

EU citizenship and the rule of law in times of Brexit: generosity by reciprocity

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Thank you for inviting me to speak at this panel which is very timely and addresses an important issue in the EU today, namely the rule of law. We are all aware of the problems that exist in some Member States around rule of law and, especially the judiciary. In this intervention, I will take a somewhat broader perspective on rule of law, as something more than procedural justice and questions of due process. In fact, my focus will be on questions of EU citizenship and citizens' rights. The argument that I would like to make is that EU citizenship and citizens' rights should be taken seriously as part and parcel of any discussion on the rule of law. This goes back to the fact that EU citizens are in the words of 2009 Stockholm programme the motor of EU integration. In 2001, the European Court of Justice has stated that EU citizenship is destined to be the fundamental status of the nationals of the Member States. This formulation appears in its subsequent case law concerning the exercise of EU citizenship rights and in various positions of the EU institutions when addressing EU citizenship issues.

My intervention in this debate is based on the idea that the European Union is a project for its citizens and that both political processes and the rule of law are meant to serve the EU citizen. Rule of law is recognised as part of the EU's founding constitutional principles alongside liberty, democracy, equality and respect for fundamental rights. Several authors have argued convincingly that rule of law should not be discussed in isolation but rather that there is a triangular relationship between rule of law, fundamental rights and democracy.¹ Pech argues that the 'modern core theoretical or philosophical purpose of this concept is to protect the primacy and dignity of the individual and therefore his/her fundamental rights.' Likewise, EU institutions state that the protection and promotion of democracy and the rule of law are a prerequisite for protecting fundamental rights and for ensuring mutual trust among member states and of citizens' trust in the European Union. The legitimacy of the EU is strongly linked with how this triangular relationship plays out in practice. This is why I argue that protection of EU citizenship rights should be seen as relevant for the rule of law as what is ultimately at stake is the protection of individual rights given to the nationals of the Member States by EU law. From this perspective, how seriously EU citizenship rights are taken should be a primary concern for the Member States, the EU institutions and for assessing the state of the rule of law in the EU.

Most of the ongoing debates concerning rule of law focus on specific Member States. What I want to do today is turn the tables around and look at the EU institutions - the Commission, more specifically. The issue that I will discuss further concerns Brexit and the EU's approach to the rights of British nationals' resident in the EU27 in case of a no-deal Brexit as a test for how seriously the EU is taking its own declared stance on citizenship of the Union as

¹ L. Pech (2009) *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09; S. Carerra, E. Guild, N. Hernanz (2013) *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU. Towards an EU Copenhagen Mechanism*, CEPS. Pech has argued that rule of law is better understood as an umbrella principle from which more concrete legal principles can be derived with the aim of subjecting the exercise of public power to some limitations.

fundamental status. The question that I will look at in detail is: Does the no-deal Brexit solution proposed by the Commission stand the test of respect for fundamental rights and rule of law? Let me say from the start that taking Brexit as a case study is to a certain extent a rather hazardous exercise as it is yet unclear what will happen and under what conditions the UK will exit the EU – that is with or without a withdrawal agreement; or if it will exit at all.

What is at stake:

Once the UK leaves the EU, British nationals resident in the EU27 will lose their EU citizenship en masse and as a consequence they will become foreigners – third country nationals (TCNs) in EU parlour. Their position in law will no longer be that of EU citizens. Article 20 TFEU makes it clear that EU citizenship is derivative in nature: to be an EU citizen one must possess the nationality of a Member State. What law will apply to UK nationals depends on the terms on which the UK will leave the EU and subsequent agreements. We are talking of about 1,2 million UK nationals resident in the EU 27 Member States. This is not a negligible number of people and the important thing to emphasize here is that we are talking about people, human beings who must make decisions about their lives and their future based on a political process that has been fraught with difficulties and above all, uncertainty. This is the case despite the fact that both parties involved – the EU on one hand and the UK on the other – have stated from the very beginning of this process of negotiating UK departure from the EU that EU citizens caught in this process will not be used as bargaining chips. This makes perfect sense from a rule of law perspective as political processes in liberal democracies are there to benefit the citizen, to offer protection and certainty.

Safeguarding the interests of EU citizens is at least on paper one of the main aims of EU's negotiations with the UK. The European Council in its guidelines for negotiating with the UK (29 April 2017: para 8) stated that 'agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens and their families affected by Brexit will be the first priority in the negotiations'. Since 2017, the EU and the UK have negotiated a Withdrawal Agreement that provides for a transition period of 2 (possibly 4) years during which the current rules on EU citizenship and free movement remain continue to apply between the EU and UK. After the transition period, the current agreement provides for a life-long continuation of almost all acquired rights of Union citizens in the UK and British nationals in EU 27 – the implementation of these provisions will be supervised for 8 years by an Independent Authority and by the Court of Justice (ECJ); UK courts can refer questions to the ECJ. The Agreement will be Union law, thus the Commission and the Court will play their normal role in supervising its implementation in the EU 27.

The Commissions' position

The Commission has drawn-up contingency plans to deal with a no-deal Brexit. In a no-deal scenario, for citizens' rights this would mean that EU law ceases to apply in the UK as of 30 March 2019; British nationals resident in the EU27 who until that point had been exercising EU citizenship rights, become foreigners subject to national immigration law and any EU rules applicable to TCNs. What happens with their previous exercise of rights? Is EU

citizenship extinguished just like that? Can EU citizens just become foreigners under a system of rule of law? Will there be a EU response or 27 national responses?

On 19 December 2018, the Commission published a Communication in which it details its approach and measures to be taken in case of a no-deal Brexit. The Commission's position is that of letting the Member States decide on their own how to deal with British nationals resident in their territory past 30 March 2019: the Member States are called upon to take a generous approach to UK nationals who are already resident there and issue them with residence and work permits based on their applicable national legislation. Member States who house the highest number of British nationals are encouraged to take a pragmatic approach in compliance with Union law and issue temporary residence permits. Moreover, the MS are asked to take all necessary legislative and administrative measures to be able to issue temporary residence permits by the withdrawal date and to process applications for definitive residence permits under the uniform format by the end of 2019. British nationals who have resided for 5 years can rely on Directive 2003/109 to apply for EU long-term residence status. The Commission reiterates its position that periods of legal residence in a Member State prior to withdrawal should be taken into account for these purposes. The Commission has adopted a proposal for a regulation which exempts UK nationals from visa requirements provided that all EU citizens are also exempted from visa requirements when entering the UK. Concerning social security protection, the Commission calls upon the Member States to take all possible steps to respond to the concerns that British nationals may have in relation to loss of rights with a view to secure legal certainty and protection of the social security entitlements acquired by citizens who have exercised their right to free movement prior to 30 March 2019.

The Commission's approach can be defined as minimal in terms of safeguarding the rights of former EU citizens who continue to reside in the EU27. The press release that accompanies this Communication highlights another aspect, namely that of reciprocity. The generous approach that is advocated by the Commission rests firmly on the UK equally adopting a generous approach towards the rights of EU27 citizens already resident in the UK prior to 30 March 2019. For all the talk of not using citizens as bargaining chips in the negotiating process, I think we can question how fundamental is the status of EU citizenship and the rights it gives rise to if in the absence of reciprocity those rights lose much of their standing and value. Moreover, there is one group of citizens for whom citizenship of the Union seems to have had no meaningful consequences – these are Britons who have not exercised their free movement rights and who upon UK's leave will lose the ability to move freely across the EU.

The Member States

It is instructive to have a look at what the Member States have done or declared that they will do in the event of no-deal Brexit as the response is far from not unitary. As a general remark, those Member States with a high number of UK nationals have announced plans to introduce some form of temporary legislation to deal with their residence and work entitlements. Not all Member States have clarified the conditions under which UK nationals resident prior to 29 March 2019 in line with EU law will be entitled to certify their status. Reciprocity of treatment is an issue that is highly relevant as some Member States have declared that this is the guiding principle in how they will deal with UK nationals. For the

time being, the UK has declared that in the event of no-deal Brexit it will offer EU citizens the same protection of acquired rights regarding residence and employment as provided for under the Withdrawal Agreement.

Just looking at the MS with the highest number of UK nationals resident there – Spain (300.000), France (150.000), Germany (100.000) Italy (27-65.000) and Netherlands (40.000), national approaches and the solutions proposed depend upon the specific issues linked to the presence of UK nationals in that Member State. For example, attempts have been made at reaching bilateral agreements between some MS and the UK on how to deal with specific issues such as healthcare – in Spain and France (where many pensioners reside). France has already rolled out contingency plans that have caused a great deal of anxiety among UK citizens as they will have one year to obtain a residence permit that will also be the basis for their right to work in France. Permits will cost 300 euros and questions have been raised as to how to prove one’s acquired right of residence. The treatment that is envisaged is that applicable to third country nationals. In Germany some local authorities have asked UK nationals to register via an online form to confirm their residency status with a view to no-deal Brexit (Berlin) – this is an interesting move as under applicable rules to EU citizens no registration is required. Germany has made changes to allow dual nationality for those Britons who apply to acquire German nationality up to 29 March 2019; Spain however has not made a similar move.

Citizens’ mobilization and political processes

One of the most interesting and visible effects of Brexit has been an increase in political mobilization and activism among citizens via well-established actors such as the European Citizens’ Action Service or NGOs such as the 3Million (EU27 in the UK) or New Europeans, European Alternatives. The EU green-card initiative belongs to the New Europeans group. The group is lobbying the EU to intervene in Brexit and issue a card that would offer privileged status to UK nationals currently living in the EU as well as to EU27 citizens settled in the UK; essentially it would allow people to retain free movement.

Moreover, citizens’ political mobilization has led to several European Citizens Initiatives registered by the European Commission that either way seek to maintain acquired rights by EU citizens and primarily ask the European Commission to take action to avoid loss of rights. One such [European Citizens Initiative](#) has been Submitted on 17/05/2018 and registered on 23/07/2018; it requests the Commission propose means to avoid risk of collective loss of EU citizenship and rights, and assure all EU citizens that, once attained, such status is permanent and their rights acquired (Permanent European Union Citizenship).

We have also seen legal mobilization before the courts with a view to get the ECJ to intervene in the Brexit process. As a result, the ECJ has declared that the UK government can unilaterally revoke its declaration under Article 50 (the notification to withdraw from the EU). In 2018, a Dutch court was asked by a UK national to refer questions for clarification to the ECJ to find out whether withdrawal of the UK from the EU automatically leads to the loss of EU citizenship of UK nationals and the loss of rights derived from EU citizenship; if not, under what conditions are rights preserved.

Another noticeable effect has been a return to national citizenship as both UK nationals and EU citizens in the UK are seeking to naturalize in their host states with a view to secure their rights as EU citizens. However, acquisition of a second nationality will not solve all issues as nationality laws differ among the Member States.

Selling EU citizenship – a counterview

The Commission's position tells us that were the UK to crash without an agreement, it is not interested - for the moment - to put forward an EU response to deal with the exercise of free movement rights of former EU citizens. The rights that UK nationals have accrued based on their current exercise of EU citizenship rights are not worth much protection beyond what individual Member States are willing to offer. The position taken in respect of a no-deal Brexit can be contrasted with the position taken by the Commission in relation to a phenomenon that is known as 'investor citizenship and residence schemes'. Here the Commission stands for EU citizenship as fundamental status that needs to be defended from the practices of certain Member States who ultimately can be said to sell EU citizenship.

On 23 January 2019, the Commission issued a report² into this phenomenon that has attracted the attention of the institutions for some time now. 3 EU member states operate investor citizenship schemes: Bulgaria, Cyprus and Malta in which case it is possible to acquire the nationality of these three states via a procedure that implies less stringent conditions than ordinary naturalisation regimes. According to the Commission the main issues are the absence of effective residence conditions and the payment of a certain amount of money as investment. The Commission views the existence of such schemes as posing security risks as once the nationality of either state is acquired, EU citizenship with its rights and privileges comes along too. It argues that 'each member state needs to ensure that nationality is not awarded absent any genuine link to the country or its citizens.' (p. 6)

20 other Member States (including Croatia) operate a form of investor residence schemes which aim to attract investment in exchange of residence rights in the state concerned. In this case the Commission is concerned that such schemes open up a fast-track access or link to permanent residence and then citizenship as well as flaunt existing EU immigration laws (Long-term residence Directive and Family Reunification Directive). Similar to citizenship investor schemes, security seems to be the overarching concern - be it about the SIS and the free travel within the Schengen area of persons holding a residence permit issued by one of the Schengen States, tax evasion, money laundering or circumvention of EU rules concerning nationality requirements set out in certain EU acts. Transparency and governance issues are also mentioned as an area of concern for the Commission.

In this case, the Commission is willing to put its competences to good use and take measures (beyond monitoring and bilateral negotiations with offending Member States). The report states that 'conditions regarding citizenship investor regimes will be included as part of the EU accession process'(p 22). The two countries named here are Turkey that operates a citizenship investor schemes and Montenegro that has passed legislation

² Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Investor Citizenship and Residence Schemes in the European Union, Com(2019)12 final, Brussels, 23.1.2019

introducing such a scheme. In addition, the Commission will monitor the impact of investor citizenship schemes implemented by visa-free countries as part of the visa-suspension mechanism (p 23). The country named in this context is Moldova that introduced an investor citizenship scheme in 2018 that benefits from visa-free travel since 2014.

Concluding remarks

What should we conclude about EU citizenship and the rule of law? The manner in which the relationship between the EU27 and the UK is to continue after 29 March 2019 and the specific arrangements that are to apply to EU citizens have been addressed as part the political process of negotiating UK's departure from the EU. Up to here, we can say that such a manner of dealing with citizens' rights post Brexit respects the basics of the rule of law.

In the case of a no-deal, we have seen that the EU institutions, namely the Commission has no appetite for launching specific legislation that would impose an EU uniform response to dealing with British nationals resident in the EU27. Instead, the Commission advocates national replies guided by generosity and pragmatism in the event of reciprocity. This is a disappointing result from the perspective of EU citizenship as a fundamental status worthy of protection by the institutions and the Member states. I think this has clear implications for how EU citizens – both UK nationals and EU27 nationals view the political process that is bringing them Brexit. Such deference to the national level and the benevolence of national administrations has played an important role in activating EU citizens to defend their citizenship rights and demand action from the Commission via EU law. This should make us question how citizens' voices can be integrated better in EU political processes.

For EU citizenship, the larger lesson to be taken from the diverging responses of the Member States in relation to how they should treat UK nationals in case of no deal Brexit – as EU citizens, as third country nationals or as something in-between – shows that 26 years after its introduction EU citizenship's fundamental status remains questionable. This begs questions as to what message the institutions send about EU citizenship. Calling something a citizenship status creates expectations and leads persons to make certain life decisions. This should be given more consideration than what the Commission has put forward as a response in case of a no-deal Brexit, that is, if the EU is about citizens and not mainly about cans of tinned vegetables, car parts, or financial services flowing freely.