Introduction

This submission focuses on the rights of EU citizens living in Scotland and in particular their enforcement. Its aim is to shed light on areas of dispute between the EU’s and the UK’s Brexit negotiators, which have led to heightened uncertainty amongst EU citizens about their future status and the status of their family members. This uncertainty is not specific to Scotland – it affects all EU citizens living in the UK at present – but it is nonetheless important to bring it to the Committee’s attention.

Timing issues

There is currently disagreement on a number of issues relating to timing.

The first timing issue concerns the cut-off date. The EU position is clear in that it wants the rights of all EU citizens (and UK citizens living in the EU27) to be protected if they had exercised their right to free movement on the date of entry into force of the withdrawal agreement (presumably end of March 2019). By contrast, the UK is open to an earlier cut-off point at some point in time between the official notification of withdrawal (29 March 2017) and the date of withdrawal from the EU.1 For EU citizens who arrived in the UK after 29 March 2017 there is therefore currently no clarity whether they will be able to acquire settled status in the UK after Brexit.

The second timing issue concerns the requirement envisaged by HM Government for EU citizens to register and obtain immigration status after Brexit. This will become necessary in administrative terms as – in contrast to many other EU Member States – the UK currently does not require EU citizens to register with the Home Office or any other authority when coming to the UK in order to exercise their Treaty rights.

The UK Government’s approach appears to go further than what is strictly required in practical terms in that it proposes a ‘grace period’ of up to two years during which EU citizens who had already exercised Treaty rights at the relevant point in time would need to register.2 Failing such registration, they will lose their rights.3

This seems to be an excessive requirement given that most EU citizens have hitherto not been in contact with the immigration authorities and may – even after two years – not be aware of what they need to do in order to be allowed to stay. The

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1 See HM Government, The United Kingdom’s Exit from the European Union, Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU, Cm9464, para 6.
2 Ibid, paras 23 et seq.
3 Ibid, para 26.
requirement – or at least the harsh consequence of losing immigration status if failing to comply – would seem to be excessive. There is no practical or legal need for it.\(^4\) The **third timing issue** concerns the period of time after Brexit during which EU citizens continue to enjoy the full panoply of rights they currently have. This concerns in particular the status of future family members. Under current rules, family members – mainly spouses, but also children under 21 and direct dependents, in particular parents in need of care - of an EU citizen, who has exercised their right to free movement, may join them in the UK regardless of their nationality (i.e. they could be from a non-EU country). Family members acquire similar rights to EU citizens, in particular a right to work and a right to equal treatment.\(^5\)

The EU’s position is somewhat maximalist in this regard in that it aims to protect not only family members of EU citizens already resident in the UK, but also future family members.\(^6\) It appears that this would be a right exercisable indefinitely. In an extreme case, e.g. of an EU citizen born in the UK on the date of Brexit, this could mean that many decades from now that person could continue to exercise the right to be joined by a future spouse or a child born abroad.

By contrast the UK’s position is that future family members will be treated the same as non-EU nationals joining British citizens or – supposedly if they are themselves EU nationals – to any special post-exit immigration agreement for EU citizens, should such an arrangement be made.

**Enforceability and enforcement**

Another question that is likely to cause friction between the UK and the EU concerns the enforceability of citizens’ rights in the future and the enforcement mechanisms available.

**On enforceability**, the EU position is that all of the citizens’ rights set out in the withdrawal agreement should be directly enforceable in the UK legal order (and in the legal orders of the EU27)\(^7\) whereas the UK position is that any arrangements will be enshrined in UK law and that the UK would be willing to make commitments in the withdrawal agreement which will have the status of international law.\(^8\)

These two positions are irreconcilable for the following reasons. The EU’s stance mirrors the current situation under EU law: EU law is different from international law and has the potential to be directly applicable in the courts of the Member States. It seems that the EU would like to see the same for the withdrawal agreement – at least as far as citizens’ rights are concerned. This would mean that EU citizens in the UK could rely directly on the terms of the agreement before a UK court,

\(^4\) There is equally no need to require EU citizens who have been granted permanent residence to re-apply for settled status. Permanent residence should automatically qualify them for settled status without further requirements to do anything.

\(^5\) See Citizens’ rights directive 2004/38/EC.


\(^7\) Ibid.

\(^8\) HM Government, The United Kingdom’s Exit from the European Union, Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU, Cm9464, para 58.
independent of whether the agreement has been (correctly) transposed into domestic legislation.

By contrast, the UK position would avoid this. By confining the status of the rights contained in the withdrawal agreement to international law, it would make it impossible to rely on the agreement in a UK court. This is because the UK is a dualist state, which means that international law can only have effect if contained in domestic legislation.

A drawback of the UK’s approach could be that the domestic legislation might not reflect the terms of the international agreement correctly. The same might be true on the EU side, which would presumably adopt similar legislation, which again might not fully reflect its terms. This creates a potential for diverging implementation (and subsequent interpretation). This would arguably run counter to the overall aim of the withdrawal agreement in respect of citizens’ rights: the creation of the same rights for EU citizens in the UK and UK citizens in the EU27.

However, even a directly effective agreement could lead to such an outcome if interpreted differently by the courts of the UK and by the courts of the EU27. Hence under both outcomes, the question of enforcement arises even though it is admittedly more acute if the UK’s position on enforceability is followed.

**Enforcement** is a further point on which the positions of the EU and the UK diverge. The EU envisions an enforcement role for the EU Commission and for the European Court of Justice (ECJ). The Commission’s role would probably be akin to that currently exercised by it: it would be able to monitor the UK’s compliance with the withdrawal agreement and would be able to bring infringement proceedings against the UK before the ECJ. Furthermore, UK courts would remain entitled – and presumably in some instances duty-bound – to ask the ECJ for a binding interpretation of the withdrawal agreement. The same would of course be true for the courts of the EU27.

By contrast, the UK’s position is that there should be no role for the ECJ. The Government’s proposals are silent about the EU Commission, but it can be assumed that the Commission would have no role to play either.

It is apposite to provide some **legal background** to this as the EU’s position is not solely political, but to an extent constitutionally required under the EU Treaties.

According to Article 344 TFEU, the EU Member States must not submit disputes over the interpretation or application of the EU treaties to another court but the ECJ. According to the ECJ, this is confirmation of its broader exclusive jurisdiction over the interpretation and application of all EU law. This means that the EU cannot conclude an agreement with a third country – such as the UK in the future – which would hand over such jurisdiction to a court other than the ECJ. This in itself would not act as much of a hurdle if jurisdiction over EU law were interpreted narrowly.

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9 Ibid.
10 A more elaborated version of this exposition can be found in: T. Lock, ‘A Role for the ECJ after Brexit?’, Europeanfutures, 3 July 2017, [http://www.europeannfutures.ed.ac.uk/article-4872](http://www.europeannfutures.ed.ac.uk/article-4872).
However, the ECJ not only considers EU law ‘proper’ – the EU treaties and EU secondary law – to be included in this, but it also says that international agreements concluded by the EU form an ‘integral part’ of the EU legal order once they are in force. It follows that the ECJ has jurisdiction to interpret these agreements internally, in particular through the preliminary reference and infringement procedures. Again, this is not much of a problem for the third country concluding the agreement with the EU. That third country must ensure that it complies and it is not the EU’s business to decide how it ensures compliance.

This then leads to the question of how disputes between the parties to the agreement – in the case of Brexit, the EU and the UK – are resolved. Here the ECJ is at first glance rather generous: it held in Opinion 1/91 that an international agreement providing for a system of courts to settle disputes between the contracting parties – which includes the interpretation of the agreement – is compatible with the EU law.\footnote{Opinion 1/91 Agreement on the European Economic Area ECLI:EU:C:1991:490.}

However, the devil is in the detail. In that same opinion – which concerned the first draft of the European Economic Area (EEA) Agreement and its dispute resolution mechanism – the ECJ held that, where an agreement replicates EU law, any court charged with the interpretation of that agreement would in essence interpret EU law. And because these interpretations would be internally binding on the ECJ – given the international agreement as interpreted by the international court forms an integral part of EU law – it would interfere with the ECJ’s exclusive jurisdiction and cannot be concluded.

The result of Opinion 1/91 is the dispute settlement arrangement based on two pillars that we now find in the (revised) EEA Agreement: the ECJ interprets its rules in binding form for the EU-side and the EFTA Court – formed as a reaction to Opinion 1/91 – interprets its rules for the remaining three non-EU members of the EEA. In doing so, the EFTA Court is bound by ECJ case law handed down before the entry into force of the EEA Agreement and in practice follows the ECJ’s newer case law as well (the so-called principle of homogeneity).

Dispute resolution concerning the interpretation of the withdrawal agreement itself must therefore be in line with Opinion 1/91. If the withdrawal agreement provides for the continuation of certain citizens’ rights, the withdrawal agreement would partly be a replica of EU law and thus very similar to the EEA Agreement.

Accordingly, the ECJ would not accept another court, such as a bespoke arbitration mechanism established to decide disputes over the interpretation and application of the withdrawal agreement. Disputes arising in the EU27 would need to be decided exclusively by the ECJ. Disputes arising in the UK could either remain referable to the ECJ or they could be decided by a new body established for this purpose (in analogy to the EFTA Court) or indeed by the UK courts themselves.

It follows that the EU’s insistence that disputes originating in the UK have to be referable to the ECJ is not mandated by EU law as it stands. A reasonable compromise could therefore either task the existing EFTA court with this (provided...
that the other EEA Member States agree); or create a new international tribunal for UK cases; or indeed require the UK to create a special tribunal for EU citizens’ cases, which would be bound to follow the ECJ’s case law on these matters.\footnote{A side issue, but nonetheless an important one, in this connection would be the costs of enforcement of rights. In order to allow EU citizens to enforce their rights effectively, these should be kept low.}

**No deal Brexit**

The Committee should finally consider the possible consequences of the UK leaving the EU without a withdrawal agreement. Under Article 50 TEU this will happen automatically on 29 March 2019 – i.e. after the expiry of a two-year period since the formal notification to withdraw – unless either a withdrawal agreement is concluded or the two-year period is extended.

Without a withdrawal agreement the status of EU citizens in the UK and of UK citizens in the EU will be highly uncertain. There is no clarity as to whether they can benefit from a concept of ‘acquired rights’, which as such neither exists in international law nor in domestic law (i.e. the common law).\footnote{Some have pointed to Article 70 of the Vienna Convention on the Law of Treaties to argue that acquired rights of EU citizens would be protected. However, that provision only protects rights of the parties (i.e. the Member States themselves) to a terminated international treaty, but not those of individuals. For a more elaborate argument see S. Douglas-Scott, ‘What Happens to ‘Acquired Rights’ in the Event of a Brexit?’ UK Constitutional Law Blog, 16 May 2016, available at: https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brexit/}

Hence the status of EU citizens in the UK would depend on unilateral measures taken by the UK; and equally, the status of UK citizens in the rest of the EU would depend entirely on whether EU law recognised ‘acquired rights’, which is equally not clear, and failing that unilateral measures by the EU respective Member States.

It therefore is in the interest of UK citizens living in the EU27 and EU citizens living in the UK that this uncertainty is avoided and a withdrawal agreement setting out the status of EU citizens in the UK and UK citizens in the EU is concluded.

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