

WORKING PAPER N. 1-2019

Ring-fencing Citizens' Rights in the Brexit Negotiations: Legal Framework and Political Dynamics

Stijn Smismans

Abstract

As the Withdrawal Agreement got 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 (by the UK and the 27 EU Member States) do not provide sufficient protection, and sets out the legal and political strategy through which a citizens' rights agreement under Article 50 may still be adopted.

Keywords: Article 50 TEU, Brexit, Citizens' Rights, Ring-fencing, Withdrawal Agreement

Ring-fencing citizens' rights in the Brexit negotiations: Legal framework and political dynamics.

Stijn Smismans

Introduction

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 that they will even have the basic right to reside. These nearly five million citizens have lived in legal uncertainty ever since the referendum.

The Withdrawal Agreement concluded between the UK Government and the European Commission in November 2018 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 UK citizens in Europe, and it allows Member States, and the UK in particular, to set up a constitutive registration system which profoundly puts at risk some people of not obtaining the protected status.¹ 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 and overnight become third country nationals, and in some cases illegal residents. Such a no deal Brexit is now ever more likely. Given the large margin of defeat of the Government on the vote to approve the Withdrawal Agreement, it is unlikely that a sufficient number of Members of Parliament (MPs) will change their mind if given a second opportunity to vote on (substantially) the same Brexit deal. Neither is there a clear majority in sight for a referendum, or for revoking Article 50 Treaty on European Union (TEU). Amending the deal to find a majority in Parliament proves equally extremely difficult. Theresa May's attempt to win over the Democratic Unionist Party and hard Brexiters by way of changing the Irish backstop is doomed to fail, as the EU won't accept a temporary backstop, and no EU concession seems ever to be good enough to convince hard Brexiters. In theory, the chances should be improved by moving the deal into the direction of a soft Brexit, but the Political Declaration setting out the framework for the future relationships can only make non-binding commitments in this sense,

· Professor of EU law and Director of the Centre for European Law and Governance, School of Law and Politics, Cardiff University I would like to thank Federico Fabbrini and Ian Cooper for comments on an earlier draft of this paper.

¹ For a detailed analysis of the shortcomings of the Withdrawal Agreement to protect EU citizens in the UK, see Stijn Smismans (2018), 'EU citizens' rights post-Brexit: why direct effect beyond the EU is not enough', *European Constitutional Law Review*, 14 (3), 443-474.

which might not be enough to convince Remainers or even soft-Brexiteers.² Most importantly, Theresa May isn't making any move in this direction, and with the Leader of the Opposition equally not engaging, it remains to be seen whether any cross-party initiative for this could even have a chance.

In the absence of a majority in favour of any of these solutions, the Article 50 TEU clock will unavoidably tick towards a no deal Brexit. This means that EU citizens in the UK and British citizens in the EU will lose the full set of rights provided by EU citizenship and simply fall under national immigration law. Two months from the Brexit deadline, neither the UK nor any of the EU27 countries (EU27) has put in place conclusive legislation and implementation measures to ensure all these citizens can reside and keep their rights under national immigration law.

It is, therefore, more than ever before, the time to 'ring-fence' citizens' rights, namely by guaranteeing these rights via a (separate) treaty under Article 50 TEU. In this paper I will first analyse why ring-fencing should have been done a long time ago, at the start of the Brexit negotiations, and why that never materialised. In the following section I explain why Article 50 TEU is the best legal basis to adopt such a citizens' rights agreement and challenge the (mainly implicit) idea of some policy-actors that only a full Withdrawal Agreement can be adopted under that Article. Finally, I analyse the political challenges to realise ring-fencing during these final months prior to the set Brexit date of 29th March, despite the increasing awareness of the risks of no deal and its consequences for the five million.

The reasons for ring-fencing and why it has not been done so far.

Since the start of the Brexit negotiations some have been asking for the UK and the EU to guarantee unilaterally and immediately to respect the rights of the five million. Even the newly created civil society organisations representing these citizens, such as the 3million (t3m) and British in Europe (BiE), favoured initially such demands. Yet, as they got better resourced, and legally informed, these associations soon changed position, prioritising demands to provide a UK-EU Treaty solution.³ Indeed, while unilateral measures are better than no measures

² A solution for this could be the use of a binding Protocol, instead of a non-binding Declaration. See Stijn Smismans, 'Breaking the Brexit Deadlock: A binding protocol to the Withdrawal Agreement might provide the answer', LSE Brexit Blog, (21 January 2019), at

<http://blogs.lse.ac.uk/brexit/2019/01/21/breaking-the-brexit-deadlock-a-binding-protocol-to-the-withdrawal-agreement-might-provide-the-answer/>

³ An exception is the New Europeans, who went on prioritizing the demand for unilateral guarantees. See <https://neweuropeans.net/unilateralguaranteesnow>; as well as arguing for a European Green card, which, like the (legally) much contested idea of 'associate citizenship', which is aimed at retaining EU citizenship rights even for British citizens who never exercised freedom of movement rights. For the legally problematic aspects of this, see Martijn Van Den

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) UK citizens 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 (see below). With so few guarantees in place, 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 strongly 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.⁴ 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,⁵ which has been set out in secondary legislation. At the moment, the Bill has not even set a date for coming into force. If it were to 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.

Brik and Dimitry Kochenov (2018), 'A Critical Perspective on Associate EU Citizenship after Brexit', *DCU Brexit Institute - Working paper N. 5 – 2018*.

⁴ [https://services.parliament.uk/Bills/2017-](https://services.parliament.uk/Bills/2017-19/immigrationandsocialsecuritycoordinationeuwithdrawal.html)

[19/immigrationandsocialsecuritycoordinationeuwithdrawal.html](https://services.parliament.uk/Bills/2017-19/immigrationandsocialsecuritycoordinationeuwithdrawal.html)

⁵ <https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent/eu-settlement-scheme-statement-of-intent>

The best protection for the five million is thus by way of a UK-EU agreement, rather than by unilateral solutions. Ideally, the UK and the EU should have agreed on this right at the start of the Brexit negotiations instead of making it dependent on other aspects of the Brexit negotiations.

I set out the arguments for such 'ring-fencing' soon after the UK had triggered Article 50 TEU:⁶

- 1) By guaranteeing these rights upfront, and reciprocally between EU citizens in the UK and UK citizens 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 (t3m) and UK citizens in Europe (BiE) have repeatedly lobbied for ring-fencing, the UK and EU have refused to do this.

The UK Government and the European Commission have negotiated a solution for citizens' rights in the Withdrawal Agreement. Agreement on this was found prior to more controversial aspects of the negotiation, particularly the Irish border. Yet, despite the anxiety of five million people uncertain about their legal status, no initiative was taken to adopt these citizens' rights separately prior to more contested issues. As a result, the fate of the five million is now bound up with the fate of the Withdrawal Agreement, opposition against which is not due to its citizens' rights provisions.

So why have the UK and EU not taken the initiative to ring-fence citizens' rights? 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 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

⁶ Stijn Smismans, 'Brexit: A separate citizens' rights agreement under Article 50 TEU', EUtopialaw blog (16h June 2017), at <https://eutopialaw.com/2017/06/16/brexit-a-separate-citizens-rights-agreement-under-article-50-teu/>

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 of reciprocity, therefore, UK citizens 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, 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.

Unfortunately the fate of citizens' rights in the Withdrawal Agreement is now 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 recent 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 defend publically 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 serious risk of no deal. Time is running out for the EU and the UK to be able to adopt a citizens' rights Treaty under Article 50 and ratify and implement it, particularly with the UK Parliament in turmoil.

The legal possibility to adopt a citizens' rights agreement under Article 50.

Besides the political dynamics against ring-fencing so far, there appears to be some implicit worry among some policy-makers about how this could be legally done, although no explicit statements have been made in this regard.

With the substance of citizens' rights already written in the Withdrawal Agreement and little prospect for the improvement of these provisions (without the risk of re-negotiation leading to diluting rights), the best solution now is to adopt these provisions as they stand under article 50 TEU, even if no agreement is found on the other parts of the Withdrawal Agreement.

Technically it is not difficult to draft a separate citizens' rights agreement copying these provisions. It would include not only its citizens' rights part (Part II), but also the procedural provisions of the Withdrawal Agreement ensuring its implementation, such as the requirement to give direct effect to these rights, the monitoring and enforcement provisions (such as the temporary role of the Court

of Justice of the EU and the creation of an independent monitoring authority).⁷ It will equally have to include a transition period, which would not provide for the continued application of all EU law like in the Withdrawal Agreement, but of all EU law related to citizens rights since such a transition period is needed to allow EU citizens to register for their new status.

The best, and most likely only, way to adopt such a citizens' rights agreement is by doing it under Article 50. Article 50 requires (only) qualified majority in the Council and the consent of the European Parliament, rather than unanimity in the Council and ratification in all national parliaments in the case of a so-called 'mixed agreement' dealing with topics on which the EU shares competences with the Member States. In case one had to rely on the latter it would be extremely difficult to get it in place by the Brexit date. Moreover, it is even uncertain that the EU would have the competence to negotiate outside of Article 50 TEU all aspects currently covered on citizens' rights in the Withdrawal Agreement. According to Articles 79 and 80 of the Treaty on the Functioning of the European Union (TFEU), the EU can lay down the conditions governing entry into and legal residence in a Member State, including for the purposes of family reunification, for third-country nationals. Yet, Member States retain the right to determine volumes of admission for people coming from third countries to seek work. Moreover, the EU may provide incentives and support for measures taken by Member States to promote the integration of legally resident third-country nationals, but EU law makes no provision for the harmonisation of national laws and regulations on this matter. Hence, unless acting under Article 50 TEU, which provides a wide horizontal power for the EU to settle 'withdrawal', it is highly unlikely the EU could negotiate a treaty (even a mixed one) with a third country that gives third country nationals a comprehensive package of rights that comes close to the set of rights of EU citizenship. Particularly as Member States are very protective of their sovereignty these days in terms of controlling immigration, it is unlikely they will leave the EU much space to act on this if it stretches competences under Article 79 and 80 TFEU.

Yet, while Member States have agreed that the EU has the wider horizontal competence to deal with all these rights in the Withdrawal Agreement, two questions may arise regarding the possibility to adopt a separate citizens' rights agreement under Article 50.

- 1) According to Article 50 the Union shall negotiate and conclude an agreement with that withdrawing State, setting out the arrangements for its withdrawal. Can a citizens' rights agreement be that agreement? The European Council has set out its expectations of what a withdrawal agreement would cover, including citizens' rights, the budget, Northern

⁷ On the limitations of this Independent Authority as provided by the Withdrawal Agreement, see Stijn Smismans, 'EU citizens in the UK are in a particularly weak position and need an independent authority to monitor their rights', LSE Brexit Blog (21st April 2018), at <http://blogs.lse.ac.uk/politicsandpolicy/eu-citizens-in-the-uk-are-in-a-particularly-weak-position-and-need-an-independent-authority-to-monitor-their-rights/>

Ireland, and institutional issues such as moving EU agencies based in the UK. However, these were political objectives set out at the start of the negotiation. There is no legal obligation under Article 50 that all these aspects have to be covered in the withdrawal agreement. 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. In that scenario, the rest of the Withdrawal Agreement fails to be adopted and the citizens' rights agreement constitutes *de facto* the only withdrawal agreement under Article 50.

- 2) The second question is whether more than one agreement can be adopted under Article 50. This question seems more pertinent if ring-fencing would have been done at the start of the negotiation process. With two months left to the Brexit date, it is highly unlikely one would first sign a citizens' rights agreement, and then still land on a second agreement on remaining issues prior to the Brexit date. More likely one has to conclude that the full Withdrawal Agreement has failed, and then adopt the citizens' rights agreement as the only agreement under Article 50.

However, the question remains relevant for two reasons. Some policy-makers keep pushing back the request for ring-fencing with the argument that the full Withdrawal Agreement needs to be given all chances to get adopted. Adopting a citizens' rights agreement now is seen as counterproductive to that, as some believe that would constitute the end of negotiations. Yet, pushing the adoption of a citizens' rights agreement backward until the eve of Brexit is risky, as it might be too late to ratify it in time. To avoid this risk it is useful to know that the signature of a citizens' rights agreement now does not exclude agreement on other issues later. If one can adopt more than one agreement under Article 50, the argument for ever pushing back adopting a citizens' rights agreement becomes less convincing.⁸ Moreover, the issue remains particularly relevant given that Article 50 might be extended. It is highly unlikely the UK can sort out its position prior to 29th March, and the amendment currently proposed in Parliament by Yvette Cooper would exactly make a request for an Article 50 extension the UK's default position to avoid (temporary) no-deal, although it would not guarantee the EU will grant such extension.

Even in the case of extension, it remains highly desirable to adopt a citizens' rights agreement now. It is unreasonable and not acceptable 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 to safeguard the rights of 5 million people now, as has been promised by all parties (even on the Leave campaign) ever since the referendum.

So, can more than one agreement be adopted under Article 50? 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

⁸ On the political dynamics of this argument see below.

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).⁹ 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’.¹⁰

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. For the sake of clarity, the EU and the UK could indicate in the citizens’ rights agreement that its signature does not constitute the full end of the Article 50 negotiation process. As long as one remains within the original or extended time limit of Article 50, a citizens rights agreement does not exhaust the possibility of adopting other agreements under the Article.

⁹ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para.27.

¹⁰ Miguel Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, *European Journal of Legal Studies*.(2007) 1(2), available at <http://hdl.handle.net/1814/7707>.

Moreover, allowing a separate citizens' rights agreement 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.

The political dynamics around ring-fencing at Brexit crunch time.

As there appear no legal excuses against ring-fencing via a separate citizens' rights agreement under Article 50, why does it still not happen while the risk of a no deal is ever increasing?

From the EU side, some still consider it 'too early' as it may impede the chances of agreement on the full Withdrawal Agreement. However, time is now very short, and pushing the issue further towards the Brexit date implies a strong risk that it can no longer be ratified and implemented in time. Moreover, if the issue is really pushed until the last moment when a no-deal is a definite outcome, it is unlikely the UK would still sign a citizens' rights agreement. Faced with the impending chaos of a no deal, guaranteeing the rights of the five million will be the least of its concerns. Failure to find an agreement for an orderly Brexit will also antagonise the relationship between the EU and the UK (its press included), making signature of a citizens' rights agreement very unlikely.

There are also no really convincing arguments that taking the issue of citizens' rights now from the negotiation table would affect the bargaining balance on the rest of the negotiations. The EU is the more demanding partner in relation to citizens' rights (with the UK having showing remarkable little effort to defend the position of its citizens in the EU), as well as in relation to the budget. Yet, by signing a citizens' rights agreement first the EU does not lose its bargaining advantage. It can still ask for the rest of the Withdrawal Agreement to be concluded prior to any detailed negotiations on the future relationship to take place, which is what matters most for the UK.

Rather than being too early, there is a serious risk now that it will soon be too late for ring-fencing, and not only because ratification and implementation require time. 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. Yet, particularly in the EU27 these unilateral solutions are not much more than generic political statements with little legislative or implementing measures being adopted or even drafted. The unilateral route would also require the negotiation of 27 bilateral agreements between UK and all other EU countries to deal with those aspects that can never be dealt with unilaterally,

such as the coordination of social security issues.¹¹ The challenges of getting in place 27 unilateral solutions in order to ensure the protection of the British citizens in the EU has led to calls for a European wide initiative to cover their situation.¹² However, efforts in this direction immediately encounter resistance in terms of whether the EU has the legal competence to act. As discussed above, Member States are reluctant to give the EU much space to act under Article 79 and 80 TFEU, and in this particular case resistance appears that strong that currently one would only contemplate that the EU adopts recommendations and not binding action.

Whatever the difficulties with unilateral action, or an EU wide solution for the British citizens in all 27 EU countries, the further elaboration of such measures may make the adoption of a citizens' rights agreement more unlikely. The more Member States have invested in setting up these solutions and the more they have asserted sovereignty over it, the more they will argue a citizens' rights agreement is no longer needed, although, as analysed above, such unilateral agreements can never provide the same protection (even if they were put in place in time).

It is the time now for political actors to take up their responsibility. It would be outrageous if the EU were to abandon its citizens and former citizens and leave 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 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. However, there is a risk that a mere joint political statement would not be 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.

¹¹ In the context of the no deal contingency planning, the EU27 have been told by the European Commission they should not enter into any deals on topics covered by the Withdrawal Agreement. It is thus impossible the 27 bilateral treaties would be in place in time.

¹² All British Members of the European Parliament signed a letter in this regard in January 2019.

- 2) 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 prior to Brexit day.