A citizens rights agreement under article 50 TEU: the time for political and false legal excuses has passed.

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Abstract:
As the Withdrawal Agreement was massively defeated in the House of Commons the risks of a no deal are now higher than ever. More than 3 million EU citizens in the UK and more than a million British citizens in the EU remain in extreme uncertainty about their status. This paper explains why the UK and the EU have so far failed to ring-fence citizens' rights and ensure they are protected even in case of no deal. It shows how unilateral national solutions do not provide sufficient protection and sets out how a citizens' rights agreement under Article 50 needs now urgently to be adopted. There are no valid political or legal excuses against that.

With Theresa May's failed attempt to get the Brexit Withdrawal Agreement approved in Parliament the country is in limbo. Nobody more so than the more than 3 million EU citizens in the UK and the 1.3 million British citizens in the EU (further referred to as 'the five million). Despite promises from actors on all sides of the political spectrum that these citizens 'will be able to go on living their lives as previously' they still have no legal guarantees that their rights will be preserved, or even have the basic right to reside. These nearly five million citizens have lived in legal uncertainty ever since the referendum.
More than a year and a half ago, I argued[1] that the best way to provide certainty to these citizens is to 'ring-fence' their rights by adopting a citizens' rights agreement under Article 50 of the Treaty on European Union. Such ring-fencing had three functions:

1) By guaranteeing these rights upfront, and reciprocally between EU citizens in UK and British in Europe, the issue would have been taken from the negotiation table and citizens wouldn't have been a bargaining chip in other areas of the Brexit negotiation.
2) By adopting and ratifying citizens' rights early in the process, their rights would have been guaranteed even in the case of 'no deal', namely failure of agreement on other aspects of withdrawal.
3) Early agreement could have relieved 5 million citizens from unnecessary anxiety.

However, while both the main associations representing EU citizens in the UK (the3million[2]) and British citizens in EU (British in Europe[3]) have repeatedly lobbied for ring-fencing, the UK and EU have refused to do this.
For the UK, the 3 million EU citizens have been one of its main bargaining chips, so it had little interest to take that off the table. Moreover, its primary objective

[1] https://eutopialaw.com/2017/06/16/brexit-a-separate-citizens-rights-agreement-under-article-50-teu/
[2] https://www.the3million.org.uk/library
[3] https://britishineurope.org/category/bie-publications/

has been to bring these citizens within existing UK immigration law categories, such as Indefinite Leave to Remain, rather than favouring a UK-EU Treaty based on reciprocity and the existing rights derived from EU law.
The EU has prioritised the latter, but insisted that the Article 50 negotiations are driven by the principle 'nothing is agreed until everything is agreed'. This is not a legal requirement inherent in Article 50. It is a procedural choice based on political premises. The EU feared that accepting a separate agreement on citizens' rights would set a precedent for a Brexit negotiation characterised by subsequent sectoral agreements in which the UK would have more scope to break up unity amongst the EU27. However, given that this is simply a political principle that the EU has set itself, and given the EU's dominant bargaining position in the negotiations, there is no reason why accepting a citizens' rights agreement would imply that other sectoral agreements have to be accepted. Moreover, citizens' rights are unique compared to other aspects of Brexit negotiations. Unlike other areas, citizens' rights are profoundly based on the idea of reciprocity. Freedom of movement is a right exercised on the basis on reciprocity, therefore, British already residing in the rest of the EU and the 3 million EU citizens in the UK should both be able to retain the rights on which they have built up their lives. Moreover, all parties (even the Leave Campaign) agreed on this. Furthermore, unlike for instance the solution to the Northern Ireland border, which is inherently related to the future trade relationship, there is no reason to link the guaranteeing of citizens' rights to other negotiating issues.

The Withdrawal Agreement does protect the five million. This solution is far from perfect; most importantly, it does not offer the right to free movement through the entire EU for British in Europe, and it allows Member States, and the UK in particular, to set up a constitutive registration system which profoundly puts some people at risk[4] of not obtaining the protected status. However, the protection provided by the Withdrawal Agreement is far superior to what would happen in case of a no deal Brexit, when the five million would become dependent on insufficient unilateral protection or even become illegal residents over night.

Unfortunately the fate of citizens' rights in the Withdrawal Agreement is bound to that of more contentious issues such as Northern-Ireland, the backstop, or even the design of the future relationship in the Political Declaration. The perverse effect of the 'nothing is agreed until everything is agreed' principle became very clear over the last months. In the corridors of the EU Institutions, particularly the European Parliament and some of the Member States' Permanent Representations, there has been increasing awareness of the risks of no deal for the five million and growing sympathy for the idea of a citizens' agreement under Article 50. However, nobody wanted to give the impression that the full Withdrawal Agreement was no longer an option, so hardly anybody was ready to publicly defend the ring-fencing of citizens rights as yet. Unfortunately the Article 50 clock is ticking, and the five million are now exactly in the position that those favouring ring-fencing feared they would be. There is a

[4] http://orca.cf.ac.uk/115136/

serious risk of no deal. Time is running out to be able to adopt a citizens' rights Treaty under Article 50 and ratify and implement it, particularly with a UK Parliament in turmoil.

Moreover, faced with the increasing risk of no deal, several Member States and the UK have started to work on unilateral solutions to deal with citizens' rights in the case of a hard Brexit. While unilateral measures are better than no measures at all, they are strongly inferior to a UK-EU Treaty based solution and create the wrong impression that the five million will be properly protected.
1) Unilateral solutions can never cover all aspects of the rights the five million hold. Some of these require by definition an international agreement, such as ensuring that people can still rely on social security contributions made and entitlements (such as pension rights) that they have built up in different countries, as well as certain aspects of cross-border health care provision which require international coordination.
2) British in Europe would depend on unilateral solutions in 27 different countries. While several countries have announced they would take unilateral measures, these still have to be implemented. With so few guarantees in place (compared to the protection offered by the WA), there is a serious risk of a tit-for-tat between the UK and EU countries in downgrading citizens' rights.
3) Unilateral solutions miss the protection of international guarantees and oversight and make the five million extremely vulnerable to further undermining of their status or bad implementation practices that would lead to individuals failing to obtain protection. The UK proposals for unilateral solutions are a case in point. The European Union (Withdrawal) Act rolls over EU law beyond the Brexit date, until UK law makes amendments to it. This appears to give the 3 million some coverage not to fall into legal limbo on Brexit day. However, on 20 December 2018, the Government introduced for discussion in Parliament the Immigration and Social Security Co-ordination (EU Withdrawal) Bill. That Bill wipes out all relevant EU law regarding immigration and the rights of the 3 million. At the same time, it gives the Government sweeping competences to deal with their status via secondary legislation, with hardly any intervention by Parliament. This follows the pattern of the trial Settled Status Scheme, which has been set out in secondary legislation. At the moment, the Bill has not even set a date for coming into force. In case it would come into effect on Brexit day in its current form, it would make all 3 million EU citizens who have not yet successfully applied for Settled Status (i.e. nearly all of them) illegal overnight. Let's assume the final version of the Bill will only come into force at the end of the so-called grace period for registration, or at least provide a mechanism to keep EU law into force until then. Even in that case, the position of EU citizens will be very vulnerable. The process to obtain settled status, and even much of the content of that status, will be set out and be amendable by Government intervention with a limited role for Parliament. In a country where immigration policy is driven by government action imposing a 'hostile environment', perfectly illustrated by the Windrush scandal, this is a very worrying prospect for EU citizens.

To protect the five million properly, unilateral solutions are not suitable solutions, and a UK-EU Treaty is necessary. The substance of this is already

written in the WA, and includes not only its citizens' rights part (Part II), but also the procedural provisions of the WA ensuring its implementation, such as the requirement to give direct effect to these rights, the monitoring and enforcement provisions, and the transition period (required to allow citizens enough time to register). Why renegotiate separate mini-deals on social security entitlements or health coordination, or even try to do this in 27 bilateral agreements between UK and all other EU countries, while a full protective package has already been drafted and agreed between the UK Government and the EU in the WA? Given the considerable risk of failure of agreement on the full WA, this citizens' rights package should now be adopted as a separate citizens rights agreement under Article 50.

There are strong reasons to adopt this under Article 50. This requires (only) qualified majority in the Council and the consent of the European Parliament, rather than unanimity in Council and ratification in all national parliaments in the case of negotiation taking place outside the Article 50 framework. It is even uncertain that the EU would have the competence to negotiate all aspects currently covered on citizens' rights in the WA outside of Article 50.

With the clock ticking the UK and EU have to act on ring-fencing NOW.
Two scenario's can be imagined:

1) Given the risk of heading into no-deal on 29th March, the UK and EU should adopt the citizens' rights Treaty under Article 50 now so that it can be ratified and implemented by Brexit day. In that scenario, the rest of the WA fails to be adopted and the citizens' rights agreement constitutes *de facto* the only withdrawal agreement under Article 50. There is no legal obligation that a WA would need to include also Northern-Ireland or other aspects currently in it. These were political objectives set at the start of the negotiation, but a political decision can equally be taken that citizens' rights constitute the only area on which agreement could be found to govern the UK's exit from the EU under Article 50.
2) Given that no deal is not an attractive scenario for anybody, it is indeed possible that the UK will ask for an extension of Article 50. Even in this scenario, the UK and EU should proceed and adopt a citizens' rights agreement under Article 50 now. It is unreasonable and unacceptable to imagine 5 million citizens, already uncertain about their legal status, waiting on the eve of Brexit to see whether the UK requests and the EU grants an extension, while that extension, after renewed negotiation, a general election or a referendum might still result in a no deal. It is time for political leaders to exercise their duty of care towards the five million and avoid further anxiety.

As I have explained in more detail previously[5], it is important here to clarify that adopting a citizens rights agreement now does not stop the Article 50 process

[5] https://eutopialaw.com/2017/06/16/brexit-a-separate-citizens-rights-agreement-under-article-50-teu/

and does not exhaust the possibility of adopting other agreements under it (as long as it is within the original or extended time limit of the Article). Although Article 50 refers to a 'withdrawal agreement' in the singular, 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 Court of Justice of the EU (CJEU) can rely on common ground in national legal traditions. In Brasserie du Pêcheur and Factortame, for instance, the Court made it 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' (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 relation to fundamental rights, rather than on the broader concept of 'generally accepted methods of interpretation'. Yet if the CJEU were to refer to the 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, an additional instrument of what is the prevailing technique of interpretation at the Court: teleological interpretation.

A purposive interpretation looks at the objectives and context of a legal provision. Article 50 aims at a negotiated solution for withdrawal from the EU. So if both negotiating partners, the EU and UK, agree on adopting a citizens' rights agreement first, this is in line with the consensual objective of the article. Moreover, it is in respect of a purposive interpretation that places Article 50 in the context of the broader objectives of the Treaties. In the context of withdrawal, adopting an international treaty with the withdrawing state is the best way to give meaning to European citizenship and serving the interests of EU 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.

It is the time now for political actors to take up their responsibility. It would be outrageous if the EU abandons its citizens and former citizens and leaves their fate to unilateral national solutions. Five million citizens have built their lives on their trust in European citizenship. For the EU not to do its utmost best to protect them is an abdication of its role and key raison d'être.
Also the UK has little reason not to do the right thing. The UK has already been willing to adopt a citizens' agreement with Switzerland, independent of future trade relationships, although these unavoidably need to be renegotiated too. So why would the UK government still refuse a separate citizens rights agreement with the EU27? Moreover, agreeing now might also create goodwill in further negotiations, whether in the context of asking for an extension of Article 50, or in the unavoidable negotiations to take place after the UK leaves the EU.

Technically, there are two ways to act on ring-fencing now:

1) The UK and the EU adopt immediately a joint political statement in which they commit that the citizens' rights part of the WA will be adopted, ratified and implemented prior to the Brexit date, even in case of failure to agree a full withdrawal agreement.
2) There is a risk that a mere joint political statement is not respected or not implemented in time, particularly in a situation when no deal takes place in a climate of full political chaos as well as potential increased hostility between the UK and the EU. Hence, the best way to secure citizens' rights is adopting the citizens' rights agreement right now, so the UK and EU can ensure implementation by Brexit day. It will come into force on Brexit day, whether that is 29th March or the end of a period of extension. A clause in the agreement itself, or a declaration by the EU and the UK, can clarify that this agreement will be the sole Article 50 agreement in the case of failure to agree on other topics by Brexit day, but that its signature does not preclude the adoption of other agreements under Article 50 until Brexit day.