



ARTICLES

SPECIAL SECTION – EU CITIZENSHIP IN TIMES OF BREXIT

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INTRODUCTION

This Special Section of *European Papers* takes the process of Brexit and the challenges raised against the process of European integration in this context as an invitation to critically reflect on the current state of EU law. Brexit raises a multitude of highly complex issues. We have chosen to focus on a particularly symbolic one: the concept of EU citizenship.

According to settled case law, EU citizenship, which was introduced by the Maastricht Treaty, is intended to be the fundamental status of nationals of the Member States. EU citizenship epitomises the sense of belonging, the idea of an ever closer union. It builds on the pre-existing free movement of economic actors by adding free movement rights for non-economic actors, the right to equal treatment for all citizens and, to some extent, political rights.

EU citizenship also played a big role in the debate preceding the Brexit referendum. In fact, the rights enjoyed in the United Kingdom (UK) by EU citizens from other Member States sparked, amongst some UK voters, fears of benefit tourism and of unwanted migration from third countries, which would erode the national social security system and destabilise the national labour market. In February 2016, an attempt was made within the European Council at redefining the complex relationship between the UK and the EU, which focused to a large extent on citizenship-related issues. The European Council conclusions that were adopted that month stated, *inter alia*, that the references in the Treaties and their preambles to the process of creating “an ever closer union among the peoples of Europe” would not apply to the UK, and they proposed to amend the existing rules on EU citizens and their family members in order to make them somewhat more restrictive.¹

However, the proposed settlement was rejected when, on June 23rd, 2016, a small majority of British votes was cast in favour of Brexit. On March 29th, 2017, the UK officially notified the European Council of its intention to withdraw from the EU, thereby triggering a two-year period of negotiations in accordance with Article 50 of the Lisbon Treaty. As far as the EU is concerned, it was immediately apparent from the guidelines for Brexit negotiations of the European Council and the negotiation directives of the

¹ European Council Conclusions of 18-19 February 2016, *A new settlement for the United Kingdom within the European Union*.

Council that EU citizenship was to play a central role in these negotiations. In fact, the Council and the Commission have repeatedly stated that one of the first priorities for the negotiations is to agree on guarantees to protect the rights of EU citizens, and their family members, that are affected by Brexit. At the same time, the UK has made it clear that it wants to limit the rights of EU citizens and their family members in the UK, in particular their right to free movements and residence.²

It is inevitable, therefore, that, in the context of the Brexit negotiations and process, the concept of EU citizenship was and continues to be deeply challenged. At the moment of the writing of this *Introduction*, discussions on Brexit are highly unstable. Nevertheless, beyond the actual Brexit negotiations, the debate pre-referendum and the discussions since then raise a number of fundamental questions that touch upon the three “prongs” of the concept of EU citizenship under EU law: the rights of EU citizens being economic migrants, the rights of EU citizens beyond employment and the political rights of EU citizens.

The aim of this Special Section is not to closely monitor the Brexit negotiations and process between the EU27 Member States and the UK from an academic perspective.³ Instead, this Special Section, as well as the workshop on which it is based,⁴ invites introspection. It is intended to explore the impact that Brexit and the debate it has triggered may have on the said three prongs of the concept of EU citizenship, in particular for the Member States remaining in the EU after Brexit. We use Brexit as an opportunity to assess the current state of EU law on citizenship and to shed light on emerging trends: How does the EU legal order (as defined by reference to the 27 remaining EU Member States) understand the concept of EU citizenship in the current context? Or in other words: what lessons can be learnt from the process of Brexit to date to steer reflections on EU citizenship in the years to come?

A first and central feature of the debates on the implication of Brexit on EU citizenship is that they illustrate how advanced and intricate the rules on free movement of persons have become, starting with the intimate relationship between EU citizenship and the free movement of economic actors. Although academic literature on EU citizenship often focuses on the rights of non-economic actors, the negotiations pre-referendum as well as the current perspectives of an actual Brexit have acted as a vivid

² See, e.g., UK Government, *The Future Relationship between the United Kingdom and the European Union*, White Paper, July 2018, assets.publishing.service.gov.uk.

³ This is already done by a number of academics. See for instance S. PEERS, *UK citizens as non-EU citizens in the EU after Brexit: applying the EU Directive on non-EU long-term residents*, in *EU Law Analysis*, 27 December 2018, eulawanalysis.blogspot.com.

⁴ The workshop was held in Leuven on 30 March 2018. We are grateful to the KU Leuven, and the Institute for European Law in particular, for having hosted that event as well as to all participants for their valuable comments on earlier versions of the papers adjusted and compiled for the purpose of this Special Section.

reminder that the hard core of EU law on citizenship is to be found in the free movement of economic actors. Sacha Garben, in her *Article on European Higher Education in the Context of Brexit* provides a powerful account of the level of European integration in the field of higher education. Her contribution stresses both the very special position that the UK has played in the Bologna process and the great loss that could ensue if the free movement of students as well as EU funding could not benefit the UK anymore.

A second important point that emerges from the on-going debates is that the sophisticated web of rules on the integration of an area without frontiers for EU citizens remains contingent on politics and is therefore extremely fragile. This is precisely the point made by Anne-Pieter van der Mei in his *Article on EU citizenship and Loss of Member State Nationality*, in which he invites judicial restraint in a context that warrants important political decisions. Hence the importance of reflecting on the broader set of norms to which EU law on citizenship belongs, as Nathan Cambien invites us to do in his *Article on Residence Rights for EU Citizens and their Family Members after Brexit: Navigating the New Normal*. These rules, indeed, might act as a “safety net” for EU citizens and UK nationals after Brexit.

A third set of contributions seeks to draw lessons on how the sophisticated – yet vulnerable – legal framework for EU law on citizenship, as exposed by the Brexit negotiations, is currently evolving. These contributions call for further political engagement with the process of European integration. In her *Article on EU Citizenship, Access to ‘Social Benefits’ and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit*, Elise Muir sheds light on a (still hesitant) trend towards addressing legal questions on EU citizenship by reference to secondary law instead of primary law. The Author welcomes that trend, for it makes space for political debate on the outer boundaries of EU citizenship (such as the rights to social benefits or to move with third-country national family members), and argues that this is the best way of addressing tensions around the EU citizenship concept. The *Article* by Natasia Athanasiadou on *The European citizens’ initiative in times of Brexit* analyses further recent efforts to stimulate political engagement with EU law, namely through the prism of the EU citizens’ right to invite the Commission to legislate on certain matters. The *Article* welcomes the changes in the administrative practice of the Commission regarding the admissibility check for European citizens’ initiatives, but at the same time calls for further respect for the principles of good administration and legal certainty.

A final set of *Articles* comes back to the hard core of EU law on citizenship which is to be found in the free movement of economic actors. These *Articles* are intimately related to the re-definition of our understanding of EU citizenship law in a “post-Brexit” context in that they illustrate the current approach to the process of economic integration through the free movement of persons in the EU27 and beyond. In their *Article on The Posting of Workers Directive revised: enhancing the protection of workers in the cross-border provision of services*, Piet Van Nuffel and Sofia Afanasjeva argue that the

EU legislature has in recent months significantly improved the balance between economic integration and the protection of domestic standards of social protection. Although the relevant institutions do not explicitly make that link, this could be related to broader policy developments resulting from the European Pillar of Social Rights, a political initiative that is to be most welcome.⁵ As for Christa Tobler, her *Article* on the *Free movement of persons in the EU vs. in the EEA: Of effect-related homogeneity and a reversed Polydor principle* illustrates the intricate and dynamic link between free movement of economic, non-economic actors and the concept of EU citizenship as it emerges from recent European Free Trade Agreement Court (EFTA Court) rulings. It also highlights, in a complementary fashion to the *Article* by Elise Muir, the different uses of EU secondary and primary law on EU citizenship by the EFTA Court as well as the European Court of Justice depending on the broader legal context.

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⁵ See further C. KILPATRICK (eds), *The Displacement of Social Europe*, Special Section in *European Constitutional Law Review*, 2018, p. 62 *et seq.*

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