

Ring-fencing Citizens' Rights before Brexit

Whose rights are involved? "Citizens' Rights" refers to the rights of those EU citizens living/working in the UK at Brexit and of UK citizens doing so in the EU27. It also includes the rights of non-EU family members of both groups, who derive their rights to live/work in the UK and EU from their EU family members. In the exercise of their EU right of free movement they moved homes, changed jobs, created businesses, met their partners and made families, and planned for the future all in the legitimate expectation that their rights as EU citizens would continue for life. From the outset both the EU and the UK have said that the rights of these citizens were their first priority. It is estimated that there are about 3.6 million EU citizens in the UK¹ and about 1.2 million UK citizens in the EU27.

What rights? The rights involved are not just the right to reside in a country but the whole range of interlinked basic rights such as the rights to work, to run a business, to healthcare, to go to school or university, to have one's qualifications recognised, to social security etc. This includes rights that rely on co-operation between all 27 member states and the UK, such as ensuring that when a person retires, having worked in several of 28 countries during their working life, their pension entitlements in those countries are added up so that they receive an aggregated pension when they retire.

What agreement is there on Citizens' Rights? The Withdrawal Agreement (WA) negotiated under Article 50 TEU between the UK government and the EU includes extensive provision on Citizens' Rights, preserving many but not all of our rights as EU citizens. It has not been ratified by the UK Parliament and, unless that happens, will have no legal effect. The Withdrawal Agreement also includes sections on the amount the UK has to pay for the 'divorce'; a transitional period to allow new arrangements to be made; and measures to preserve peace in Ireland by preventing a hard border between Northern Ireland and the Republic of Ireland. All the controversy in the UK has been over these other sections, particularly the 'Irish backstop', designed to prevent a hard border.

What is "ring-fencing"? Ring-fencing involves taking those parts of the Withdrawal Agreement which deal with Citizens' Rights, placing a ring around them and preserving them as the only agreement under Art. 50.

¹ These are only estimates because the UK has not had a registration system for EU citizens, and therefore it is not possible to know with any confidence how many EU citizens are in the UK. Furthermore, for both sets of citizens, their non-EU family members are also affected, so the total number of citizens affected is in fact likely to be far more than 5 million.

Why have any agreement on Citizens' Rights?

1. A treaty is needed if Citizens' Rights are to be protected at all. Without such a treaty the UK or a Member State will be able to reduce our rights at will, and both the UK and the EU will be powerless to protect their own citizens living across the Channel or North Sea.
2. The UK already proposes that in the event of No Deal, EU citizens' rights be less than those in the Withdrawal Agreement – family reunification is to be drastically limited and the right of appeal to the courts is to be removed. And it could reduce these rights even further at any time in the future, particularly as the Government has considerable powers to reduce rights with limited control by Parliament.
3. The No Deal arrangements proposed for Britons in the EU26 (excluding Ireland which has a historic understanding with the UK) are without exception worse than those under the Withdrawal Agreement. There are great variations between countries, and some have still to make any provision as to final status after a grace period at all. Some (e.g. France, Spain and Germany) have made or are making laws under which the rights conferred on citizens are conditional on the UK's actions post-Brexit, so that the rights would fall away if the UK fails to do what is expected of it as regards their own citizens (and in some cases, not only as regards Citizens' Rights but in other areas too). And of course, without a binding treaty all these countries are free to change their laws at will.
4. An international treaty is thus required to ensure that all affected citizens are not deprived any further of their rights, now or by as yet unknown future governments.

Why not have bilateral agreements between the UK and each Member State?

1. An agreement at EU/UK level is far more effective than 27 bilateral agreements.
2. With bilateral agreements, our uniform EU rights would be replaced by 28 different sets of rights, each different from the other. Just as a UK citizen in Poland would have different rights from one in Spain, Poles and Spaniards in the UK would have different rights from each other. This is a far cry from one of the EU's central aims, namely the 'General Principle of Non-discrimination' (Article 18 TFEU), which the WA does provide for.
3. Bilateral agreements are incapable of providing adequately for complex interrelated issues like aggregation of pension entitlements, social security coordination, health care and recognition of qualifications, particularly for the many thousands of people who have lived in more than two EU countries. The EU has well established arrangements on these topics, which are included in the WA and can be copied in a UK-EU citizens' rights agreement but could not be copied in bilateral agreements.
4. Bilateral agreements have never covered the wide area of rights EU citizens hold that are guaranteed in the WA. Moreover, they lack the enforcement mechanisms included in the WA. Only a UK-EU Treaty can cover the set of rights set out in the WA and provide proper international enforcement. Respect of bilateral agreements will depend on the bargaining position of the countries involved, and (citizens from) small EU countries will struggle to bring the UK to account if the bilateral agreement is not respected.

Why should “ring-fencing” be done before Brexit? An agreement under Art. 50 TEU cannot legally be made after Brexit (presently fixed for 31.10.19). Under Art. 50 the Council of the European Union has the power to conclude, by qualified majority voting, an agreement covering all matters to do with Citizens’ Rights, with consent of the European Parliament. But it loses that power at Brexit date. Any agreement after Brexit can no longer be made under Art. 50, and therefore would require unanimity in the Council and, since these are issues that are a shared competence between the EU and its Member States, would have to be ratified by all national parliaments. Any new agreement will form part of a wider negotiation which is likely to take years. In the meantime the 5 million affected citizens will lose all their existing rights at Brexit, and will only have such rights as have been unilaterally conceded by their country of residence, vulnerable as these rights are to further erosion. On top of that, it is not certain that an agreement **after** Brexit could even cover the same range of rights as are included in the Withdrawal Agreement, due to mixed- or member state-competence issues. It would therefore be far more difficult to reach the necessary agreement and would lengthen indefinitely the period for which all affected citizens remain in limbo.

How do we know the UK Parliament would agree? In the whole Brexit saga the *only* issue which the UK Parliament has agreed unanimously was to call upon the EU to agree to ring-fence Citizens’ Rights. On 27th February 2019 it passed a motion put forward by Conservative MP Alberto Costa, the son of Italian immigrants, to that effect. The UK Secretary of State has twice written to M. Barnier pursuant to that motion, but M. Barnier rejected the proposal.²

Why does the EU’s negotiator not agree? There are two reasons:

1. The EU’s negotiating strategy has been “nothing is agreed until everything is agreed”. This is designed to prevent the UK from cherry-picking and agreeing on the issues it needs whilst refusing to agree on issues the EU wants. Whilst we appreciate the force of that strategic thinking, it breaks down on Citizens’ Rights. This is because Citizens’ Rights is a subject which is neutral – it does not favour the UK or the EU, but both sides have an interest in ensuring the protection of their own citizens, and both sides have already agreed, by means of the Withdrawal Agreement, a set of measures to do that. So it is not like the other issues covered by the Withdrawal Agreement where a concession on one issue will be met by a demand for a countervailing concession on another. We stress – we are not asking for what has been agreed in the Withdrawal Agreement on Citizens’ Rights to be changed or renegotiated; we are only asking for it to be saved if and when it is clear that the WA will never be ratified.
2. Some issues outside Part 2 of the Withdrawal Agreement, the Citizens’ Rights part, would also have to be included – eg certain provisions on data protection and on governance of the agreement in so far as these relate to Citizens’ Rights. Whilst we accept that this is correct, all have already been agreed and we are not asking for any of them to be changed. All that is required is the technical exercise of extracting the relevant provisions³.

² The correspondence exchange is available on <https://www.gov.uk/government/publications/costa-amendment-letter-to-the-eu-institutions>

³ Indeed, a suggestion of such an extraction has been available since March 2018 at <https://eulawanalysis.blogspot.com/2018/03/ending-limbo-case-for-ring-fencing-eu27.html>

Why should the EU agree to ring-fencing?

1. The 5 million citizens whose rights are at stake are the show-case for EU ideals. They are the people who have exercised one or more of the four freedoms, and their rights are being taken away *only for that reason*. If the EU cannot protect those who have taken its promises at face value, who will it protect? And what is the value of the European project? Now is not the time to turn 5 million convinced Europeans into doubters of its value.
2. The Dutch parliament passed a motion⁴ on 2nd April 2019, calling on the government to seek to implement the citizens' rights parts of the Withdrawal Agreement if a No Deal scenario "becomes inevitable". The motion was supported by 11 out of the 13 parties represented in the Dutch parliament.
3. The UK has signed agreements⁵ with Switzerland and the EEA EFTA states on citizens' rights which apply in a No Deal scenario. The UK and Irish governments signed a Memorandum of Understanding⁶ on citizens' rights, which also applies regardless of whether there is a Withdrawal Agreement between the EU and the UK. Therefore, citizens of 26 EU countries in the UK and British citizens in 26 EU Member States still have no certainty over their rights and face a substantially worse outcome in a No Deal scenario than citizens of Norway, Iceland, Liechtenstein, Switzerland and Ireland living in the UK and British citizens living in those five countries.
4. Finally, the EU's refusal to ring-fence gives the UK an easy propaganda victory. The election of Mr. Johnson has brought into the UK government the team behind Vote Leave. This was one of the most formidable publicity machines yet seen in UK politics, and in the likely No Deal scenario it is already seeking to put the blame for this on the EU. As things stand it will have no need to resort to distortion or exaggeration to claim that the UK's support for ring-fencing and the EU's opposition make the EU "the bad guys" on Citizens' Rights.

⁴ <https://europestreet.news/dutch-mps-vote-to-decouple-citizens-rights-from-brexit-agreement-in-no-deal-scenario/>

⁵ <https://www.gov.uk/government/news/uk-agreements-with-the-eea-efta-states-and-switzerland>

⁶ <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta>