining the current protection of EU citizens. Unlike what may appear at first sight, the inclusion of direct effect and preliminary reference procedure in the Withdrawal Agreement does not provide 'extraordinary' protection to EU citizens. It is not extraordinary as there are serious limits to the 'supranationality' provided; and it is definitely not extraordinary in guaranteeing that EU citizens in the UK will not be deprived of their current rights. In order to avoid the latter, the EU should take into account the particular features of the UK legal system as a country no longer part of the EU, and adjust guarantees in the Withdrawal Agreement accordingly. This can be done by adopting a separate Protocol attached to the Withdrawal Agreement in which the UK would set out its registration system (thereby overcoming the risk of the discretion provided by the Citizens' Directive), and by including into the Withdrawal Agreement a clear requirement to set out into primary legislation not only the principle of direct effect but also the substantive citizens' rights provisions.

THE SUBSTANTIVE FLAW OF THE WITHDRAWAL AGREEMENT

Why copy-and-paste is not the same as maintaining current protection

The Withdrawal Agreement copies most of the substantive rights provided by the EU Citizens' Directive 2004/38/EC,⁶ the professional qualifications Directive⁷ and the free movement of workers and social security Regulations.⁸ EU citizens in the UK would thus be able to rely on most of these rights of residence, and non-discrimination against nationals in relation to the right to work, providing services, access to healthcare and benefits. Some rights were strongly disputed in the negotiations and the public debate; and EU citizens have to give up some of their rights in the Withdrawal Agreement. E.g. under EU law, an EU citizen has more rights than a British citizen to bring in a third country spouse, which was unacceptable for the British negotiators. Another problem was the right to return to the UK. Under EU law, a citizen can lose their permanent residence after two years of absence, but can still rely on EU free movement rules to return.

⁶ 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 (OJ L 158, 30.4.2004, p. 77).

⁷ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ L 255, 30.9.2005, p. 22).

⁸ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ L 141, 27.5.2011, p. 1). Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L166,30.4.2004,p.1); and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L284, 30.10.2009, p.1).

After Brexit, the latter option would fall away; unless EU citizens were given an unconditional right to return. The draft Withdrawal Agreement settled for a compromise for a right to return for five years. Most problematically, the EU has accepted that the UK can deport even those with permanent residence for criminal conduct after Brexit. Rather than sticking to the restrictive grounds of deportation set out in the Citizens' Directive, the UK will be allowed to set out its own definition of criminal conduct liable to deportation.

All these topics, in which the material scope of the new status would differ from that of the Citizens' Directive, have attracted strong debate and the European Parliament in particular is still set to fight for ensuring all these rights to the full. This is laudable from the perspective that these citizens have built up their life in the legitimate expectation that they were protected by EU citizenship, and there is much to be said for considering these rights as acquired rights.⁹

At the same time, the focus in the negotiations on the material scope of the new status - called 'settled status' in the UK, although the Withdrawal Agreement uses the concept 'permanent residence' -¹⁰ has overshadowed discussion on who can obtain this status, and how they can do so.

The EU has taken a formalistic approach and simply copied the personal scope and burden of proof requirements set out in the Citizens' Directive, assuming this would guarantee EU citizens the same rights as they hold now.

Unfortunately, this fails to take into account the particular challenges of applying these criteria in the UK once it is no longer part of the EU.

In a nutshell, in order to obtain the residence rights provided by the EU Citizens' Directive, one needs to be in work (or have been in work), or demonstrate having sufficient resources and comprehensive sickness insurance. There is a level of discretion for the Member States on whether and to what extent they impose and control these criteria. One can discuss whether the system set up by the Directive provides the best balance between facilitating free movement (and protecting those who made use of it) and allowing Member States some scope to impose restrictions in order to ensure viability of their welfare system. It is not the place here to repeat that debate.¹¹ Rather, while assuming the system

⁹ The concept of 'acquired rights' as traditionally used in international law has limited scope to protect all the rights provided by EU citizenship. See House of Lords, European Union Committee, 'Brexit: Acquired Rights', 10th report of session 2016-17, HL Paper 82, 14 December 2016. Yet, in a report for the European Parliament, Volker Roeben *et al.* develop the argument of 'continuity' on the basis of EU citizenship. See V. Roeben, J. Snell, P. Minnerop, P. Telles and K. Bush QC, *The feasibility of associate EU citizenship for UK citizens post-Brexit*, A study for Jill Evans MEP, July 2017. I do not agree with the authors that such continuity is possible for those who have never exercised the free movement rights, but the argument merits elaboration for those who have; which is, though, beyond the scope of this paper.

¹⁰ Throughout the negotiations the EU has always referred to its existing concept of 'permanent residence', while the UK negotiators used the concept of 'settled status' instead, which is also the concept used in the Government's proposal on how it will implement the registration system. See Home Office, EU Settlement Scheme: Statement of Intent, 21.06.2018. 'Settled status' is sometimes used interchangeably with 'indefinite leave to remain' which is a key concept of UK immigration law.

¹¹ S. Giubboni, 'Free movement of persons and European solidarity', 13 *European Law Journal*, (2007) p.360; D. Thym, 'The elusive limits of solidarity: residence rights of and social benefits for economically inactive union citizens', 52 *Common Market Law Review* (2015), p.17; E. Spaventa, 'Earned Citizenship: Understanding Union Citizenship Through its Scope' in D. Kochenov (ed) *EU*

provides for a more or less fair balance, one has to realise its proper functioning so far appears to have been dependent on a set of conditions, none of which is realised in the context of Brexit:

- 1) The Directive allows the Member States to introduce a registration system which requires EU citizens to register soon after arrival. It equally provides that EU citizens have acquired permanent residence once they have legally resided for five years in the country on the basis of the conditions of the Directive. Member States are required to provide a procedure allowing these citizens, if they desire so, to receive a permanent residence document that confirms that status. Most Member States have introduced an obligatory initial registration system. As a result people have some proof of their residence status from arrival, which facilitates acquiring a permanent residence document if they desire to obtain one after five years. Yet, people will rarely apply for such a permanent residence document since the initial registration is most often sufficient to profit from the full protection of rights provided by EU citizenship, and absence of the permanent residence document does not necessarily imply you have not acquired permanent residence. The UK, instead, has never introduced a compulsory registration system on arrival; which echoes the UK's overall lack of a general population register or use of ID cards. EU citizens were given all the rights provided by the Citizens' Directive without a registration system, requiring them simply to present a European ID or passport when accessing services. They were not asked to provide proof of being in work or having sufficient resources and comprehensive sickness insurance. As a result, people also did not feel the need to ask for a permanent residence card once they were five years in the country. Brexit puts this system on its head. The UK would now introduce a compulsory registration, not only on arrival but even for permanent residence. Moreover, this requirement would now retroactively be applied to those already in the country. Suddenly requiring proof in relation to entitlement that is based on conditions that may go back years or decades is highly problematic as people might fail to provide evidence of initial arrival and compliance. It is easy here to see the risk of a potential repeat of the Windrush scandal in which people were equally asked to provide proof of entitlement for situations years and decades ago, while they had been considered to be living in the UK legally all that time.
- 2) The Directive's system of registration for permanent residence is declaratory, so absence of the document does not mean you are not entitled. Furthermore, people only risk losing entitlements when the State has reasonable doubt that they are a burden on their welfare system, rather than the State being able to apply checks systematically.¹²

Citizenship and Federalism: the Role of Rights, (Cambridge University Press 2017) p.204; D. Thym (ed) *Questioning EU Citizenship Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017); F. Pennings and M. Seeleib-Kaiser (eds) *EU Citizenship and Social Rights Entitlements and Impediments to Accessing Welfare* (Elgar 2018).

¹² Article 14 Directive 2004/38/EC.

Instead, the registration system that the UK will introduce after Brexit will be constitutive in nature. At the request of the UK, the Withdrawal Agreement gives the option to set up either a constitutive registration system,¹³ or keep the existing declaratory system.¹⁴ Unlike in a declaratory system, in a constitutive system one has to successfully apply in order to obtain the status. In case one is rejected or has not made an application, one loses all entitlements and faces deportation. The consequences of not holding a 'settled status' document are thus much harder-hitting than when one does not hold a permanent residence document under EU law. In the latter declaratory system, absence of the document does not mean you are not entitled. Even if your application is rejected you might still be able to stay on a temporary basis, or might be able to return under free movement provisions. In the UK post-Brexit instead, there is no such 'fall-back protection' of general free movement provisions if you fail your settled status application. Moreover, the consequences of a constitutive registration system can be particularly dire if combined with the UK's so-called 'hostile environment' policy to immigration.¹⁵ Prior to becoming Prime Minister, Theresa May as Home Secretary introduced a policy she deliberately called 'the hostile environment' to illegal immigration. The 'hostile environment' forces all sorts of public and private actors, from hospitals to banks and schools, to actively check for citizens not having the required papers. Once identified, people lose all entitlements; they won't have access to healthcare and benefits (and may be asked to pay back whatever they have received over many years), they will lose their job (as their employer will be fined otherwise), their bank account is frozen; and they are asked to leave the country; failure of which leads to forced deportation, which can happen prior to any recourse to appeal. While it is not the place here to discuss whether this is an appropriate way to deal with 'illegal immigrants', the key issue is that the UK has applied such 'hostile environment' measures even to people who are legally entitled to stay but struggled to prove their entitlement. This is mainly due to the fact that the UK has no proper system of registration and identity cards, while the Home Office has a remarkably high administrative error rate¹⁶

¹³ Article 17 (1) to (3) Withdrawal Agreement.

¹⁴ Article 17(4) Withdrawal Agreement.

¹⁵ Independent Chief Inspector of Borders and Immigration, 'Inspection Report of the hostile environment' (October 2016), available at <https://www.gov.uk/government/publications/inspection-report-of-hostile-environment-measures-october-2016>; and K. McDonald, 'What is Hostile Environment, Theresa May's policy that led to the Windrush scandal and other problems', *News The Essential Daily Briefing* (April 17th 2018), at <https://inews.co.uk/news/politics/what-is-hostile-environment-theresa-may-windrush-eu-citizens-legal-immigrants/>.

¹⁶ Reports by the Parliamentary and Health Service Ombudsman show that the Home Office is one of the main departments receiving complaints and has the highest uphold rate. In the second quarter of 2017, 47% of the 14,170 determined appeals against Home Office immigration decisions were granted. See House of Commons Home Affairs Committee, 'Immigration Policy: basis for building consensus', Second Report of 2017-2019, HC500, 10, January 2018, paragraph 43.

and applies Kafkaesque burden of proof requirements. The dramatic consequences of this approach have been clearly illustrated by the Windrush scandal. People who had been living legally in the country for decades suddenly lost their entitlement to cancer treatment, were asked to pay back years of social benefits, were sacked by their employer, were refused re-entry into the country after a short trip abroad and thereby cut off from their family, were detained in deportation centres and removed.

- 3) The Directive is implemented within the context of the judicial oversight and the remedies provided by EU law. EU citizens can rely on direct effect and supremacy, while they have access to the preliminary reference procedure. Moreover, the infringement procedure ensures top-down control over Member States' implementation of EU law. Once the UK leaves the EU, this comprehensive system is no longer in place. As I will argue in more detail below, there are some doubts about to what extent 'direct effect' as promised in the Withdrawal Agreement will be ensured. Equally, it is uncertain to what extent UK judges will make use of the option to refer a preliminary ruling to the CJEU. Moreover, the Withdrawal Agreement no longer offers the infringement procedure as a way to control respect of EU law.

Hence, while the EU pretends the Withdrawal Agreement will offer (nearly) the same protection to EU citizens as the rights they currently hold under the Citizens' Directive, the acceptance of a constitutive system, combined with past and current UK immigration legacy means that a copy-and-paste of the Citizens' Directive can have dramatic consequences once the country is no longer part of the EU.

This can best be illustrated by taking into account the way the UK has until now implemented the registration for permanent residence under the Citizens' Directive. As that system is declaratory not many EU citizens have felt the need to apply for a permanent residence card, although applications increased after the Brexit referendum as people hoped permanent residence would give them more protection.¹⁷ Many who have applied did so in order to subsequently apply for British citizenship¹⁸ since successful registration of permanent residence has become a precondition for citizenship in 2015.¹⁹

However, while application to obtain a permanent residence card was not compulsory, the system has been particularly complicated in terms of requiring proof of residence. EU citizens have to apply via a 85 page long application document, with poor guidelines, and have to provide extensive documentation

¹⁷ 295.000 EU citizens were granted PR status in the period 2004 to 2017. 58% of those were in 2016 and 2017. See The Migration Observatory, 'Unsettled Status. Which EU citizens are at risk of failing to secure their rights after Brexit?', 12 April 2018, at <http://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of-failing-to-secure-their-rights-after-brexite/>

¹⁸ In the period 2004 to 2017, 148.000 EU citizens obtained British citizenship. Ibid. footnote 16.

¹⁹ Applications by EU citizens went up slightly after introducing this requirement, but went up dramatically after the Brexit referendum, see data in P. Duncan and L. O'Carroll, 'Sharp rise in number of EU nationals applying for UK citizenship', The Guardian, 14 March 2018, at <https://www.theguardian.com/uk-news/2018/mar/14/sharp-rise-in-number-of-eu-nationals-applying-for-uk-citizenship>

(in original or certified documents) to show they have complied with the Citizens' Directives' requirements of being either in work (or having been in work) or having sufficient resources and comprehensive sickness insurance. The application process has been so complicated that 28% of EU citizens applying for it failed their application.²⁰

If the UK's registration system for 'settled status' post-Brexit is based on a similar burden of proof requirement, the consequences would be dramatic. Unlike for the declaratory PR system, all 3.5 million EU citizens will be obliged to register under the new constitutive system, and failure of the application will mean immediately being faced with all the consequences of the 'hostile environment', losing all entitlements and facing deportation. A 28% rejection under these conditions would be a nightmare.

Yet, there is little in the draft Withdrawal Agreement that would prevent the UK from introducing a registration system nearly as demanding in terms of burden of proof as its previous permanent residence system, because the Withdrawal Agreement mainly copies the criteria and discretion available to the Member States in the Citizens' Directive. Article 17(1) of the Withdrawal Agreement does try to set some limits to avoid that the UK's burdensome permanent residence procedure would be copied into a constitutive registration system for settled status. For instance, it should be possible that supporting documents, other than identity documents may be submitted in copy (art. 17(1j)). It requires that the application process should be 'smooth, transparent and simple', 'any unnecessary administrative burdens have to be avoided' (art. 17(1)e); and application forms have to be 'short, simple and user-friendly' (art. 17(1)f). However, much of this remains open to interpretation, particularly in the absence of established case law and uncertainty about how much a say the Court of Justice will get on this matter. Most importantly, it does not alter the main qualifying criteria, based on being in work or having sufficient resources, and the difficulty of proving these retrospectively.

The UK could still ask for a high number of documents to prove work status or having sufficient resources, even to prove situations several decades ago. It may equally still require those not in work to prove they have a comprehensive sickness insurance. The latter requirement has been particularly problematic in the UK, since the UK has not accepted that having access to the National Health Service (NHS) fulfils the requirement of having comprehensive sickness insurance. All EU citizens residing in the UK have been given access to the NHS, so hardly any (and particularly not those who are not in work) have taken a private health insurance. It is even questionable that, given the broad reliance on the NHS, any of the existing private insurance schemes could even be considered to be 'comprehensive'.²¹ Hence, requiring a comprehensive sickness

²⁰ Reiss Edwards, Immigration Lawyers London, 'Home Office Rejects over 28% Permanent Residency Applications – Report' at <https://immigrationlawyers-london.com/blog/high-permanent-residence-rejection-rates.php>

²¹ A. Herbeć, 'The scandal of CSI, the little-known loophole used to deny EU citizens permanent residency', available at: <http://blogs.lse.ac.uk/brexit/2017/03/17/disheartened-and-disappointed-the-government-and-universities-have-failed-eu-citizens-over-comprehensive-sickness-insurance/>

insurance and not considering NHS access as complying with that requirement would virtually automatically exclude all those who are not in work. The European Commission has criticised the UK on this point²², but never taken enforcement action on the issue. If there were already problems with the way in which the UK implemented the Citizens' Directive while still in the EU, it will become even more challenging when the Withdrawal Agreement applies the same criteria for the UK when supranational supervision will be even weaker, and the registration is not a declaratory but a constitutive one, suddenly applying to 3.5 million people.

From political statements to legal commitments

The UK is fully aware that applying a similar system as its permanent residence application procedure would constitute an administrative, social and political disaster. Registering 3.5 million citizens via a procedure similar to the permanent residence application would require huge administrative resources and take decades. At the same time, deporting over 28% of the 3.5million EU citizens is not desirable politically, economically or socially. So the UK has signed up to some procedural limitations to the constitutive registration system as set out in Article 17 of the Withdrawal Agreement, as discussed above. Additionally, the UK has promised politically to introduce a simple registration procedure based only on proof of legal residence, identity and criminality check. This has been translated into a 'Statement of Intent', announcing a proposal for the registration system.²³

The Government has explicitly stated that it would not apply the requirements of comprehensive sickness insurance and being in 'genuine and effective work'.²⁴ In theory, the latter would imply that the UK would not check on being in work at all, and that no means testing would be applied either. Under EU law means testing is only applicable if one is not in 'genuine and effective work', and it is the latter definition by which the CJEU has set out the parameters of what can be asked in terms of proof of being in work. Yet, the precise intentions of the Government remain unclear. It has said it will introduce an online registration procedure,²⁵ based on identity and declaration of residence and whether one has a criminal record. The Government will then check whether this is confirmed by existing databases, particularly from the tax office HMRC and Department for Work and Pensions. This raises the question of what proof will be required of people who are not (sufficiently) in these databases. Will those people still be required to show proof of being in work or having sufficient resources? The list

²² http://europa.eu/rapid/press-release_IP-12-417_en.htm

²³ Home Office, EU Settlement Scheme: Statement of Intent, 21.06.2018. This will take the form of an amendment of the Immigration Rules; see discussion below.

²⁴ HM Government, 'Technical Note. Citizens' rights - Administrative procedures in the UK', 7 November 2017, paragraph 11; at <https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk>; and Home Office, EU Settlement Scheme: Statement of Intent, 21.06.2018.

²⁵ HM Government, 'Technical Note. Citizens' rights - Administrative procedures in the UK', 7 November 2017, paragraph 6; at <https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk>

of acceptable documents of proof listed in the Statement of Intent²⁶ suggests that some people might be able to provide sufficient proof even if not in work or without sufficient resources, but the insistence that the evidence should neatly cover the continuity of residence during five years might prove difficult for those not in work. Moreover, this is so far only a statement of intent; and even if turned into law, the conditions might be easily amenable.

The basic finding remains that the Withdrawal Agreement still leaves the UK the nearly full discretion of the Citizens' Directive; so its requirements can go from asking a single document showing residence prior to Brexit which would allow nearly EU citizens to obtain settled status, to a burdensome process similar to its permanent residence registration system, which could lead to over 28% getting a letter to leave the country. Moreover, as I will show below, the Withdrawal Agreement does not provide guarantees that these criteria would be set out in primary legislation, thus making these criteria open to adjustments by executive action and EU citizens at risk of a gradual undermining of their status.

So why has the EU not made more effort to ensure the UK's political statements would be turned into legal commitments and avoid so many of its citizens risk deportation?

The European Commission has taken a formalistic approach arguing that EU citizens retain the same entitlements as under the EU Citizens' Directive, and thus pretending they are not at risk. However, that fails to acknowledge that these criteria cannot operate in the same way when they are applied in a country that never had registration and will introduce a constitutive registration system when it is no longer a Member of the EU. The refusal to accept this reasoning seems to be inspired by the fear that writing more details into the Withdrawal Agreement on a simpler registration system in the UK would put the other 27 Member States under pressure to apply a similar procedure, and thus *de facto* undermine the discretion allowed by the Citizens' Directive. However, the Withdrawal Agreement is an international treaty. It can set particular provisions for the UK (as, in fact, it does on other issues),²⁷ and this approach would be justified by the fact that the legal situation in a country out of the EU is not identical to that of countries in the EU. Hence, legally this can be done within the Withdrawal Agreement without imposing new requirements on the other 27 Member States. Nevertheless, if there is political reluctance by the remaining Member States, an alternative solution is to set out the UK's political statements regarding a simple registration based merely on residence, ID and criminality check into a Protocol attached to the Withdrawal Agreement. Such a Protocol would be a binding commitment by the UK on how it will implement the Withdrawal Agreement.²⁸

²⁶ Annex A to the Statement of Intent.

²⁷ E.g. Article 4 Withdrawal Agreement addresses particularly how the UK should implement the Withdrawal Agreement; Article 151 makes the preliminary reference procedure applicable to the UK, while Article 152 requires the creation of independent authority to monitor implementation of the Withdrawal Agreement only in the UK.

²⁸ For a detailed proposal on what such a Protocol could look like, see S. Smismans, 'Brexit and EU Citizens' Rights: A proposal for a Protocol', 12 June 2018, at <http://eulawanalysis.blogspot.com/2018/06/brexit-and-eu27-citizens-rights.html>.

Given that the Brexit withdrawal negotiations are based on the principle ‘nothing is agreed until everything is agreed’, such a revision of the Withdrawal Agreement or the inclusion of a Protocol specific for the UK is still possible. Whether this is politically achievable depends on several factors. It is not clear to what extent the formalistic approach of the European Commission was really inspired by substantive resistance from the Member States. Although the European Council and the Council have defined guidelines for the Brexit negotiation, the process has been strongly driven by the European Commission, within a very short time frame, leaving the Member States little time to get through the nitty-gritty complex citizens’ rights provisions of the Withdrawal Agreement.²⁹ Whether the UK is ready to agree to such a revision of the Withdrawal Agreement or to signing up to a separate Protocol depends on bargaining power in the negotiations. From its perspective, it comes down to setting out legally a commitment it had already made politically, but it might be very reluctant to do so at an international level. Yet, the UK government might be willing to do so if the EU offered freedom of movement throughout the entire EU for the British already residing in Europe, which remains the biggest weakness of the Withdrawal Agreement for this group. The European Parliament might be the ultimate dealmaker on this issue. It has presented itself as the big defender of citizens’ rights in the Brexit negotiations and has repeatedly stated it will not approve the Withdrawal Agreement if it has no guarantees on their protection. Yet, to defend EU citizens properly it has to realise that the key issue is not whether the Withdrawal Agreement copies all rights of the citizens’ Directive, including the right of residence for a third country spouse, but whether it provides procedural guarantees on the registration system that take into account the particular challenges of the UK post-Brexit.

THE PROCEDURAL FLAW OF THE WITHDRAWAL AGREEMENT

How to ensure direct effect: from Joint Report to Withdrawal Agreement

There is no doubt that the Joint Report agreed by the EU and the UK in December 2017 is aimed at giving citizens’ rights strong protection. The key relevant provisions of the Joint Report read as follows:

34. Both Parties agree that the Withdrawal Agreement should provide for the legal effects of the citizens' rights Part both in the UK and in the Union. UK domestic legislation should also be enacted to this effect.

35. The provision in the Agreement should enable citizens to rely directly on their rights as set out in the citizens' rights Part of the Agreement and should specify that inconsistent or incompatible rules and provisions will be disapplied.

²⁹ E.g. the European Commission published its draft Withdrawal Agreement on 28 February 2018, after which it negotiated with the UK, and presented an UK-EU draft Withdrawal Agreement on 19 March. The Member States had then just a bit more than a week to consider they could agree with that at the European Council meeting of 22 and 23 March.

36. The UK Government will bring forward a Bill, the Withdrawal Agreement & Implementation Bill, specifically to implement the Agreement. This Bill will make express reference to the Agreement and will fully incorporate the citizens' rights Part into UK law. Once this Bill has been adopted, the provisions of the citizens' rights Part will have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future. The Withdrawal Agreement will be binding upon the institutions of the Union and on its Member States from its entry into force pursuant to Article 216(2) TFEU.

The Joint Report thus clearly commits to ensuring the continuing 'supranational' character of citizens' rights by requiring direct effect and primacy of these provisions. Paragraph 36 provides further detail on how the UK has to implement the protection provided by the Withdrawal Agreement. More precisely, it clearly states this has to be done via a Withdrawal Agreement and Implementation Bill ().

Paragraph 36 might seem ambiguous at first sight.³⁰ On the one hand, it requires that the Implementation Bill 'will fully incorporate the citizens' rights Part into UK law'. This could be read as requiring that all citizens' rights provisions of the Withdrawal Agreement need to be copied into the Implementation Bill (in order to have effect).

On the other hand, the UK and EU agreed that the Withdrawal Agreement will provide for direct effect and supremacy of these provisions (para.35). The UK Government had initially made confusing statements on how it would ensure direct effect. The Secretary of State for Exiting the European Union, David Davis, suggested when referring to 'direct effect, if you like', that the mere incorporation of Withdrawal Agreement citizens' rights provisions in national primary legislation would as such guarantee direct effect.³¹ However, that would not allow citizens to rely directly on the Withdrawal Agreement in the case of contradiction between national law and the Agreement. To ensure direct effect one needs a provision in the Implementation Bill that recognises the supranational features of citizens' rights, in a similar way as the European Communities Act recognises the supranational features of European law.

³⁰ See M. Elliot, 'The Brexit Agreement and citizens' rights. Can Parliament deliver what the Government has promised?', 11 December 2017, at <https://publiclawforeveryone.com/2017/12/11/the-brexite-agreement-and-citizens-rights-can-parliament-deliver-what-the-government-has-promised/>

³¹ This statement appeared to be mere covering up of the initial UK negotiation position that they would not accept direct effect, as stated in paragraph 3 of the 'Technical Note: Implementing the Withdrawal Agreement' (13 July 2017): "It would be both inappropriate and unnecessary for the agreement to require the UK to bring the EU concept of direct effect into its domestic law. The same substantive result can be achieved if the Withdrawal Agreement requires the UK to give citizens specified rights, and the UK enacts domestic legislation whose effect is to bestow those rights. Not only will EU citizens be able to enforce those rights through the UK's domestic legal system, but the UK's compliance with its international obligations can also be enforced using whatever mechanisms the agreement includes for the resolution of disputes"; at <https://www.gov.uk/government/publications/technical-note-on-implementing-the-withdrawal-agreement>

The question is then whether, if direct effect is guaranteed via a specific provision in primary legislation, it is still required or useful to copy the citizens' rights provisions fully into primary legislation? From a EU law perspective there is no requirement in that sense. About half of the EU Member States, for instance, transpose EU Directives mainly via secondary rather than primary legislation,³² which does not impede that some provisions of these Directives have direct effect. However, we are not dealing here with the implementation of a Directive when a country is part of the EU, but the implementation of an international agreement in a country no longer part of the EU. I will argue below that in such a context it is important to ensure both direct effect and the incorporation of citizens rights in primary legislation in order to protect EU citizens properly. It is not a question of either a direct effect provision, or the full copying of citizens' rights into primary legislation. The two guarantees can be combined.

However, compared to the Joint Report, the Withdrawal Agreement appears more synoptic in its wording on how the UK should ensure direct effect and proper implementation of citizens' rights. The Joint Report expressed political agreement but had to be translated into a proper legal text. This was done at the initiative of the European Commission and subsequently amended in negotiation with the UK. On 19 March 2018, the UK and EU presented their joint draft text of the Withdrawal Agreement. Much of this was coloured in green, indicating agreement between the two parties, although even for those "green" provisions the EU sticks to the principle that 'nothing is agreed until everything is agreed'.

Article 4 (1) of the Withdrawal Agreement (coloured green) states the following:

"1. Where this Agreement provides for the application of Union law in the United Kingdom, it shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States.

In particular, Union citizens and United Kingdom nationals shall be able to rely directly on the provisions contained or referred to in Part Two. Any provisions inconsistent or incompatible with that Part shall be disapplied."

This clearly confirms the principle of direct effect and supremacy in relation to citizens' rights,³³ as was promised in paragraph 35 of the Joint Report.

While Article 4(1) Withdrawal Agreement is coloured green, and the principle of direct effect and supremacy of citizens' rights is thus agreed, the way in which

³² European Parliament, Directorate General Internal Policies of the Union, 'Comparative Study of Transposition of EC law in the Member States', June 2007, PE 378.294.

³³ The first paragraph of the Article also raises the question of whether provisions in the Withdrawal Agreement other than those of the citizens' rights part can have direct effect. This would follow from the broad requirement that the UK has to give the same legal effect to Union law referred to in the Withdrawal Agreement as it produces within the Union. At the same time, it is only in relation to citizens' rights that the Withdrawal Agreement clearly wanted to avoid any doubt on the matter.

the UK is supposed to implement this appears far less settled. Article 4(2) Withdrawal Agreement is rudimentary in this regard:

“The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities, through domestic primary legislation.”

Moreover, this paragraph has not been coloured green, indicating there is no agreement on how the UK should guarantee the ‘supranational character’ of citizens’ rights. Compared to the commitment of the Joint Report, the Withdrawal Agreement shows three particular weaknesses relating to how the UK should implement citizens’ rights.

Firstly, the Joint Report provided a strong definition of how supremacy should be ensured, requiring that only express repeal of the Implementation Bill (and thus also its provisions on direct effect and supremacy) would allow for national law to override the Withdrawal Agreement provisions on citizens’ rights. Such express repeal would blow up the entire Brexit Withdrawal Agreement, so the UK would have a strong incentive not to undermine citizens’ rights. There is doubt, though, on whether UK public law allows such a strong legislative entrenchment.³⁴ The experience of the European Communities Act, and case law such as *Jackson*,³⁵ *Thoburn*,³⁶ *HS2*³⁷ and *Miller*³⁸ suggest that the Implementation Bill could be made highly, but not necessarily absolutely, resistant to implied repeal. However, much depends on the precise wording of the Implementation Bill in this regard (and, the political feasibility of living up to such high level of legislative entrenchment promised in the Joint Report is questionable, to say the least). As Mark Elliot argues,³⁹ in the end, even if Parliament commits to such strong terms in the Implementation Bill, one will have to wait to see how the judiciary sets the final terms of this.

Given the uncertainty about the extent to which legislative entrenchment is possible under the UK Constitution, one may understand that the Withdrawal Agreement (which is a legally binding text) is less explicit on this than the Joint Report (which is a mere political agreement). The Withdrawal Agreement does not explicitly mention that only express repeal could bring an end to the supremacy of these norms. Although the requirement of Article 4(1) that ‘any provisions inconsistent or incompatible with that Part shall be disapplied’ can be considered as an unconditional statement of the supremacy principle, the generic way in which its implementation is defined in Article 4(2) is likely to give more leeway to the British legislator to provide a definition that would impose fewer limits on its future action than one that only allows express repeal. The Withdrawal Agreement’s more ‘neutral’ wording seems more in line with the

³⁴ See M. Elliott, see above footnote 23; and, more positively, M. Gordon, ‘Parliamentary Sovereignty and the Implementation of the EU Withdrawal Agreement’ (17 January 2018) <https://ukconstitutionallaw.org/2018/01/17/mike-gordon-parliamentary-sovereignty-and-the-implementation-of-the-eu-withdrawal-agreement-part-i/>

³⁵ R. (Jackson) v. Attorney General [2005] UKHL 56.

³⁶ *Thoburn v Sunderland City Council* [2003] QB 151 (Div Ct)

³⁷ R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3

³⁸ R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5

³⁹ *Ibid.*

EU's constitutional dialogue tradition with its Member States. That being said, for EU citizens it means less protection than what the Joint Report proposed.

Secondly, the Withdrawal Agreement does not refer to the Implementation Bill, but simply requires for the citizens' rights status to be ensured via primary legislation. This could mean that these rights could be dealt with in more than one act of primary legislation, and that they could, for instance, be partially covered in a separate piece of primary legislation dealing with immigration law. This would detract from the particular status of these rights as guaranteed by the Withdrawal Agreement, and make it more likely that they are interpreted in the light of provisions and principles of immigration law.

Thirdly, and most importantly, the text does not refer to the full incorporation of the citizens' rights provisions in the Implementation Bill, or even primary legislation. Article 4(2) Withdrawal Agreement requires primary legislation to ensure direct effect and supremacy of the citizens' rights provisions. However, this could be met by setting out in primary legislation a specific provision to that effect, in a similar way as the European Communities Act does today. Having done that, the draft version of the Withdrawal Agreement does not prevent the UK from implementing the citizens' part of the Withdrawal Agreement via secondary legislation. The principles of direct effect and supremacy could be set out in the Implementation Bill, probably together with provisions that require future coordination with the EU, such as on social security entitlements built up in different countries. However, the Government might be inclined to set out much of the citizens' rights provisions, such as the criteria for registration, in secondary legislation.

The Withdrawal Agreement appears thus built on the assumption that by transferring the concept of direct effect into an international agreement applicable to a non-EU country, EU citizens would be properly protected as if they were within the EU. Unfortunately, I will argue in the following section that this fails to take into account the particular challenges of implementation in a non-EU country, as well as the substantive flaw of the Withdrawal Agreement.

Why citizens' rights need to be set out in primary legislation (despite the direct effect of the Withdrawal Agreement)

The added value of having all provisions in one text.

The Withdrawal Agreement is a complex text, with multiple references to other EU texts, such as the Citizens' Directive and the Social Security Coordination Regulations. Although it provides individual rights, it is written as directed to the UK and the 27 Member States. Some of these provisions also leave a level of discretion as to how the UK and EU27 will achieve the objectives set.

Implementation by national administrations and courts will be strongly facilitated if the rights set out in the Withdrawal Agreement are copied in the Implementation Bill, together with the transposition measures that allow some discretion for the UK. Respect of the Withdrawal Agreement can then most

often be assured simply by relying on direct effect establishing a contradiction between the Implementation Bill and the Agreement rather than having to rely on direct effect in relation to a multitude of (secondary legislative) acts. In the absence of a Implementation Bill that incorporates the rights set out in the Withdrawal Agreement as comprehensively as possible, EU citizens would, for some aspects, have to rely directly on the Withdrawal Agreement (which then refers to other EU law), while for other aspects potentially on several acts of primary legislation (e.g. on the Implementation Bill for issues of future social security coordination with the EU; or on a new immigration bill for issues concerning registration), and most likely, on many acts of secondary legislation. One can avoid such complexity by comprehensively setting out the citizens' rights provisions within the Implementation Bill. The risk that courts, but in particular national administrations and private actors such as banks or landlords, fail to identify the proper rules applicable to EU citizens is thus reduced. At the same time, as I will argue in more detail below, having all provisions in one single text facilitates monitoring by the EU on whether the UK is living up to its promises.

The added value of having the citizens' rights provisions set out in detail in an act of primary legislation

What is the added value of setting out in detail citizens' rights in primary legislation if direct effect is already ensured via a specific provision in such legislation?

Firstly, to put the Withdrawal Agreement into practice, further implementation measures will need to be taken, which go beyond ensuring direct effect, or even beyond literally copying Agreement provisions into primary legislation. For instance, as explained above, the Withdrawal Agreement leaves considerable discretion regarding the registration procedure and the requirements to obtain permanent residence, such as being in work or having sufficient resources. The Government has promised not applying criteria such as comprehensive sickness insurance and 'genuine and effective work'. However, if these promises are not set out into primary legislation, simple ministerial intervention or changing administrative practice could substantially undermine the rights of EU citizens at any time. These implementation decisions will affect the most fundamental rights of residence, family life, healthcare etc. of thousands of people who have already held these rights for years and decades. It could not be just left to the Government or a Minister to decide and amend these rights. They will need to be enshrined by Parliament into primary legislation.

It is true that secondary legislation in the UK is not entirely free from parliamentary scrutiny. There are two main scrutiny procedures for such secondary legislation.⁴⁰ In the negative procedure, the statutory instrument would be made and come into force without parliamentary action but could be annulled, on a motion of either House. In the affirmative procedure, the statutory instrument would be debated (usually by a delegated legislation committee in

⁴⁰ R. Kelly, 'The European Union (Withdrawal) Bill: scrutiny of secondary legislation (Schedule 7)', House of Commons Library Briefing Paper Number 08172, 7 December 2017, p.8.

the House of Commons, and in the Chamber in the House of Lords) and could only be made after being approved by both Houses of Parliament. However, such scrutiny does not give Parliament any opportunity to amend the regulations brought forward by the Government, which means that in most cases Parliament will have no impact on such secondary legislation. It requires finding a majority in Parliament that so radically disagrees with the measure that it prefers its annulment to going ahead, which is highly unlikely as Government will feel comfortable about its majority in Parliament. In practice, blocking or even debating Regulations almost never happens.⁴¹ Hence, it is essential that the political commitments the UK has already made about the implementation of the Withdrawal Agreement are set out in primary legislation. Without such legal entrenchment the promises about a simple registration system based on residence rather than being in work could be quickly or gradually undermined by administrative action at the expense of many people.

Secondly, enshrining norms into primary legislation ensures stability and visibility, and facilitates enforcement and monitoring. This makes it easier to show if administrative practice breaches primary legislation than having to rely on international norms. At the same time it is easier to monitor the respect of key legislative acts against international norms than having to monitor respect of the latter by a continuous screening of ever changing norms of secondary legislation and administrative practice. UK immigration law in particular is infamous for continuing ministerial intervention and amendments,⁴² creating uncertainty for those involved. From this perspective it is not only useful to set out in primary legislation the implementation choices over which the UK has discretion, but equally to incorporate fully the citizens' rights provisions of the Withdrawal Agreement. This is particularly the case as there are some limitations to, and doubts about the 'supranational features' of the Withdrawal Agreement. The combination 'secondary legislation + direct effect' might work when a country is part of the EU and full judicial control under EU law is guaranteed. However, that is no longer the case.

After Brexit, EU citizens will no longer profit from the infringement procedure. Instead, Article 152 of the Withdrawal Agreement requires the UK to set up an 'Independent Authority' to monitor the implementation of the Agreement. However, such arrangement by which the UK is asked to monitor itself is far from the supranational enforcement that is guaranteed via the infringement procedure.⁴³

Non-respect of the Withdrawal Agreement can also be dealt with in the arbitration mechanism set up by it. Article 162 of the draft Withdrawal Agreement even provides that failure of arbitration could lead to one of the

⁴¹ Ibid.

⁴² Between 2012 and 2018 alone, UK immigration rules have been changed 57 times in secondary legislation. <https://www.gov.uk/government/collections/archive-immigration-rules>

⁴³ I have argued elsewhere that the only way to ensure a properly independent and functioning monitoring authority is by establishing a UK-EU Joint Authority. S. Smismans, 'EU citizens in the UK are in a particularly weak position and need an independent authority to monitor their rights', LSE Brexit Blog, 21st April 2018, <http://blogs.lse.ac.uk/politicsandpolicy/eu-citizens-in-the-uk-are-in-a-particularly-weak-position-and-need-an-independent-authority-to-monitor-their-rights/>

parties taking the issue to the CJEU for final decision (although this part of the draft Withdrawal Agreement remains under discussion). However, such arbitration, even if ultimately leading to a CJEU decision, starts as a more political process, and cannot be triggered by individual action. It remains to be seen to what extent such political monitoring can keep track of ever changing norms of secondary legislation and administrative practice. Instead, the UK will be very much in the spotlight of the EU when it adopts its Implementation Bill. By setting out citizens' rights provisions in detail in the Implementation Bill, the EU could monitor respect of the Withdrawal Agreement before the limelight is dimming.

In the absence of strong monitoring mechanisms, EU citizens will have to rely on direct effect and court action to test the validity of national norms against the Withdrawal Agreement. This can become highly challenging if these norms are continuously changing in secondary legislation and administrative practice. The problem is further exacerbated by the limits to and doubts about the effectiveness of the 'supranational character' of citizens' rights of the Withdrawal Agreement.

As mentioned above, there is still some ambiguity on how the UK will ensure direct effect, and to what extent the primacy of citizens' rights can be entrenched. Moreover, in addition to legal entrenchment, the issue is also one of practical implementation of supranational principles in daily judicial practice when the UK is no longer a Member of the EU. The supranational features of EU law (such as direct effect, supremacy, and option to refer to the CJEU) have worked to the extent that the judiciary considers itself to be part of the EU judicial order. As the UK will have left the EU, it remains to be seen to what extent the judiciary feels committed to relying on these principles and tools, applicable just for citizens' rights under the Withdrawal Agreement. There might be a reluctance to apply direct effect; at least until the Supreme Court has clearly spoken out on it. Even more so one can question whether judges will make any use of the potential to refer to the CJEU, for which they have considerable discretion.⁴⁴ UK courts have traditionally already been more reluctant than judges in many other EU countries to make use of the preliminary reference procedure.⁴⁵ Brexit will only increase that reluctance.

There are also doubts to what extent citizens will still have the possibility to claim *Francovich* damages⁴⁶ (currently also applicable in case of failure to comply with EU law by a national court in final appeal, *Köbler*).⁴⁷

⁴⁴ On the behavioral factors influencing the willingness of national judges to refer, see M. Broberg and N. Fenger, *Preliminary references to the European Court of Justice*, (Oxford University Press 2014, 2nd ed) p.49.

⁴⁵ T. Tridimas, 'Knocking on heaven's door: fragmentation, efficiency and defiance in the preliminary reference procedure', *Common Market Law Review* (2003), p. 9 at p. 38.

⁴⁶ The Withdrawal Agreement is not explicit on this. Article 4(1) of the Agreement states that where the Agreement provides for the application of Union law, it should produce 'the same legal effects as those which it produces within the Union and its Member States'. 'The same legal effects' would imply the opportunity to claim *Francovich* damages. However, aspects of the Withdrawal Agreement, such as Article 17(1) defining the constitutive registration system, are not Union law to which the Withdrawal Agreement refers, but new provisions set by the Agreement itself. It can be questioned whether 'same legal effects' can be extended to such provisions; which would make the entire Agreement Union law, which seems contradictory to the intention of Article 4(1).

⁴⁷ CJEU, Case C-224/01. Gerhard Köbler v Republic of Austria.

Hence, the more doubts that remain about the proper respect for the supranational character of citizens' rights, the more important it is to ensure these rights are also set out in primary legislation. This will not protect against future legislative action, but it will at least protect against the potential gradual undermining of these rights via secondary legislation, while it allows the EU to monitor UK implementation when the Implementation Bill is in the spotlight, rather than having to look at a fluidity of norms set out in a context where 'supranational supervision' can no longer be what it once was.

It is worth noting in this regard that the EU Citizens' Directive has been implemented in the UK by way of Regulations, which is secondary legislation. However, it would be wrong to deduce that it would therefore be right to also implement the citizens' rights provisions of the Withdrawal Agreement via Regulations. A Directive is embedded in the protection of the EU's supranational judicial system. If national law does not respect the Directive, the latter can be relied upon directly. Doubts on its interpretation can be settled via preliminary rulings of the CJEU. Failure of a Member State to comply can lead to enforcement action and financial sanctioning by the CJEU, or damages via the national court. As just analysed, this comprehensive system is not available for non-compliance with the citizens' rights provisions of the Withdrawal Agreement. The 'supranational character' of its citizens' rights is limited, and object of considerable uncertainty regarding its application. In the absence of proper supranational supervision, EU citizens need a dual guarantee; direct effect on the one hand, and legislative protection against administrative undermining of their rights on the other hand.

The added value of having citizens' rights set out in the Implementation Bill and not in another act of primary legislation.

Setting out citizens' rights in the Implementation Bill rather than any other act of primary legislation strengthens the visibility of the specific status of these rights as protected by the Withdrawal Agreement. This would avoid the risk that some of the rights, such as those requiring future coordination with the EU (e.g. on social security entitlements) would be set out in the Implementation Bill, while others, such as those related to the registration procedure, would be set out in immigration law. Besides the issue of decreased clarity as rights would be dispersed in different texts, the inclusion of EU citizens' rights in immigration law would increasingly push interpretation of these rights into the general approach of UK immigration law and further away from EU law and the guarantees provided by the Withdrawal Agreement.

One can conclude that there are good reasons to combine direct effect with a requirement to set out in detail citizens' rights in the Implementation Bill. Unfortunately, the Withdrawal Agreement is only explicitly requiring the first. In the absence of the latter, EU citizens remain in a weak spot, given the limitations to the 'supranational character' of protection when a country is no longer a member of the EU. The EU should therefore abandon its complacent stance in the negotiations and realise that just copying direct effect is not

sufficient to face the unique implementation challenges in the UK. The Withdrawal Agreement should require that its citizens' rights provisions, as well as specific commitments by the UK regarding the registration system set out in a Protocol, will need to be copied into primary legislation.

Without such a requirement, the UK is likely to implement much of the citizens' rights provisions via secondary legislation, as I will explain in the next section.

THE UK'S LEGAL FRAMEWORK TO IMPLEMENT THE WITHDRAWAL AGREEMENT AND CITIZENS' RIGHTS

The relationship between Withdrawal Act and Implementation Bill

While the UK has been negotiating with the EU over the terms of the Withdrawal Agreement, it has adopted the Withdrawal Act to repeal the European Communities Act and decide the rules on how it will deal with the legacy of the *acquis communautaire*. However, the Act does not deal with the specific category of citizens' rights protected by the Withdrawal Agreement. On the one hand, this makes sense as the Withdrawal Agreement still has to be adopted. On the other hand, it is also odd since the Act seems to be aimed at a comprehensive definition of how EU law will be retained or not after Brexit. The specific *sui generis* nature of citizens' rights is not accounted for. They constitute a sort of 'super-retained EU law' as they also retain part of their supranational nature. Unlike any norm of EU-derived or retained law under the Withdrawal Act, the citizens' rights provisions should, according to the Withdrawal Agreement, have direct effect and supremacy, and profit from the temporary protection of the CJEU via preliminary references, as well as from the international arbitration mechanism set up in the Withdrawal Agreement.

Since the Withdrawal Act does not deal with citizens' rights, the commitments made in the Withdrawal Agreement regarding their special status will need to be translated into national law by way of the Withdrawal Agreement and Implementation Bill (Implementation Bill).

To understand the role of the Implementation Bill it is useful to remind here first the difference between approval and implementation of an international treaty under UK law. The Government has announced it will present the Withdrawal Agreement for approval by way of a Resolution to be adopted in the two Houses.⁴⁸ The Supreme Court noted in *Miller*⁴⁹ in January 2017 that such a resolution does not have any legislative effect, but is nevertheless "an important political act".⁵⁰ In addition to this vote, the Constitutional Reform and Governance Act 2010 allows for the House of Commons to block ratification of an international agreement. If the Houses adopt the Resolution to approve the Withdrawal Agreement and ratification is not blocked, the Agreement will then

⁴⁸ Procedures for the Approval and Implementation of EU Exit Agreements: Written statement - HCWS342, 13 December 2017.

⁴⁹ R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

⁵⁰ J. Simson Caird, 'Parliament and the Withdrawal Agreement: The "Meaningful Vote"', U.K. Const. L. Blog (9th Feb. 2018) (available at <https://ukconstitutionallaw.org/>)

need to be *implemented* by an Act of Parliament. In the UK's dualist system such an Act is required for international norms to come into force into national law. The Government has announced that it will introduce the Implementation Bill to that effect.⁵¹

At the stage of writing this article, the Government has made not public any indications on what the Implementation Bill will look like. This leaves many questions on how citizens' rights will be dealt with in the Bill; more particularly:

- 1) how will direct effect be defined?
- 2) to what extent will the citizens' rights provisions of the Withdrawal Agreement be copied into the Bill?
- 3) To what extent will implementation choices for which the Withdrawal Agreement leaves discretion be settled by the Bill, e.g. in relation to the substantive requirements to obtain settled status?
- 4) To what extent will the Bill provide a delegation to the Government to implement the Withdrawal Agreement via secondary legislation and administrative action?

As analysed above, the Withdrawal Agreement is only explicit regarding the first of these issues, namely the requirement to set out direct effect into primary legislation (and still on this issue there is doubt on whether the Bill will and can live up to the promise of 'express repeal' set out in the Joint Report). At the same time, whether provisions will be copied into the Bill, whether substantive implementation choices will be set out by it, and which delegation to Government is provided, all are issues which can profoundly affect the legal status of EU citizens.

Unfortunately, while we still do not know what the Bill will look like, two initiatives of the Government suggest it is strongly inclined to deal with EU citizens' rights extensively via secondary legislation rather than safeguarding these rights in the Implementation Bill. Firstly, the Government has tried in the Withdrawal Act to give itself powers to implement the Withdrawal Agreement, rather than leaving such implementation to Parliament. Secondly, the Government intends to pre-empt the legislative space by adopting 'implementation measures' of the Withdrawal Agreement even prior to the Agreement being adopted.

The Withdrawal Act: defining the future role of Parliament in implementing the Withdrawal Agreement

The Withdrawal Act does not deal with citizens' rights directly, but it does so indirectly by defining the respective role of Government and Parliament in the implementation of the Withdrawal Agreement. When the Government introduced the Withdrawal Act in Parliament in July 2017 it provided sweeping powers for the Government to implement the Withdrawal Agreement.

Article 9(1) stated:

⁵¹ Procedures for the Approval and Implementation of EU Exit Agreements: Written statement - HCWS342, 13 December 2017.

A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day.⁵²

Such powers would be extensive as, according to Article 9(2) ‘regulations under this section may make any provision that could be made by an Act of Parliament’.⁵³ The Withdrawal Act does set some limits on their use. Most importantly, these powers cannot be used after exit day, and the Act defines some matters in which they cannot be used. Such government action would, in theory, also not entirely avoid parliamentary scrutiny, as such secondary legislation would be subject to either the positive or negative scrutiny procedure. However, as established above, these scrutiny procedures hardly ever lead to Parliament discussing or blocking secondary legislation.

Not surprisingly, Article 9 was hotly debated in Parliament. An amendment was introduced (at the initiative of Dominic Grieve MP) which made the powers to implement the Withdrawal Agreement via regulations

“subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union.”⁵⁴

The amendment was not born out of a concern with citizens’ rights. Rather, it was seen as a way for Parliament to get a foot in the door on the decision and direction of Brexit. The Government has long been reluctant to give Parliament a definitive say on Brexit. The Grieve amendment does set some legally binding commitment on this issue, but its impact in terms of allowing Parliament to shape the direction of Brexit is likely to be limited. The power given to Parliament is to approve the Withdrawal Agreement; but it does not afford it a role in the negotiations. Its potential impact on the Government negotiation position by threatening non-approval is also likely to be limited since, due to the time table set by the Article 50 TEU procedure, non-approval would probably lead to the UK falling into the legal limbo of a no deal Brexit.

Yet, while the Grieve amendment may have little impact on the direction of Brexit, it has an important consequence in defining the role of Parliament in the *implementation* of the Withdrawal Agreement. The executive powers provided in Article 9 can only be used after Parliament has approved the Withdrawal Agreement by statute. This means the political approval via Resolution is not sufficient to trigger these powers, and the Government will only be able to act on this basis after adoption of the Implementation Bill. This gives Parliament the first say regarding the implementation of the Withdrawal Agreement.

⁵² The European Union (Withdrawal) Bill (HC Bill 5) as introduced, 13.07.2017, available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_1.htm

⁵³ The initial version of the Withdrawal Act as introduced even gave the power for such Regulation to amend the Withdrawal Act itself.

⁵⁴ European Union (Withdrawal) Bill (HLBill 79), as introduced in House of Lords, 18.01.2018, at https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/lbill_2017-20190079_en_1.htm

Of course, Parliament's room for manoeuvre in implementation is constrained by the terms of the Withdrawal Agreement. Yet, particularly on citizens' rights, the Withdrawal Agreement leaves considerable discretion to the UK (and remaining Member States) regarding different options of implementation, for instance, in relation to the criteria and burden of proof to obtain settled status. Thanks to the Grieve amendment, these important implementation choices can be made by Parliament, rather than just be set out into secondary legislation.

The question is whether Parliament will take up this role. Obviously, the Bill will be introduced by the Government. Given its clear preference to hold wide powers to implement the Withdrawal Agreement, it is still likely, despite the Grieve amendment, it will prefer to implement citizens' rights mainly via secondary legislation. It can attempt to do this in two ways. It may introduce an Implementation Bill that provides little detail on citizens' rights, while at the same time preparing Regulations with further implementation measures, which will be presented as secondary legislation immediately after adoption of the Bill on the basis of Article 9 of the Withdrawal Act. Alternatively, it simply can introduce an Implementation Bill with little detail but which includes a broad delegation for the Government to take further implementation measures. The latter strategy is more likely than the former because such delegation extends beyond exit day, unlike Article 9 powers.⁵⁵

In both cases, Parliament has the chance to disagree with the Government's 'minimal approach' to the Implementation Bill and can insist, via amendments, that the Bill itself sets out more detail on citizens' rights. However, it remains to be seen to what extent the Parliament will take up this role. As explained above, the Withdrawal Agreement does not require Parliament to do anything else than ensuring direct effect. Moreover, while the debate on the Withdrawal Act shows that Parliament has been keen to carve itself a role in the decision and direction of Brexit, it is not obvious it is particularly preoccupied with protecting the status of EU citizens. Finally, and most problematically, I will show in the following section that the Government is already attempting to pre-empt the regulatory space on EU citizens' rights, even prior to debating the Implementation Bill.

Pre-empting the legislative space via secondary legislation

As argued above, the UK intends to set up a constitutive registration system through which all EU citizens residing in the UK before the end of the transition period will have to apply to obtain settled status. The Government plans first to set up a 'voluntary registration' system, prior to exit day⁵⁶ and subsequently an obligatory registration procedure, meaning that all EU citizens will need to be registered by the end of the 'grace period' (which lasts six months after the end

⁵⁵ From this perspective, the Grieve amendment has largely reduced the usefulness of Article 9 powers, although they remain available (prior to exit) for as far as the Implementation Bill does not provide clear delegation powers.

⁵⁶ HM Government, "Technical Note. Citizens' rights - Administrative procedures in the UK", 7 November 2017, paragraph 4; at <https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk>

of the transition period).⁵⁷ The introduction of a voluntary registration prior to Brexit is remarkable as such registration is aimed at conferring a status that still has to be defined in the Withdrawal Agreement. The intention is to detach the initial registration from the coming into force of the full legal status it will eventually confer. People applying during the voluntary registration period will first obtain 'indefinite leave to remain', which is a status under immigration law. After exit and the Withdrawal Agreement coming into force, the Implementation Bill would need to ensure that these people also hold the extra rights that the Withdrawal Agreement provides. Interestingly enough, those applying after exit are still said to obtain 'indefinite leave to remain', with some extra add-ons provided by the Withdrawal Agreement. So the Statement of Intent makes clear that EU citizens will primarily be provided with an existing status of immigration law. During the transition period EU citizens will also still be able to assert their free movement rights, even if they fail the registration procedure.⁵⁸ A person refused status under the scheme before the end of transition can still make a new application until the end of the grace period.⁵⁹ However, this does not mean that (voluntary) registration is without risk. Although the proposed registration system does not check all conditions required to qualify under free movement, the procedure may be sufficient to ascertain that one does not. So people who wrongly assumed being legally in the UK under EU law, or who are, but failed to prove so, might still be asked to leave within the limits provided by EU law.

By introducing a registration system prior to the adoption of the Withdrawal Agreement and by assigning EU citizens a status of immigration law, the Government appears clearly intent on bypassing the constraints of the Withdrawal Act in terms of parliamentary scrutiny. From the start of the Brexit negotiations, the Government has been keen to stress that the new status would be one of UK immigration law, insisting that the concept of 'settled status' familiar to immigration law would be used, rather than the EU law concept of 'permanent residence'.⁶⁰ This leaves considerable scope to bypass Parliament as immigration law relies widely on executive action, and as far as Parliamentary involvement is concerned it often relies simply on the negative resolution procedure, which does not require express approval from Parliament. Immigration law is therefore typically criticised for side-lining Parliament as substantive changes may often not be debated, considered or scrutinised by Parliament.⁶¹ The Statement of Intent is not explicit on whether the negative or positive scrutiny procedure will be used, but there is no doubt that it intends to

⁵⁷ The transition period runs from first day after exit day (29 March 2019) until 31 December 2020, and ensures the full application of the EU law in the UK, including all those arriving prior to that date can still apply residence status. In the subsequent six months there is an additional 'grace period', during which people who arrived prior to 31 December 2020 can still register.

⁵⁸ Home Office, EU Settlement Scheme: Statement of Intent, 21.06.2018, p.22, indent 5.20.

⁵⁹ Ibid, p.22, indent 5.18.

⁶⁰ The Statement of Intent repeatedly uses the concept 'indefinite leave to remain' interchangeably with 'settled status'. This is highly confusing because indefinite leave to remain is a well established concept of immigration law, which is an inferior status to the rights set out in the Withdrawal Agreement, which the Statement of Intent proclaims to respect.

⁶¹ Joint Council for the Welfare of Immigrants, 'How Immigration rules evade democracy', 22 December 2010, <http://www.jcwi.org.uk/2010/12/22/how-immigration-rules-evade-democracy>

introduce the settled status scheme via secondary legislation under Immigration Rules prior to the adoption of the Implementation Bill.

This leaves several unanswered questions about the extent to which citizens' rights will be protected by the Implementation Bill. As argued above, the Bill needs to include a provision on direct effect. The Statement of Intent also clarifies that the creation of the independent authority and the creation of a right to appeal for the scheme will have to be set out in primary legislation,⁶² which could be the Implementation Bill. The Bill will also need to include a mechanism that ensures that all those who successfully apply (prior or post exit) profit from all the rights provided in the Withdrawal Agreement and not simply the inferior status of indefinite leave to remain. However, the Statement of Intent is not explicit about this and refuses to refer to a status specific to EU citizens.⁶³ The Government's intention is clearly to define the EU citizens' status as indefinite leave to remain under immigration law via secondary legislation. Moreover, the procedure and conditions to obtain that status will be set out in secondary legislation. This makes their status very vulnerable to future changes by secondary legislation, as well as to interpretation via immigration law concepts and case law.

It is questionable whether the Government's intention to adopt the settled status scheme via Immigration Rules respects the requirement of Article 9 of the Withdrawal Act that implementation of the Withdrawal Agreement via secondary legislation is only possible after the Implementation Bill has been adopted. From an immigration law perspective it is indeed possible to introduce the settled status scheme via secondary legislation. However, it is difficult to argue that this scheme, which defines profoundly the rights that EU citizens will hold and sets out fully the conditions under which they can obtain it, is *not* an implementation of the Withdrawal Agreement. Hence, from that perspective it is difficult to see how this respects the Withdrawal Act's requirement of Article 9 that implementation of the Withdrawal Act needs first to pass through an act of Parliament before secondary legislation can be adopted.

The Government is likely to 'legalise' its premature intervention by seeking its confirmation in the Implementation Bill. It will argue that the system is already (substantially) in place, and will propose a broad delegation of powers allowing it in the future to continue dealing with EU citizens' rights mainly via secondary legislation. By setting out the scheme under immigration law first and subsequently proposing a 'minimal' Implementation Bill, the Government thus pre-empts the regulatory space. The question is whether Parliament wants to re-enter that regulatory space. So far Parliament has not shown a particular concern for the protection of EU citizens' rights or the belief that there is a need for guarantees in primary legislation, and it might be happy simply to

⁶² Home Office, EU Settlement Scheme: Statement of Intent, 21.06.2018, p.6, indent 1.9 and p.22, indent 5.19.

⁶³ The Statement of Intent only states that the 'practical arrangement' of the scheme will, in the future, have to reflect in full the agreement on citizens' rights reached with the EU. Ibid. p.6, indent 1.8,

rubberstamp a solution the Government has already set up and wants to protract via secondary legislation.

As I have argued above, such a solution, in which much of the status of EU citizens is set out in secondary legislation would profoundly weaken their position. As the Windrush scandal has illustrated, being at the mercy of changing secondary legislation and implementation rules of UK immigration law is not a comfortable position to be in. Unlike the Windrush generation, EU citizens will still be able to rely on direct effect; but, as analysed above, given the limitations to the supranational features of the Withdrawal Agreement, that will not offer a similar protection of their rights as they have today.

CONCLUSION

Despite promises from both the UK and the EU that EU citizens residing in the UK and British citizens residing in the EU would be fully protected after Brexit, the proposed legal framework does not live up to that expectation. The EU has rightly insisted that citizens' rights require a particular protection, and the introduction of direct effect and supremacy for these provisions in the Withdrawal Agreement can be considered an important achievement, given in particular the UK's initial refusal and the unique character of applying these mechanisms outside the EU. At the same time, the EU (and particularly the European Commission) has been too complacent and formalistic in its approach. One cannot take for granted that by copying substantive provisions of EU law (such as the Citizens' Directive), and procedural mechanisms (such as direct effect) into a country that is no longer fully part of the EU judicial system, citizens would be equally protected as when that country was still part of the EU. The substantive flaw of the Withdrawal Agreement is that it fails to recognise that applying the Citizens' Directive main criteria has very different consequences when it is done with a declaratory system within an EU Member State than when it is applied to a constitutive system in a non-EU country (particularly as the latter never applied a registration system). The consequence is that many EU citizens may fail to prove their entitlement and will automatically be faced with the harsh consequences of the UK's 'hostile environment' approach to immigration policy.

The procedural flaw of the Withdrawal Agreement is the assumption that by simply copying direct effect, EU citizens will be properly protected, even when the UK is no longer part of the EU. Yet, direct effect is only one aspect of the EU's judicial framework. In the absence of other supranational guarantees such as the infringement procedure and Francovich damages, but equally in the context of doubts about how the UK will put into practice direct effect, the requirement to set out citizens' rights provisions into primary legislation provides a welcome complementary guarantee. Unfortunately, the Withdrawal Agreement remains evasive on such a requirement.

The Withdrawal Act also leaves considerable scope for important aspects of EU citizens' rights provisions to be implemented via secondary legislation, and the Government's intention to introduce a voluntary registration scheme prior to Brexit may function as a strong impetus to pre-empt further parliamentary debate and guarantees on citizens' rights.

In order to protect its citizens properly, the EU should abandon its formalistic approach and take into account that the particular challenges of implementation in the UK outside of the EU require particular guarantees that go beyond a simple copy and paste of substantive EU law norms and EU procedural principles. Such guarantees can be provided by specific provisions in the Withdrawal Agreement on how the UK will implement a simple registration system, and by a clearer requirement that the Withdrawal Agreement citizens' rights provisions should be set out in primary legislation. Alternatively, such guarantees could be written in a Protocol to the Withdrawal Agreement, in which the UK would set out in detail how it will implement the Agreement. This would take into account the particular implementation challenges in the UK, and make the UK's promises legally binding internationally, without having to reopen the agreement reached on the draft Withdrawal Agreement.⁶⁴ Such a Protocol could subsequently be translated into primary legislation, together with the Withdrawal Agreement.

In the absence of further guarantees in the final Withdrawal Agreement or an attached Protocol, it is up to the UK Parliament to take up its responsibility. The Implementation Bill should set out clear guarantees for EU citizens' rights, both by ensuring a solid definition of direct effect and setting out rights in detail in the Bill itself, leaving little leeway for discretion for Government action to decide on the most fundamental rights to reside, work and access to services for people who have already been residing in the country legally for years.

⁶⁴ I have argued elsewhere how the citizens' rights provisions should be 'ring-fenced' from other withdrawal negotiation topics, so that these rights would be guaranteed even if the rest of the Withdrawal Agreement fails, see S. Smismans, "Brexit: a separate citizens' rights agreement under Article 50 TEU", available at *Eutopialaw blog*, 16 June 2017, <https://eutopialaw.com/2017/06/16/brexit-a-separate-citizens-rights-agreement-under-article-50-teu/>