

This is an Open Access document downloaded from ORCA, Cardiff University's institutional repository:<https://orca.cardiff.ac.uk/id/eprint/132977/>

This is the author's version of a work that was submitted to / accepted for publication.

Citation for final published version:

Smismans, Stijn 2017. Brexit. A separate citizens' rights agreement under article 50 TEU. [Online]. EUtopialaw.

Publishers page:

Please note:

Changes made as a result of publishing processes such as copy-editing, formatting and page numbers may not be reflected in this version. For the definitive version of this publication, please refer to the published source. You are advised to consult the publisher's version if you wish to cite this paper.

This version is being made available in accordance with publisher policies. See <http://orca.cf.ac.uk/policies.html> for usage policies. Copyright and moral rights for publications made available in ORCA are retained by the copyright holders.



## **Brexit. A separate citizens' rights agreement under Article 50 TEU**

**Stijn Smismans (Professor of EU Law, Cardiff University)**

smismanss@cardiff.ac.uk

published at Eutopialaw, 16<sup>th</sup> June 2017,  
<https://eutopialaw.com/2017/06/16/brexit-a-separate-citizens-rights-agreement-under-article-50-teu/>.

### **Why a separate citizens' rights agreement under article 50 is required**

The European Council Guidelines for the Brexit negotiation adopted on 29<sup>th</sup> April 2017 (further referred to as Negotiation Guidelines), as well as the Council Directives for the negotiation adopted on 22<sup>nd</sup> May 2017 (further referred to as Negotiation Directives), show a clear EU commitment to defend the rights of the nearly five million people whose lives are most directly affected by Brexit, namely the EU citizens residing in the UK and British citizens residing in the EU. The Negotiation Directives clearly state that the withdrawal negotiations should ensure 'the necessary effective, enforceable, non-discriminatory and comprehensive guarantees' and they favor a rather maximalist defense of the rights of these citizens (including judicial protection by the CJEU). The UK's promises to protect the rights of these citizens are comparatively vague. However, both the EU and the UK have agreed that dealing with the rights of these citizens is the first priority of negotiations. However, there is no procedural guarantee that these citizens would not end up as a bargaining chip.

The Negotiation Guidelines and Directives provide a phased approach to the negotiations. However, this phased approach aims primarily at separating the negotiation of the withdrawal settlement under Article 50 TEU (phase 1) from the negotiation of an agreement on the future relationship between the UK and the EU (phase 2). In addition to that it provides for a second stage within the first phase (Article 50 withdrawal settlement). In that second stage, the withdrawal negotiation can start to reflect on the potential scenarios for the future UK-EU relationship. Article 50 requires 'taking account of the framework for its [withdrawing Member State's] future relationship with the Union' when dealing with the withdrawal agreement. However, the Guidelines state clearly that this second stage of the first phase will only start when the European Council has decided that there is 'sufficient progress' on the issues identified as priorities of the first phase.

Citizens' rights have been identified as the first item on the agenda of the first phase of the negotiation process. The proposed 'phasing' thus gives some level of separating citizens' rights from other parts of the negotiation. However, this is far from ring-fencing. The EU has taken the approach that as far as the

withdrawal issues (phase 1) are concerned 'nothing is agreed until everything is agreed'. This means at least that citizens' rights issues might be traded off against other topics of the first phase of negotiation, such as the financial settlement and the Ireland-Northern Ireland border issue. Moreover, they may even be influenced by the reflections about the future UK-EU relationship which will appear on the negotiation table as issues 'to be taken into account' prior to the finalisation of the Article 50 withdrawal agreement. Hence, EU citizens in the UK and British in the EU remain fully at risk of becoming bargaining chips.

The proposed negotiation procedure entails two additional dramatic consequences for the 4.5 million citizens directly affected. The principle 'nothing is agreed until everything is agreed' prolongs unnecessarily the uncertainty these people are living in. Moreover, in the case the withdrawal agreement fails, citizens will find themselves in a legal limbo with dramatic consequences.

The only solution to solve the uncertainty of 4.5 million people is to adopt an agreement on citizen's rights at the start of the Article 50 negotiation, independently from other withdrawal issues.

So why has it so far not happened?

One can understand the EU's reluctance to negotiate on citizens' rights PRIOR to the triggering of Article 50. The UK referendum was merely an internal affair as long as Article 50 had not been triggered. Moreover, if negotiating a citizens' rights agreement prior to Article 50 had been attempted, it would not have profited from the decision-making procedure of Article 50 (which allows for the agreement to be adopted via Qualified Majority in Council and consent by the EP, and thus not requiring ratification by national parliaments in the EU 27). Negotiation outside Article 50 would be more cumbersome since it may require ratification by all national parliaments. Hence, the 'time advantage' of starting negotiation prior to triggering Article 50, would immediately have been lost as the procedure itself would slow down the process. Finally, the EU feared that negotiation on partial issues prior to the triggering of Article 50 would undermine the unity of the EU 27.

However, now that Article 50 has been triggered, there is no reason why a separate agreement on citizens' rights cannot be negotiated prior to all other issues.

The moral argument in favor of that remains as strong as ever before. The strategic argument of the EU that it would encourage 'cherry-picking' is also hardly convincing. The EU has set out by now its institutional framework, priorities and strategy for the negotiations. It is no longer unprepared and has the institutional mechanism in place to ensure unity in response to the UK in negotiations. Moreover, arguments that a separate citizens rights agreement opens the way for cherry-picking are based on the wrong assumption. Accepting ring-fencing for citizens' rights does not create any obligation to do the same for other issues. There is a strong moral argument to state: 'a separate agreement will only be done on citizens' rights given the human costs involved'. As will be shown below; that does not create any legal precedent for the EU to accept separate agreements on other issues.

The only remaining question then is whether it is legally possible. More precisely, the question is whether the rights of post-Brexit EU citizens can be legally ring-fenced from other negotiation topics and be safeguarded prior to the end of the withdrawal negotiation and in a way that it stands even in failure of the latter.

To show whether ring-fencing is legally possible we need to address three questions:

- 1) Is it possible to adopt a separate agreement on citizens rights signed under Article 50?
- 2) How to ensure procedurally that the negotiation of these citizens' rights, and of this separate agreement, is not mixed up with other Brexit negotiation issues (ring-fencing in the strict sense).
- 3) How to ensure that the agreement comes into force even if other aspects of the Brexit negotiation fail (safeguarding)

### **Is a separate agreement legally possible under Article 50 TEU?**

As confirmed in Article 5 of the Negotiation Guidelines, Article 50 TEU confers on the Union an 'exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal. This exceptional competence is of a one-off nature and strictly for the purposes of arranging the withdrawal from the Union.' There is no doubt that addressing the rights of the 4.5 million is inherently an issue of withdrawal and can thus be dealt with via Article 50. These are issues on which the EU has been able to act on behalf on the Member States so far, and this competence extends (thanks to Article 50) to dealing with all withdrawal aspects related to it.

However, Article 50 TEU talks about a withdrawal agreement in the singular. The question is then whether a separate agreement on citizens' right under Article 50 is possible. I will argue that the use of the singular in relation to 'agreement', does not exclude legally that the withdrawal could be composed of several agreements, as long as the objectives and spirit of Article 50 TEU are respected.

#### *Interpretation method common to the Member States?*

It is first worth pointing out that interpreting the singular in the plural (and vice versa) is not an unusual legal interpretation technique. In some jurisdictions, this option is even set out as a general interpretation rule by statute. The UK Interpretation Act of 1978, for instance, states in section 6(c) that 'in any Act, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular'. Part III, Article 11(a) of the Irish Interpretation Act of 1937, equally states that 'every word importing the singular shall, unless the contrary intention appears, be construed as if it also imported the plural, and every word importing the plural shall, unless the contrary intention appears, be construed as if it also imported the singular'.

The EU does not have a generic interpretation act like the UK or Ireland. However, to interpret EU law the CJEU can rely on common ground in national legal traditions. In *Brasserie du Pêcheur and Factortame*, for instance, the Court made clear that ‘it is for the [CJEU], in pursuance of the task conferred on it by Article [19 TEU] of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in *accordance with generally accepted methods of interpretation*, in particular by reference to the fundamental principles of the [EU] legal system and, where necessary, *general principles common to the legal systems of the Member States*’<sup>1</sup> (emphasis added). The case law and academic analysis has mainly focused on ‘general principles common to the legal systems of the Member States’, particularly in relationship to fundamental rights, rather than on the broader concept of ‘generally accepted methods of interpretation’. Yet, if the CJEU were to refer to the concept of generally accepted method of interpretation or principles common to the legal systems of the Member States, it will not simply derive from a comparative study a mean, more or less arithmetic. As Miguel Poiares Maduro argues, ‘it is not simply a question of determining what legal solution is common to the national legal orders. It is also, or mostly, a question of determining what legal solution fits better with the EU legal order (in the light of its broader set of rules and principles and of its context of application). Comparative law becomes, in this way, one more instrument of what is the prevailing technique of interpretation at the Court: teleological interpretation.’<sup>2</sup>

### *Teleological interpretation*

As the President of the CJEU, Koen Lenaerts, states, writing academically and with reference to Advocate General Fennelly ‘the characteristic element in the [CJEU]’s interpretative method is [...] the so-called ‘teleological’ approach’.<sup>3</sup> Rather than necessarily sticking to a literal interpretation, the teleological or purposive interpretation looks to the objectives and context of a legal provision. One of the reasons why teleological interpretation is so popular in the CJEU is that all official languages of the EU are equally valid. As each language comes with nuances and contextual background and translation is no absolute science, legal interpretation that aims at coherence by looking into objectives and legal context of provisions is often more preferable than sticking to literal interpretation.

The teleological interpretation of the CJEU is also a meta-purposive

---

<sup>1</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para.27.

<sup>2</sup> Miguel Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, *European Journal of Legal Studies*.(2007) 1(2), available at <http://hdl.handle.net/1814/7707>.

<sup>3</sup> Koen Lenaerts, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’, EUI Working Papers AEL 2013/9 Academy of European Law Distinguished Lectures of the Academy p.24; and N. Fennelly, ‘Legal Interpretation at the European Court of Justice’ (1996) 20 *Fordham International Law Journal* 664.

interpretation.<sup>4</sup> It does not refer exclusively to a purposive interpretation of the relevant legal rule, but places this interpretation in the wider context of a systematic understanding of the EU legal order. Purposive interpretation is part of a constitutionalizing and integrationist understanding of the European legal order. Legal rules have to be understood in the context of the wider objectives and institutional balances provided by the EU Treaties and the autonomy of the EU legal order.

In this tradition of teleological interpretation it is extremely unlikely that the CJEU would adopt a strict literal interpretation of Article 50 if it were asked whether 'an agreement' can be interpreted in the plural. This is even more so as Article 50 is a brief provision that can hardly be said to provide a comprehensive solution to the process of withdrawal of a Member State.

At the same time, from a teleological viewpoint, the adoption of a separate citizens' rights agreement under Article 50 corresponds with the objectives and spirit of Article 50, as well as the broader objectives and integrationist logic of the Treaties.

To understand the objectives and spirit of Article 50, one has to look at how it was drafted, to interpret it in line with and in light of the Treaties, and understand the institutional and negotiation balance it provides.

Article 50 TEU is characterised by two main features. On the one hand, it confirms the right of a Member State to withdraw and encourages a negotiated withdrawal outcome. On the other hand, it sets out a balance of power in the negotiations that is tilted in favour of the EU27 in order to defend the general interest of the EU and the objectives of the Treaties. The idea of a 'withdrawal article' was first discussed in the Convention preparing the Constitutional Treaty (Article I-60 of that text), and following failure of the latter subsequently introduced as Article 50 TEU by the Lisbon Treaty. According to Lord Kerr, the Secretary-General of the Convention, the article was partially inspired by an intention to undermine the false argument of Eurosceptics, particularly in Britain, that the EU had imprisoned Member States towards 'ever closer union' without any way to get out of it.<sup>5</sup> Although that claim was legally unnecessary (as international law allows a Member State to withdraw), a clear statement in the EU Treaties would undermine the false accusation. At the same time, it was feared that an authoritarian leader would come to power in a Member State and take the country out of the EU without any transitional legal solutions.<sup>6</sup> The article therefore confirms the right to leave the EU while introducing a procedure aimed at a negotiated outcome. Hillion<sup>7</sup> and Syrpis<sup>8</sup> argue that

---

<sup>4</sup> Miguel Poyares Maduro, *ibid.*

<sup>5</sup> 'Article 50 author Lord Kerr: I didn't have UK in mind' in *Politico EU*, at <http://www.politico.eu/article/brexit-article-50-lord-kerr-john-kerr/>

<sup>6</sup> *Ibid.*

<sup>7</sup> C Hillion, 'Accession and Withdrawal in the Law of the European Union' in A Arnall and D Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP, 2015) 126 at 150-51.

<sup>8</sup> Phil Syrpis, 'What next? An analysis of the EU law questions surrounding Article 50 TEU: Part One', Blogpost in *EUtopialaw*, (posted 8 July 2016), at



Article 50 has a specific function in relation to the integration process in that it 'bolsters the normative basis for a negotiated withdrawal' and 'points towards a strong post-withdrawal engagement by the Union with the former Member State'.

At the same time, Article 50 sets out a balance of power that favours the EU27 over the withdrawing Member State during the negotiation.<sup>9</sup> Article 50 requires the remaining member states to adopt via the European Council (minus withdrawing state) guidelines for the negotiation. In theory these are guidelines for the negotiation by the remaining 27, but in practice these are likely to set out the rules of procedure for the negotiation as a whole, since a withdrawing state is not very likely to be in a strong enough economic bargaining position to impose its preferred rules of procedure. Most importantly, Article 50 paragraph 3 introduces a 'guillotine clause'; once a Member State has decided its withdrawal and notified the European Council, the 2 year period of paragraph 3 is triggered, which leads to either a negotiated agreement, or, failing that, automatic exit, unless the European Council, by unanimity decides to extend the negotiation period. For the withdrawing Member State there is much more at stake than for the other Member States. Failing to reach an agreement means that the exiting country will fall back on standard WTO rules, while the cost for the remaining Member States of an exit without agreement will be shared between 27 Member States. The threat of an automatic non-negotiated exit therefore favors the bargaining position of the rest of the EU.

Hence, Article 50 is crafted so that it aims at a negotiated outcome but provides at the same time an institutional set-up and negotiation balance that should ensure that the general interests of the EU and objectives of the Treaties are not compromised via the withdrawal process.

The question is then whether a separate citizens' rights agreement respects the objectives and spirit of Article 50 and general scheme of the Treaties? As both the EU27 and UK agree on the priority of dealing with the citizens' rights post-Brexit, it obviously corresponds to the Article's objective to come to a negotiated solution. At the same time, it does not undermine the power balance set out in the article. Accepting a separate agreement on citizenship rights does not imply other topics of the Brexit negotiations can be dealt with in several agreements. There is a strong moral argument to claim that citizens' rights are unique given the human consequences they entail and therefore deserve being ring-fenced from other negotiation issues. Moreover, accepting such a separate deal does not create any legal precedent for accepting such deals on other issues. It is for the European Council (EU27) to set out (and amend) the negotiation Guidelines, and it is fully empowered to state that only a citizens' rights agreement can be negotiated separately. Hence, accepting a separate citizens' rights agreement does not undermine the balance of power set out in Article 50. Fears that

---

<https://eutopialaw.com/2016/07/08/what-next-an-analysis-of-the-eu-law-questions-surrounding-article-50-teu-part-one/>

<sup>9</sup> See also Nick Barber, Tom Hickman and Jeff King: Pulling the Article 50

'Trigger': Parliament's Indispensable Role. UK Constitutional Law Blog (posted (27th Jun 2016) (available at <https://ukconstitutionallaw.org/>).

accepting a citizens' rights agreement would undermine the EU's bargaining position because the UK favours an approach of negotiation separate sectoral agreements (in which it assumes it has more leeway to play out the divisions among the remaining Member States) are unjustified. The EU remains in the political and legal position to refuse any sectoral approach on other issues, even if it has accepted a citizens' rights agreement. The only qualification that has to be made is that in order to respect the institutional balance of Article 50, a separate citizens' rights agreement signed prior to the rest of the withdrawal agreement would need to include a clause that signature of the agreement alone does not constitute the end of the 2 year negotiation period provided in the article.

Allowing a separate citizens' agreement under Article 50 also fits with a meta-purposive understanding of the article. The CJEU has been proactive in establishing the EU legal order by teleological interpretation establishing principles such as supremacy and direct effect. European citizenship is another core principle that reinforces the autonomy of the EU legal order and integrationist direction of the EU, and CJEU case law has been central to strengthening European citizenship. At the same time, European citizenship is dependent on national citizenship. The vulnerability of EU citizenship comes dramatically to the fore in the case of withdrawal of a Member State from the Union. Millions of citizens risk losing overnight a comprehensive set of rights, on which many have built their lives. As the EU loses its jurisdiction over the former Member State it appears powerless to uphold the protection of these rights, while the international law regime of 'acquired rights' offers little or no solution either for those who have 'built up' and exercised freedom of movement rights. The only way in which the EU can still try to protect these citizens is via the negotiated withdrawal of Article 50. Hence, as a separate and ring-fenced agreement on citizens' rights under Article 50 is the best way to ensure this protection, allowing such an agreement guarantees the realisation of the wider objectives of the EU; serving the interests of its citizens (Article 13(1) TEU) and protecting its citizens in its relations with the wider world (Article 5 TEU). By way of allowing a separate citizens' rights agreement even the 'withdrawal article 50' can realise its integrationist potential; giving European citizenship a meaning as a set of acquired rights even when a Member State leaves. Allowing a separate citizens' rights under Article 50 (and thus not sticking to a literal interpretation of 'agreement' in the singular) does not go against the right interpretation of that Article, but is the best way to realise its objectives and its role within the wider objectives and integrationist logic of the Treaties.

### **Procedurally ring-fencing from other negotiation issues.**

The legal possibility to sign a separate citizens' rights agreement under Article 50 does not as such guarantee that negotiation on these citizens' rights is ring-fenced from all other negotiation topics. If negotiation on other issues runs in parallel, trade-offs might be made, which would still turn citizens into bargaining chips. Hence, in addition to the question whether Article 50 allows more than one agreement, we have to address the question of timing of the negotiations.



How can one procedurally guarantee that negotiations on a citizens' rights agreement do not overlap with negotiations on other Brexit issues.

As explained above, the phased timing proposed in the Negotiation Guidelines does not solve the risk of people becoming a bargaining chip. At best, it avoids that the discussion of citizens' rights is not mixed up with final negotiations on the future (trade) relationship between the UK and the EU. Yet, discussions on citizens' rights would take place together with discussions on the other withdrawal topics of phase one, such as the financial settlement. Moreover, in the proposed scheme of the Guidelines, discussion on citizens' rights may even be influenced by reflections on the future relationship (in stage 2 of phase 1).

There are two options to ensure ring-fencing and avoiding citizens become a bargaining chip.

**'Hard ring-fencing'** requires that the negotiation and signature of a separate citizenship agreement would take place prior to any other topics being discussed. In addition to ring-fencing, it would also have the advantage of putting negotiators under pressure to find quickly an agreement on an issue which all parties have described as important. If successful, it is also more likely to allow sufficient time for the UK Parliament to ratify it so that it can come into force on Brexit day.

However, given the short time frame of the 'guillotine clause' of Article 50, paragraph 3, there may not be much appetite to adopt this approach; particularly since several months of the two-year period have already been lost due to the UK general election. It is also very unlikely that the European Council would still redraft its negotiations guidelines prior to starting the negotiations.

Yet, **'soft ring-fencing'** is still possible. 'Soft ring-fencing' requires that a citizens' rights agreement is negotiated and signed (and ratified) *prior to* starting the second stage of the first phase. Thus a solution on citizens' rights will need to be agreed *prior to* any discussions on the framework of a potential future relationship UK-EU that could be taken into account in the withdrawal negotiation of Article 50. In this way, citizens' rights might still be mixed up with other first phase topics such as the financial settlement, but they would not be mixed up with any considerations about the future relationship UK-EU. Such 'soft ring-fencing' does not even require adjusting the phased approach of the current Negotiation Guidelines, since the Council can simply make a political statement that in order for it to conclude that there is sufficient progress on the first stage, it will require that there is a signed citizens' rights agreement. It will require, though, an adjustment of the Guidelines to clarify that a separate citizenship agreement is possible; but, as Article 50 provides, the Council can adjust its Guidelines whenever it deems appropriate. It is also advisable that the Council does not simply require signature but also ratification in the UK Parliament of the citizens' rights agreement prior to accepting progress to stage 2 of the withdrawal negotiations. Otherwise, EU citizens still fall short of guaranteed protection on Brexit day.

**A 'partial scope withdrawal agreement with safeguard clause' and 'consolidated Brexit agreement'**

If (soft) ring-fencing is achieved, a citizens' rights agreement will be signed before the full Article 50 withdrawal agreement. The date of coming into force is best set for Brexit day. On EU side, the agreement is adopted by qualified majority (QMV) in the Council and consent of the European Parliament. On UK side, it requires ratification by the UK Parliament. As explained above, soft ring-fencing should best require that the UK ratifies the agreement as a condition to proceed to stage 2 of phase 1 of the negotiations.

The agreement would constitute a 'partial scope Brexit agreement' and, therefore, would need, as mentioned above, to include a clause that clarifies its signature does not stop the 2 year negotiation period of Article 50.

The citizens' rights agreement will also need to include a '**safeguard clause**', stating that its validity is not dependent upon the entry into force of any other agreement to be concluded under Article 50 TEU. So, even in the case of failure of any other withdrawal Agreement under Article 50, the citizens' rights agreement comes into force on Brexit day. It would then *de facto* constitute THE (only) Article 50 withdrawal agreement.

In the case the rest of the withdrawal negotiation is also successful, this withdrawal agreement of Article 50 will equally require QMV in Council and EP consent on the part of the EU, and ratification on UK side. The Commission Legal Service could subsequently provide a consolidated version of the citizens' rights agreement and final withdrawal deal as one single text.

An alternative solution is for the final withdrawal agreement to copy integrally the citizens' rights agreement, which would be adopted by QMV in Council and EP Consent on the one hand, and UK Parliament ratification on the other hand. However, this is not entirely without risk as it would require the UK Parliament again to reconsider the citizens' rights agreement together with the rest of the Article 50 withdrawal agreement.

## **Conclusion**

A separate citizens' rights agreement under Article 50 TEU is the best way to safeguard the rights of EU citizens residing in the UK and British citizens in the EU. A soft ring-fencing mechanism can ensure these citizens do not become a bargaining chip in the core Brexit negotiations, while providing certainty about their future earlier on in the negotiation process. A safeguard clause can ensure they do not fall into a legal limbo on Brexit day. All this can be done on the basis of a teleological interpretation of Article 50. That Article 50 talks about 'an agreement' in the singular cannot be used by policy-makers as an excuse for not ring-fencing the rights of 4.5 million citizens. The moral case for ring-fencing is beyond doubt. The legal solution is available.