Submission on behalf of the3million

This document provides a detailed legal argumentation for two key demands of the3million:
-a request for a Protocol to be attached to the Withdrawal Agreement
-the need for better guarantees that EU citizens' rights will be set out in primary legislation

The document has been written in a personal capacity by Stijn Smismans, Professor of EU law at Cardiff University. Prof. Smismans has advised the3million on a voluntary basis, and has (co-)authored some of its documents, such as the Analysis 1 and 2 of the Withdrawal Agreement, and the Proposal for a Protocol (together with Luke Piper).

If you would like further clarification on these arguments, Professor Smismans is available to provide further information.
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EU citizens' rights post Brexit: why direct effect beyond the EU is not enough

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INTRODUCTION

One of the key priorities of the Brexit negotiations has been the protection of the 3.5 million EU citizens already residing in the UK and the more than 1 million British citizens residing in the EU. Much of the debate has focused on the material scope of the rights they will hold after Brexit. The draft Withdrawal Agreement[1] provides for a status that would come close to their current status, although these citizens would be deprived of some of the rights they currently hold, in particular in relation to family reunion and the increased risk of being deported on the basis of criminality for acts committed after Brexit, while the free movement rights of British citizens residing in the EU are only guaranteed in the country in which they are currently residing. The main challenge, however, remains in ensuring that EU citizens in the UK and British citizens in the EU can have access to this new status; as well as guaranteeing proper implementation of the Withdrawal Agreement (WA). This challenge is especially difficult for EU citizens in the UK, as the country will no longer be part of the EU, and will thus fall out of the comprehensive judicial protection provided by EU law. Therefore, this article focuses on the legal status of EU citizens in the UK, rather than that of the British citizens in the EU. In particular, it will analyse the procedural

[1] Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16-19 March 2018, TF50 (2018) 35 – Commission to EU27, 19 March 2018.

mechanisms needed to guarantee their rights, rather than debate the material scope of their status.[2]

Anxiety about the fate of the 3.5 million EU citizens in the UK has increased in the light of the UK's approach to immigration, particularly in the light of the 'Windrush' scandal.

It is no surprise then that the EU has sought to ensure that EU citizens would still be able to profit from a certain level of 'supranational protection' after Brexit. Indeed, the draft Withdrawal Agreement states that its section on citizens' rights will have direct effect in the UK, and the preliminary rulings procedure should remain available for 8 years after Brexit. From an international law and national sovereignty perspective, this supranational protection appears extraordinary. Never have these supranational features of EU law reached beyond the EU. However, it would be wrong to assume that EU citizens in the UK now have extraordinary protection. Beside the fact that the promised 'settled status' is inferior to the rights they currently enjoy, the main problem is that many remain at risk of failing to prove entitlement to this status, while tools for monitoring and enforcement are weak. In this article I argue that the EU, and in particular the European Commission, has been too complacent and has taken a formalistic approach to the negotiations, ignoring the particular challenges of implementation in the UK as a country outside of the EU. The EU's approach to citizens' rights in the withdrawal negotiations is based on a double flaw. It takes a cut-and-paste approach to, respectively, EU supranational principles (such as direct effect) and substantive EU law provisions (such as the Citizens' Directive 2004/38/EC), and pretends that the literal transfer of these principles and provisions would offer the same level of protection to EU citizens even in a country that will no longer be a member of the EU. Unfortunately this fails to take into account the particular challenges EU citizens face in the UK, which is due both to the legacy of how the UK has dealt with EU immigration in the past and to the limitations of EU oversight when the UK is out of the EU. As a result, and despite the 'extraordinary' reference to direct effect and preliminary rulings, the Withdrawal Agreement leaves EU citizens in a very vulnerable position.

In the first section I analyse the key substantive flaw of the WA, which consists in copying into the WA the same level of discretion for implementation that is built into the Citizens Directive 2004/38/EC. While such discretion may be appropriate for Member States within the EU, it has very different consequences

[2] In this article I do not address the concept of EU citizenship. Surprisingly, the conceptual debate on EU citizenship in the context of Brexit has particularly focused on the idea of 'associate citizenship', promoted by Guy Verhofstadt, which would guarantee EU citizenship rights for British nationals even if not yet residing in the EU. On the profound conceptual and legal problems of that proposal, see Martijn van den Brink and Dimitry Kochenov (2018), 'A critical perspective on associate EU citizenship after Brexit', DCU Brexit Institute Working Paper No.5; at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175318. For other interesting contributions on EU citizenship post-Brexit see Patricia Mindus (2017), 'European citizenship after Brexit', Palgrave; and Stephanie Reynolds (2018), '(De)constructing the road to Brexit: Paving the way to further limitations to the free movement and equal treatment?', in Daniel Thym (ed) (2017), 'Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU', Hart: Oxford, 57-87. However, both contributions pre-date the Brexit negotiations. While much remains to be said on EU citizenship conceptually in the light of recent developments, the focus of this paper is on identifying the procedural mechanisms needed to protect EU citizens in the UK properly.

when a country is no longer part of the EU. The combination of introducing a constitutive instead of declaratory registration system, the UK's 'hostile environment' immigration policy and the weak supranational guarantees when out of the EU, means that many EU citizens risk immediate loss of all entitlements to work, healthcare, benefits, and ultimately face deportation. I argue that the only way to guarantee this does not happen is by setting out a detailed procedure within the WA, or in a separate Protocol attached to it, on how the UK will organise the registration of EU citizens.

In the following sections, I analyse the main procedural flaw of the WA, namely the assumption that a simple requirement to apply direct effect to citizens' rights would provide sufficient protection for EU citizens to retain their current status. In section 2, I will first analyse the procedural implementation mechanisms promised in the Joint Report. The Joint Report was adopted by the UK and the EU in December 2017 to set out the political agreement on what would be written in the WA. The Joint Report did in fact take into account the particular challenges of implementation in a non-EU country by promising a double guarantee, namely direct effect *and* the full incorporation of citizens' rights into primary legislation. I will argue why such a double guarantee is indeed required and why direct effect on its own would not provide sufficient protection.

However, in section 3 I analyse how the WA does not live up to the promises made in the Joint Report regarding incorporating citizens' rights provisions into primary legislation. It appears to assume that by simply copying the principle of direct effect, EU citizens would be properly protected. Indeed, this underestimates the difficulties of implementing supranational features of EU law in a non-EU country.

Having analysed the two main flaws of the WA, in the final section I will analyse how this interacts with the legal framework the UK is setting up to take itself out of the EU and implement the WA, in particular in relation to the implementation of citizens' rights. This framework is constituted of the UK Withdrawal Bill (WB)(by which the UK takes itself out of the EU, but retains existing EU law until revision by future UK law), the Withdrawal Agreement and Implementation Bill (WAIB), and the proposed registration system. The proposed legal framework suggests the Government will have considerable leeway to implement EU citizens' rights. In the absence of proper supranational protection and clear guarantees set out in primary legislation, the residence status of many EU citizens is at risk, particularly when also taking into account the substantive flaw of the WA.

I conclude that the EU should set aside its formalistic approach, and acknowledge that copying parts of the EU's supranational principles such as direct effect and substantive provisions of EU law is not the same as maintaining the current protection of EU citizens. Unlike what may appear at first sight, the inclusion of direct effect and preliminary reference procedure in the WA does not provide 'extraordinary' protection to EU citizens. It is not extraordinary as there are serious limits to the 'supranationality' provided; and it is definitely not extraordinary in guaranteeing that EU citizens in the UK will not be deprived of their current rights. In order to avoid the latter, the EU should take into account the particular features of the UK legal system as a country no longer part of the EU, and adjust guarantees in the WA accordingly. This can be done by adopting a separate Protocol attached to the WA in which the UK would set out its

registration system (thereby overcoming the risk of the discretion provided by the Citizens' Directive), and by including into the WA a clear requirement to set out not only the principle of direct effect but also the substantive citizens' rights provisions into primary legislation.

THE SUBSTANTIVE FLAW OF THE WA

Why copy-and-paste is not the same as maintaining current protection

The WA copies most of the substantive rights provided by the EU Citizens' Directive 2004/38/EC,[3] the professional qualifications Directive[4] and the free movement of workers and social security Regulations.[5] EU citizens in the UK would thus be able to rely on most of these rights of residence, and non-discrimination against nationals in relation to the right to work, providing services, access to healthcare and benefits. Some rights were strongly disputed in the negotiations and the public debate; and EU citizens have to give up some of their rights in the WA. E.g. under EU law, an EU citizen has more rights than a British citizen to bring in a third country spouse, which was unacceptable for the British negotiators. Another problem was the right to return to the UK. Under EU law, a citizen can lose their permanent residence after two years of absence, but can still rely on EU free movement rules to return. After Brexit, the latter option would fall away; unless EU citizens were given an unconditional right to return. The draft WA settled for a compromise for a right to return for five years. Most problematically, the EU has accepted that the UK can deport even those with permanent residence for criminal conduct after Brexit. Rather than sticking to the restrictive grounds of deportation set out in the Citizens' Directive, the UK will be allowed to set out its own definition of criminal conduct liable to deportation.

All these topics, in which the material scope of the new status would differ from that of the Citizens' Directive, have attracted strong debate and the European Parliament in particular is still set to fight for ensuring all these rights to the full. This is laudable from the perspective that these citizens have built up their life in the legitimate expectation that they were protected by EU citizenship, and there is much to be said for considering these rights as acquired rights.[6]

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[3] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77).

[4] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ L 255, 30.9.2005, p. 22).

[5] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ L 141, 27.5.2011, p. 1). Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L166,30.4.2004,p.1); and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L284, 30.10.2009, p.1).

[6] The concept of 'acquired rights' as traditionally used in international law has limited scope to protect all the rights provided by EU citizenship. See House of Lords, European Union Committee, 'Brexit: Acquired Rights', 10th report of session 2016-17, HL Paper 82, 14 December

At the same time, the focus on the material scope of the new status, called 'settled status' under UK law, has overshadowed discussion on who can obtain this status, and how they can do so.
The EU has taken a formalistic approach and simply copied the personal scope and burden of proof requirements set out in the Citizens' Directive, assuming this would guarantee EU citizens the same rights as they hold now.
Unfortunately, this fails to take into account the particular challenges of applying these criteria in the UK once it is no longer part of the EU.

In a nutshell, in order to obtain the residence rights provided by the EU Citizens' Directive, one needs to be in work (or have been in work), or demonstrate having sufficient resources and comprehensive sickness insurance. There is a level of discretion for the Member States on whether and to what extent they impose and control these criteria. One can discuss whether the system set up by the Directive provides the best balance between facilitating free movement (and protecting those who made use of it) and allowing Member States some scope to impose restrictions in order to ensure viability of their welfare system. It is not the place here to repeat that debate. [7] Rather, while assuming the system provides for a more or less fair balance, one has to realise its proper functioning so far appears to have been dependent on a set of conditions:

1) The Directive provides both the option to introduce an initial registration soon after arrival, and a subsequent registration system to obtain permanent residence after five years. Most Member States have introduced the first system, which then facilitates also applying the second. However, if a Member State has not applied an initial registration for years or decades, the sudden introduction of a registration system for permanent residence raises particular challenges as people might fail to provide evidence of initial arrival and compliance; particularly if that system becomes obligatory.
2) The Directive's system of 'registration' for permanent residence is declaratory, so absence of the document does not mean you are not entitled. Furthermore, people only risk losing entitlements when the State has reasonable doubt that they are a burden on their welfare system, rather than the State being able to apply checks systematically.[8]

2016. Yet, in a report for the European Parliament, Volker Roeben *et al.* develop the argument of 'continuity' on the basis of EU citizenship. See Volker Roeben, Jukka Snell, Petra Minnerop, Pedro Telles and Keith Bush QC, 'The feasibility of associate EU citizenship for UK citizens post-Brexit', A study for Jill Evans MEP, July 2017. I do not agree with the authors that such continuity is possible for those who have never exercised the free movement rights, but the argument merits elaboration for those who have; which is, though, beyond the scope of this paper.

[7] Stefano Giubboni, "Free movement of persons and European solidarity", European Law Journal 13(3), p.360-379. Daniel Thym (2015), The elusive limits of solidarity: residence rights of and social benefits for economically inactive union citizens, Common Market Law Review Vol.52(1), 17-50 ; Eleanor Spaventa (2017), "Earned Citizenship: Understanding Union Citizenship Through its Scope" in *Dimitry Kochenov (ed) EU Citizenship and Federalism: the Role of Rights, Cambridge University Press, p.204-225; Daniel Thym (ed) (2017)* Questioning EU Citizenship Judges and the Limits of Free Movement and Solidarity in the EU, Hart: Oxford; Frans Pennings and Martin Seeleib-Kaiser (eds) (2018) EU Citizenship and Social Rights Entitlements and Impediments to Accessing Welfare, Edward Elgar, Cheltenham.

[8] Article 14 Directive 2004/38/EC.

3) The Directive is implemented within the context of the judicial oversight and the remedies provided by EU law. EU citizens can rely on direct effect and supremacy, as well as Francovich damages in national courts, while they have access to the preliminary reference procedure. Moreover, the infringement procedure ensures top-down control over Member States' implementation of EU law.

Unfortunately, none of these conditions are realised in the context of Brexit.

1) The UK has never applied an initial registration system for EU citizens. EU citizens were given all the rights provided by the Citizens' Directive without a registration system, requiring them simply to present a European ID or passport when accessing services. They were not asked to provide proof of being in work or having sufficient resources and comprehensive sickness insurance. Suddenly requiring such proof in relation to entitlement that is based on conditions that may go back years or decades is highly problematic. It is easy here to see the risk of a potential repeat of the Windrush scandal in which people were equally asked to provide proof of entitlement for situations years and decades ago, while they had been considered to be living in the UK legally all that time.
2) The UK is set to introduce a constitutive registration system. At the request of the UK, the draft WA gives the option to set up either a constitutive registration system,[9] or keep the existing declaratory system.[10] Unlike in a declaratory system, in a constitutive system one has to successfully apply in order to obtain the status. In case one is rejected, or one has no document certifying this status, one loses all entitlements and faces deportation. The consequences of not holding a 'settled status' document are thus much harder-hitting than when one does not hold a permanent residence document under EU law. In the latter declaratory system, absence of the document does not mean you are not entitled. Even if your application is rejected you might still be able to stay on a temporary basis, or might be able to return under free movement provisions.
   The consequences of a constitutive registration system can be particularly dire if combined with the UK's so-called 'hostile environment' policy to immigration.[11]

3) The Citizens' Directive, and the discretion it allows to Member States, has been supervised by the EU judicial system. Once the UK leaves the EU, this will no longer be the case. As I will argue in more detail below, there are some doubts about to what extent 'direct effect' as promised in the

[9] Article 17 (1) to (3) WA.
[10] Article 17(4) WA.
[11] Independent Chief Inspector of Borders and Immigration, 'Inspection Report of the hostile environment' (October 2016), available at https://www.gov.uk/government/publications/inspection-report-of-hostile-environment-measures-october-2016; and Karl McDonald, "What is Hostile Environment, Theresa May's policy that led to the Windrush scandal and other problems", News The Essential Daily Briefing (April 17th 2018), at https://inews.co.uk/news/politics/what-is-hostile-environment-theresa-may-windrush-eu-citizens-legal-immigrants/.

> WA will be ensured. Equally, it is uncertain to what extent UK judges will make use of the option to refer a preliminary ruling to the CJEU. Moreover, the WA no longer offers the infringement procedure as a way to control respect of EU law. Neither will EU citizens any longer be able to invoke Francovich damages in UK courts.

Hence, while the EU pretends the WA will offer (nearly) the same protection to EU citizens as the rights they currently hold under the Citizens' Directive, the acceptance of a constitutive system, combined with past and current UK immigration legacy means that a copy-and-paste of the Citizens' Directive can have dramatic consequences once the country is no longer part of the EU.
This can best be illustrated by taking into account the way the UK has until now implemented the registration for permanent residence (PR) under the Citizens' Directive. As that system is declaratory not many EU citizens have felt the need to apply for a PR card, although applications increased after the Brexit referendum as people hoped PR would give them more protection. Most who have applied did so in order to subsequently apply for British citizenship as PR is a precondition for the latter.
However, while the UK has been very relaxed in allowing EU citizens residence and equal treatment simply on the basis of ID and without requirement to register, its PR registration system has been particularly complicated in terms of requiring proof of residence. EU citizens have to apply via a 85 page long application document, with poor guidelines, and have to provide extensive documentation (in original or certified documents) to show they have complied with the Citizens' Directives' requirements of being either in work (or having been in work) or having sufficient resources and comprehensive sickness insurance. The application process has been so complicated that it had a rejection rate of 28%.[12] This does not even take into account that there are many EU citizens who are not applying for PR because they know they do cannot provide the required evidence.
If the UK's registration system for 'settled status' post-Brexit is based on a similar burden of proof requirement, the consequences would be dramatic. Unlike for the declaratory PR system, all 3.5 million EU citizens will be obliged to register under the new constitutive system, and failure of the application will mean immediately being faced with all the consequences of the 'hostile environment', losing all entitlements and facing deportation. A 28% rejection under these conditions would be a nightmare.

Yet, there is nothing in the draft WA that would prevent the UK from introducing a registration system (nearly) as demanding in terms of burden of proof as its previous PR system, because the WA simply copies the criteria and discretion available to the Member States in the Citizens' Directive. The UK could still ask for a high number of original documents to prove work status or having sufficient resources, even to prove situations several decades ago. It may equally still require those not in work to prove they have a comprehensive sickness insurance. The latter requirement has been particularly problematic in the UK,

[12] Reiss Edwards, Immigration Lawyers London, "Home Office Rejects over 28% Permanent Residency Applications – Report" at https://immigrationlawyers-london.com/blog/high-permanent-residence-rejection-rates.php

since the UK has not accepted that having access to the National Health Service (NHS) fulfils the requirement of having comprehensive sickness insurance. All EU citizens residing in the UK have been given access to the NHS, so hardly any (and particularly not those who are not in work) have taken a private health insurance. It is even questionable that, given the broad reliance on the NHS, any of the existing private insurance schemes could even be considered to be 'comprehensive'.[13] Hence, requiring a comprehensive sickness insurance and not considering NHS access as complying with that requirement would virtually automatically exclude all those who are not in work. The European Commission has criticised the UK on this point[14], but never taken enforcement action on the issue. If there were already problems with the way in which the UK implemented the Citizens' Directive while still in the EU, it will become even more challenging when the WA applies the same criteria for the UK when supranational supervision will be even weaker, and the registration is not a declaratory but a constitutive one, suddenly applying to 3.5 million people.

From political statements to legal commitments

The UK is fully aware that applying a similar system as its PR application procedure would constitute an administrative, social and political disaster. Registering 3.5 million citizens via a procedure similar to the PR application would require huge administrative resources and take decades. At the same time, deporting over 28% of the 3.5million EU citizens is not desirable politically, economically or socially. So the UK has politically promised to introduce a simple registration procedure based on proof of legal residence, identity and criminality check. However, the exact legal translation and detail of that commitment remain unclear. The Government has explicitly stated that it would not apply the requirements of comprehensive sickness insurance and being in 'genuine and effective work'.[15] In theory, the latter would imply that the UK would not check on being in work at all, and that no means testing would be applied either. Under EU law means testing is only applicable if one is not in 'genuine and effective work', and it is the latter definition by which the CJEU has set out the parameters of what can be asked in terms of proof of being in work. Yet, the precise intentions of the Government remain unclear. It has said it will introduce an online registration procedure,[16] based on identity and declaration of residence and whether one has a criminal record. The Government will then check whether this is confirmed by existing databases, particularly from the tax office HMRC. This raises the question of what proof will be required of people who are not

[13] Aleksandra Herbeć, The scandal of CSI, the little-known loophole used to deny EU citizens permanent residency, available at: http://blogs.lse.ac.uk/brexit/2017/03/17/disheartened-and-disappointed-the-government-and-universities-have-failed-eu-citizens-over-comprehensive-sickness-insurance/

[14] http://europa.eu/rapid/press-release_IP-12-417_en.htm

[15] HM Government, "Technical Note. Citizens' rights - Administrative procedures in the UK", 7 November 2017, paragraph 11; at https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk

[16] HM Government, "Technical Note. Citizens' rights - Administrative procedures in the UK", 7 November 2017, paragraph 6; at https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk

(sufficiently) in the HMRC database. Will those people still be required to show proof of being in work or having sufficient resources?
The draft WA leaves the UK the full discretion of the Citizens' Directive; so its requirements can go from asking a single document showing residence prior to Brexit which would allow nearly EU citizens to obtain settled status, to a burdensome process similar to its PR registration system, which could lead to over 28% getting a letter to leave the country. Moreover, as I will show below, the WA does not provide guarantees that these criteria would be set out in primary legislation, thus making these criteria open to adjustments by executive action and EU citizens at risk of a gradual undermining of their status.

So why has the EU not made more effort to ensure the UK's political statements would be turned into legal commitments and thus avoid over 28% of its citizens risking deportation?
The European Commission has taken a formalistic approach arguing that EU citizens retain the same entitlements as under the EU Citizens' Directive, and thus pretending they are not at risk. However, that fails to acknowledge that these criteria cannot operate in the same way when they are applied in a country that never had registration and will introduce a constitutive registration system when it is no longer a Member of the EU. The refusal to accept this reasoning seems to be inspired by the fear that writing more details into the WA on a simpler registration system in the UK would put the other 27 Member States under pressure to apply a similar procedure, and thus *de facto* undermine the discretion allowed by the Citizens' Directive. However, the WA is an international treaty. It can set particular provisions for the UK (as, in fact, it does on other issues),[17] and this approach would be justified by the fact that the legal situation in a country out of the EU is not identical to that of countries in the EU. Hence, legally this can be done within the WA without imposing new requirements on the other 27 Member States. Nevertheless, if there is political reluctance by the remaining Member States, an alternative solution is to set out the UK's political statements regarding a simple registration based merely on residence, ID and criminality check into a Protocol attached to the WA. Such a Protocol would be a binding commitment by the UK on how it will implement the WA.

Given that the Brexit withdrawal negotiations are based on the principle 'nothing is agreed until everything is agreed', such a revision of the WA or the inclusion of a Protocol specific for the UK is still possible. Whether this is politically achievable depends on several actors. It is not clear to what extent the formalistic approach of the European Commission was really inspired by substantive resistance from the Member States. The negotiation has been strongly driven by the European Commission, within a very short time frame, leaving the Member States little time to get through the nitty-gritty complex citizens' rights provisions of the WA.[18] From the UK perspective, it comes down

[17] E.g. Article 4 WA addresses particularly how the UK should implement the WA; Article 151 makes the preliminary reference procedure applicable to the UK, while Article 152 requires the creation of independent authority to monitor implementation of the WA only in the UK.
[18] E.g. the European Commission published its draft WA on 28 February 2018, after which it negotiated with the UK, and presented an UK-EU draft WA on 19 March. The Member States had

to setting out legally a commitment it had already made politically, but it might be very reluctant to do so at an international level. Yet, the UK government may be willing to do so if the EU offered freedom of movement throughout the entire EU for the British already residing in Europe, which remains the biggest weakness of the WA for this group. The European Parliament might be the ultimate dealmaker on this issue. It has presented itself as the big defender of citizens' rights in the Brexit negotiations and has repeatedly stated it will not approve the WA if it has no guarantees on their protection. Yet, to defend EU citizens properly it has to realise that the key issue is not whether the WA copies all rights of the citizens' Directive, including the right of residence for a third country spouse, but whether it provides procedural guarantees on the registration system that take into account the particular challenges of the UK post-Brexit.

THE NECESSITY OF THE DUAL PROTECTION PROMISED IN THE JOINT REPORT

Direct effect and full incorporation in primary legislation

There is no doubt that the Joint Report agreed by the EU and the UK in December 2017 is aimed at giving citizens' rights strong protection. The key relevant provisions of the Joint Report read as follows:

> 34. Both Parties agree that the Withdrawal Agreement should provide for the legal effects of the citizens' rights Part both in the UK and in the Union. UK domestic legislation should also be enacted to this effect.
>
> 35. The provision in the Agreement should enable citizens to rely directly on their rights as set out in the citizens' rights Part of the Agreement and should specify that inconsistent or incompatible rules and provisions will be disapplied.
>
> 36. The UK Government will bring forward a Bill, the Withdrawal Agreement & Implementation Bill, specifically to implement the Agreement. This Bill will make express reference to the Agreement and will fully incorporate the citizens' rights Part into UK law. Once this Bill has been adopted, the provisions of the citizens' rights Part will have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future. The Withdrawal Agreement will be binding upon the institutions of the Union and on its Member States from its entry into force pursuant to Article 216(2) TFEU.

The Joint Report thus clearly commits to ensuring the continuing 'supranational' character of citizens' rights by requiring direct effect and primacy of these provisions. Paragraph 36 provides further detail on how the UK has to

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then just a bit more than a week to consider they could agree with that at the European Council meeting of 22 and 23 March.

implement the protection provided by the WA. More precisely, it clearly states this has to be done via a Withdrawal Agreement and Implementation Bill (WAIB).
Paragraph 36 might seem ambiguous at first sight.[19] On the one hand, it requires that the citizens' rights part of the WA is fully incorporated in the WAIB. This seems to suggest that all citizens' rights provisions of the WA need to be copied into the WAIB (in order to have effect).
On the other hand, the UK and EU agreed that the WA will provide for direct effect and supremacy of these provisions (para.35). Obviously, this will need to be implemented by primary legislation in the UK, similar to the way in which the European Communities Act recognised the supranational features of European law. It is surely not sufficient, as the Secretary of State for Exiting the European Union, David Davis, suggested when referring to 'direct effect, if you like', that the mere incorporation of WA citizens' rights provisions in national primary legislation would as such guarantee direct effect.[20] The WAIB will, at the very least, have to include a provision that acknowledges the direct effect and supremacy of the WA's citizens' rights provisions, so that in the case of conflict between a national norm and the WA citizens' rights provisions the latter will prevail.

However, it is wrong to conclude that the inclusion in the WAIB of a provision ensuring direct effect and supremacy would make the inclusion of the specific citizens' rights provisions of the WA into the WAIB superfluous. It is not a question of 'either, or'. The two guarantees can be combined, and there are very good reasons to do so.

Why citizens' rights need to be set out in primary legislation (despite the direct effect of the WA)

The added value of having all provisions in one text.

The WA is a complex text, with multiple references to other EU texts, such as the Citizens' Directive and the Social Security Coordination Regulations. Although it provides individual rights, it is written as directed to the UK and the 27 Member

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[19] See Mark Elliot, "The Brexit Agreement and citizens' rights. Can Parliament deliver what the Government has promised?", 11 December 2017, at https://publiclawforeveryone.com/2017/12/11/the-brexit-agreement-and-citizens-rights-can-parliament-deliver-what-the-government-has-promised/

[20] This statement appeared to be mere covering up of the initial UK negotiation position that they would not accept direct effect, as stated in paragraph 3 of the 'Technical Note: Implementing the Withdrawal Agreement" (13 July 2017): "It would be both inappropriate and unnecessary for the agreement to require the UK to bring the EU concept of direct effect into its domestic law. The same substantive result can be achieved if the Withdrawal Agreement requires the UK to give citizens specified rights, and the UK enacts domestic legislation whose effect is to bestow those rights. Not only will EU citizens be able to enforce those rights through the UK's domestic legal system, but the UK's compliance with its international obligations can also be enforced using whatever mechanisms the agreement includes for the resolution of disputes"; at https://www.gov.uk/government/publications/technical-note-on-implementing-the-withdrawal-agreement

States. Some of these provisions also leave a level of discretion as to how the UK and EU27 will achieve the objectives set.
Implementation by national administrations and courts will be strongly facilitated if the rights set out in the WA are copied in the WAIB, together with the transposition measures that allow some discretion for the UK. 'Direct effect' then only needs to be relied on in the case of a contradiction between the WAIB and EU law. In the absence of a WAIB that incorporates the rights set out in the WA as comprehensively as possible, EU citizens would, for some aspects, have to rely directly on the WA (which then refers to other EU law), while for other aspects potentially on several acts of primary legislation (e.g, on the WAIB for issues of future social security coordination with the EU; or on a new immigration bill for issues concerning registration), and most likely, on many acts of secondary legislation. One can avoid such complexity by comprehensively setting out the citizens' rights provisions within the WAIB. The risk that courts, but in particular national administrations and private actors such as banks or landlords, fail to identify the proper rules applicable to EU citizens is thus reduced. At the same time, it facilitates control by the EU on whether the UK is living up to its promises. Non-respect of the WA can be dealt with in the arbitration mechanism set up by the WA. Article 162 of the draft WA even provides that failure of arbitration could lead to one of the parties taking the issue to the CJEU for final decision (although this part of the draft WA remains under discussion). However, any monitoring by the EU will start as a more political process to be dealt with via arbitration, and cannot be triggered by individual action. Such political monitoring of systematic problems of implementation will realistically take place when all the spotlights are still on Brexit and the UK is adopting its WAIB. However, monitoring becomes more difficult when the limelight is dimming and if implementation of the WA is organised via multiple acts of primary and secondary legislation. This brings me to the key point of the need for primary legislation:

The added value of having the citizens' rights provisions set out in detail in an act of primary legislation

In theory, the requirement of direct effect and supremacy could be set out by recognising these principles in an act of primary legislation, such as the WAIB, while further implementation of the citizens' part of the WA could be left over to secondary legislation. However, that would leave EU citizens in a weak position. Their status could be amended at the whim of a Minister, and nothing appears more subject to continuing ministerial intervention and amendments than UK immigration law[21]. In theory, this would need to remain within the limits set by the WA. However, it will be much more difficult for the EU to monitor this fluidity of ever changing norms of secondary legislation that can chip away at the rights of EU citizens, compared to when these rights are set out in the WAIB. EU citizens would then have to rely on direct effect and numerous court actions to test the validity of these ever changing norms affecting their status.

[21] Between 2012 and 2018 alone, UK immigration rules have been changed 57 times in secondary legislation. https://www.gov.uk/government/collections/archive-immigration-rules

Hence, the EU has good reasons to not only ask for direct effect, but equally for the citizens' part of the WA to be fully incorporated in the WAIB. The *sui generis* 'super protective' status of citizens' rights lies not only in their supranational character, but also in parliamentary protection against whimsical governmental action. We are talking here about the most fundamental rights of residence, family life, healthcare etc. which people have held for years or decades. These rights should be protected by Parliament, and not be open to being undermined by ministerial action and administrative procedure.

The added value of setting out citizens' rights in the WAIB is even more apparent if one takes into account the doubts about the effectiveness of the 'supranational character' of citizens' rights as set out in the Joint Report.

The Joint Report provides a strong definition of how supremacy should be ensured, requiring that only express repeal of the WAIB (and thus also its provisions on direct effect and supremacy) would allow for national law to override the WA provisions on citizens' rights. Such express repeal would blow up the entire Brexit Withdrawal Agreement, so the UK would have a strong incentive not to undermine citizens' rights. There is doubt, though, on whether UK public law allows such a strong constitutionalisation.[22] The experience of the European Communities Act, and case law such as *Thoburn*,[23] *HS2*[24] and *Miller*[25] suggest that the WAIB could be made highly, but not necessarily absolutely, resistant to implied repeal. However, much depends on the precise wording of the WAIB in this regard (and, the political feasibility of living up to such high level of constitutionalisation promised in the Joint Report is questionable, to say the least). As Mark Elliot argues,[26] in the end, even if Parliament commits to such strong terms in the WAIB, one will have to wait to see how the judiciary sets the final terms of this. In the meantime, EU citizens face uncertainty and depend on the occasion and resources to take court action to clarify their status.

The issue of how 'supranational' the citizens' rights provisions can be is not only a question of whether Parliament can constitutionalise these norms. The issue is also one of practical implementation of supranational principles in daily judicial practice when the UK is no longer a Member of the EU. One would at least expect that national norms of secondary legislation would be set aside if in contrast with the WA. However, the supranational features of EU law (such as direct effect, supremacy, and option to refer to the CJEU) have worked to the extent that the judiciary considers itself to be part of the EU judicial order. As the UK will have left the EU, it remains to be seen to what extent the judiciary feels committed to relying on these principles and tools, applicable just for citizens' rights under the WA. There might be a reluctance to apply direct effect; at least

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[22] See Mark Elliott, see above footnote 22; and, more positively, Mike Gordon, "Parliamentary Sovereignty and the Implementation of the EU Withdrawal Agreement" (17 January 2018) https://ukconstitutionallaw.org/2018/01/17/mike-gordon-parliamentary-sovereignty-and-the-implementation-of-the-eu-withdrawal-agreement-part-i/

[23] Thoburn v Sunderland City Council [2003] QB 151 (Div Ct)

[24] R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3

[25] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5

[26] Ibid.

until the Supreme Court has clearly spoken out on it. Even more so one can question whether judges will make any use of the potential to refer to the CJEU, for which they have considerable discretion.[27] UK courts have traditionally already been more reluctant than judges in many other EU countries to make use of the preliminary reference procedure.[28] Brexit will only increase that reluctance.

In any case, citizens are losing the protection from the EU infringement procedure,[29] as well as the possibility to claim *Francovich* damages (currently also applicable in case of failure to comply with EU law by a national court in final appeal, *Köbler*).[30]

The more doubts that remain about the proper respect for the supranational character of citizens' rights, the more important it is to ensure these rights are also set out in primary legislation. This will not protect against future legislative action, but it will at least protect against the potential gradual undermining of these rights via secondary legislation, while it allows the EU to monitor UK implementation when the WAIB is in the spotlight, rather than having to look at a fluidity of norms set out in a context where 'supranational supervision' can no longer be what it once was.

It is worth noting in this regard that the EU Citizens' Directive has been implemented in the UK by way of Regulations, which is secondary legislation. However, it would be wrong to deduce that it would therefore be right to also implement the citizens' rights provisions of the WA via Regulations. A Directive is embedded in the protection of the EU's supranational judicial system. If national law does not respect the Directive, the latter can be relied upon directly. Doubts on its interpretation can be settled via preliminary rulings of the CJEU. Failure of a Member State to comply can lead to enforcement action and financial sanctioning by the CJEU, or damages via the national court. As just analysed, this comprehensive system is not available for non-compliance with the citizens' rights provisions of the WA. The 'supranational character' of its citizens' rights is limited, and object of considerable uncertainty regarding its application. In the absence of proper supranational supervision and application of these norms, Parliament needs to intervene as an intermediate control in order to avoid improper action by Government.[31]

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[27] On the behavioral factors influencing the willingness of national judges to refer, see Morten Broberg and Niels Fenger (2014, 2nd ed) Preliminary references to the European Court of Justice, Oxford University Press, Oxford. p.49-57.

[28] Takis Tridimas, "Knocking on heaven's door: fragmentation, efficiency and defiance in the preliminary reference procedure", Common Market Law Review (2003), 9-50, p.38.

[29] According to Article 152 WA the UK has to set up an 'independent authority' which, in the literal wording of the Article, 'shall have equivalent powers to those of the Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches' of the citizens' part of the WA. It seems, though, an odd legal translation of wishful thinking. It is difficult to imagine how a national authority set up by the UK to monitor itself could function in an equivalent way as the supranational monitoring and enforcement guaranteed by the European Commission.

[30] CJEU, Case C-224/01. Gerhard Köbler v Republic of Austria.

[31] A similar and wider problem presents itself in the context of the EU Withdrawal Bill. The debate remains unsettled regarding the appropriate status (primary or secondary legislation) of existing UK Regulations that implemented EU Directives. While the House of Lords proposed that all retained EU law should have the status of primary legislation, the Government has

The added value of having citizens' rights set out in the WAIB and not in another act of primary legislation.

The Joint Report refers to the incorporation of citizens' rights in the WAIB specifically. This strengthens the visibility of the specific status of these rights as protected by the WA. This would avoid the risk that some of the rights, such as those requiring future coordination with the EU (e.g. on social security entitlements) would be set out in the WAIB, while others, such as those related to the registration procedure, would be set out in immigration law. Besides the issue of decreased clarity as rights would be dispersed in different texts, the inclusion of EU citizens' rights in immigration law would increasingly push interpretation of these rights into the general approach of UK immigration law and further away from EU law and the guarantees provided by the WA.

One can conclude that the Joint Report's reference to both ensuring direct effect/supremacy and incorporating the citizens' rights fully into the WAIB is anything but accidental. There are very good reasons to combine a requirement to set out recognition of direct effect/supremacy in the WAIB, with a requirement to set out in detail the citizens' rights provisions in that Bill. In the absence of the latter, EU citizens remain in a weak spot, given the limitations to the 'supranational character' of protection when a country is no longer a member of the EU. Unfortunately, as I will show in the next two sections, both the WA and the WB fail to ensure that citizens' rights will be fully incorporated into the WAIB.

THE PROCEDURAL FLAW OF THE WA

The Joint Report expressed political agreement but had to be translated into a proper legal text. This was done at the initiative of the European Commission and subsequently amended in negotiation with the UK. On 19 March 2018, the UK and EU presented their joint draft text of the Withdrawal Agreement. Much of this was coloured in green, indicating agreement between the two parties, although even for those "green" provisions the EU sticks to the principle that 'nothing is agreed until everything is agreed'. Unfortunately, the WA does not live up to all promises made in the Joint Report.

Article 4 (1) of the WA (coloured green) states the following:

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proposed a new amendment to the Bill to be discussed in the House of Commons which would imply that UK Regulations implementing EU Directives would keep their status of secondary legislation post-Brexit. See Alison Young, 'Status of EU law post Brexit', UK Constitutional Law Blog, (2nd May 2018) at https://ukconstitutionallaw.org/2018/05/02/alison-young-status-of-eu-law-post-brexit-part-one/. However, while this solution would avoid the 'flood of primary legislation' that the House of Lords' proposal would create, it diminishes the status of the rights provided in such UK Regulations. Having provisions set out simply in secondary legislation is not the same as having them set out in secondary legislation as implementation of an EU Directive, the enforcement of which is guaranteed by the EU judicial system.

> "1. Where this Agreement provides for the application of Union law in the United Kingdom, it shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States.
> In particular, Union citizens and United Kingdom nationals shall be able to rely directly on the provisions contained or referred to in Part Two. Any provisions inconsistent or incompatible with that Part shall be disapplied."

This clearly confirms the principle of direct effect and supremacy in relation to citizens' rights,[32] as was promised in paragraph 35 of the Joint Report.

While Article 4(1) WA is coloured green, and the principle of direct effect and supremacy of citizens' rights is thus agreed, the way in which the UK is supposed to implement this appears far less settled. Article 4(2) WA is rudimentary in this regard:

> "The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities, through domestic primary legislation."

Moreover, this paragraph has not been coloured green, indicating there is no agreement on how the UK should guarantee the 'supranational character' of citizens' rights. Compared to the commitment of the Joint Report, the WA shows three particular weaknesses relating to how the UK should implement citizens' rights.

Firstly, there is no explicit mention that only express repeal could bring an end to the supremacy of these norms. Although the requirement of Article 4(1) that 'any provisions inconsistent or incompatible with that Part shall be disapplied' can be considered as an unconditional statement of the supremacy principle, the generic way in which its implementation is defined in Article 4(2) is likely to give more leeway to the British legislator to provide a definition that would impose fewer limits on its future action than one that only allows express repeal.

Secondly, the WA does not refer to the WAIB, but simply requires for the citizens' rights status to be ensured via primary legislation. This could mean that these rights could be dealt with in more than one act of primary legislation, and that they could, for instance, be (partially) covered in a separate piece of primary legislation dealing with immigration law. This would detract from the particular status of these rights as guaranteed by the WA, and make it more likely that they are interpreted in the light of provisions and principles of immigration law.

Thirdly, and most importantly, the text does not explicitly refer to the full

[32] The first paragraph of the Article also raises the question of whether provisions in the WA other than those of the citizens' rights part can have direct effect. This would follow from the broad requirement that the UK has to give the same legal effect to Union law referred to in the WA as it produces within the Union. At the same time, it is only in relation to citizens' rights that the WA clearly wanted to avoid any doubt on the matter.

incorporation of the citizens' rights provisions in the WAIB, or even primary legislation. Article 4(2) WA requires primary legislation to ensure direct effect and supremacy of the citizens' rights provisions. However, this could be met by setting out in primary legislation a specific provision to that effect, in a similar way as the European Communities Act does today. Having done that, the draft version of the WA does not prevent the UK from implementing the citizens' part of the WA via secondary legislation. The principles of direct effect and supremacy could be set out in the WAIB, probably together with provisions that require future coordination with the EU, such as on social security entitlements built up in different countries. However, the Government might be inclined to set out much of the citizens' rights provisions, such as the criteria for registration, in secondary legislation.
Hence, the WA does not deliver on the promises of the Joint Report to have the dual guarantee of, on the one hand, direct effect, and on the other hand, the incorporation of citizens' rights into primary legislation.

THE UK'S LEGAL FRAMEWORK TO IMPLEMENT THE WA AND CITIZENS' RIGHTS

The Withdrawal Bill and the role of Parliament in implementing the WA

While the UK is negotiating with the EU over the terms of the WA, it also has to implement national legislation to repeal the European Communities Act and decide the rules on how it will deal with the legacy of the *acquis communautaire*. The EU Withdrawal Bill (WB) as debated in the House of Commons and the House of Lords provides rules on how to deal with EU-derived domestic legislation such as legislation implementing EU Directives (Article 2WB), retained direct EU legislation such as EU Regulations (Article 3WB), and retained directly effective EU law resulting from direct effect (Article 4WB). The citizens' rights protected by the WA do not fall into any of these categories. They have a *sui generis* nature, thanks to the extra protection provided by the WA. They constitute a sort of 'super-retained EU law' as they also retain part of their supranational nature.[33] Unlike any norm of EU-derived or retained law under the WB, the citizens' rights provisions should, according to the WA, have direct effect and supremacy, and profit from the temporary protection of the CJEU via preliminary references, as well as from the international arbitration mechanism set up in the WA.[34] However, the WB does not set out the status of these rights, which means that at the national level, their special status provided by the WA will need to be guaranteed by the Withdrawal Agreement and Implementation Bill (WAIB). As discussed above, one of the challenges is whether this WAIB will

[33] It is also worth pointing out that retained EU law under the WB shall be interpreted in respect of CJEU case law until exit day (except for Supreme Court and, to a certain extent, High Court of Justiciary) (Article 6WB), whereas 'super- retained EU law' is to be interpreted with respect of CJEU case law as it stands at the end of the transition period (Article 4(4) WA).
[34] Article 152 WA also requires the creation of an 'independent authority' to monitor respect of the WA's citizens' rights provisions in the UK. However, this would be a purely national institution, thus guaranteeing neither supranational nor international monitoring; and one can doubt whether it will ever function 'independently'.

and can consolidate direct effect and supremacy and constitutionalise citizens' rights to the extent that only express repeal could override them, as promised in the Joint Report. The other open question is whether, beyond a stipulation on direct effect and supremacy, the citizens' rights provisions of the WA will be incorporated fully into the WAIB. While the WA is evasive on this point compared to the Joint Report, it is important to analyse the role of the WB on this issue.

As the WB passed its way through Parliament, a key issue of debate has been to set out appropriate rules that define the role of Parliament in the drafting of the future WAIB and thus in the implementation of the WA and citizens' rights. When the Government introduced the WB in the House of Commons in July 2017 it provided sweeping powers for the Government to implement the WA.

Article 9(1) stated:

> A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day.[35]

Article 9(2) even went as far as stating that:

> Regulations under this section may make any provision that could be made by an Act of Parliament (including modifying this Act).[36]

The Article has a sunset clause stating that its powers cannot be used after exit day, and also defines some matters in which these powers cannot be used.[37] Yet, the principal intention of the Government was clearly to implement the WA via secondary legislation. This does not imply that such Government action entirely escapes parliamentary scrutiny. The WB proposes to apply the normal scrutiny procedures for such secondary legislation, which can take three forms:[38]

> -in the negative procedure, the statutory instrument would be made and come into force without parliamentary action but could be annulled, on a motion of either House;
> -in the affirmative procedure, the statutory instrument would be debated (usually by a delegated legislation committee in the House of Commons,

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[35] The European Union (Withdrawal) Bill (HC Bill 5) as introduced, 13.07.2017, available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_1.htm

[36] An amendment adopted in the House of Lords would remove the possibility for delegated legislation to amend the WB itself. European Union (Withdrawal) Bill, Version of the Bill showing changes made on Report, 8.05.2018, https://publications.parliament.uk/pa/bills/lbill/2017-2019/0102/EU-Withdrawal-Bill-AOR-Tracked-Changes.pdf. This amendment still has to be approved by the House of Commons.

[37] Namely, (a) impose or increase taxation; (b) make retrospective provision, (c) create a relevant criminal offence, or(d) amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it.

[38] Ricard Kelly, House of Commons Library Briefing Paper Number 08172, 7 December 2017 The European Union (Withdrawal) Bill: scrutiny of secondary legislation (Schedule 7), p.8.

and in the Chamber in the House of Lords) and could only be made after being approved by both Houses of Parliament;
-under the "urgent procedure", a statutory instrument normally subject to the affirmative procedure could be made and come into force before parliamentary approval is given. In this case, if the regulations were not approved by both Houses within one month of being laid, they would cease to have effect.

However, such scrutiny does not give Parliament any opportunity to amend the regulations brought forward by the Government, which means that in most cases Parliament will have no impact on such secondary legislation. It requires finding a majority in Parliament that so radically disagrees with the measure that it prefers its annulment to going ahead.

The WB sets out the circumstances in which secondary legislation would be subject to the affirmative procedure,[39] and refers to the negative procedure as default for all other cases (unless urgency justifies the urgent procedure).[40] The WA's provision on creating an 'Independent Authority' for monitoring implementation of the Agreement in the UK would, for instance, require the affirmative procedure to be used. However, very important provisions, such as setting out the criteria for the settled status registration and the documents required as proof might potentially be simply set out via the negative procedure. In any case, even the affirmative procedure would in practice mean limited involvement of Parliament.

Not surprisingly, Article 9 was hotly debated in Parliament, and it was, in fact, the only article on which the Government got outvoted in the Commons. An amendment was introduced (at the initiative of Dominic Grieve MP) which made the powers to implement the WA via regulations

> "subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union."[41]

The amendment was not born out of a (particular) concern with citizens' rights. Rather, it was seen as a way for Parliament to get a foot in the door on the decision and direction of Brexit. The Government has long been reluctant to give Parliament a definitive say on Brexit. The Grieve amendment does set some legally binding commitment on this issue, but its consequences in terms of really giving Parliament a say on the direction of Brexit are likely to be limited. The power given to Parliament is to approve the WA; but it gives neither a role in the

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[39] Namely, establishing a new public authority; transferring an EU function to a newly created public authority; transferring an EU legislative function to a UK body; imposing fees; creating or widening the scope of certain criminal offences; creating or amending a power to legislate; and amending the Withdrawal Act.

[40] Delegated Powers and Regulatory Reform Committee, European Union (Withdrawal) Bill, 28 September 2017, HL Paper 22 2017-19, paras 96-98.

[41] European Union (Withdrawal) Bill (HLBill 79), as introduced in House of Lords, 18.01.2018, at https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/lbill_2017-20190079_en_1.htm

negotiations nor a power to amend.[42] Its potential impact on the Government negotiation position by threatening non-approval is also likely to be limited since, due to the time clock set by the Article 50 TEU procedure, non-approval would probably lead to the UK falling into a hard Brexit legal limbo. Yet, at the same time the amendment gives Parliament a role in the *implementation* of the WA. This obviously leaves little scope for improvisation, as the terms of the WA have to be respected. Nevertheless, this leaves Parliament a potentially important role to protect citizens' rights in primary legislation, and ensure that choices left by the WA to the UK are decided by Parliament rather than the Executive, for instance, in relation to the discretion allowed by the Citizens' Directive regarding requirements and burden of proof for registration of permanent status.

The question is to what extent Parliament will take up this role. The WB, even as amended in the two Houses so far,[43] still allows for the WA to be implemented to a great extent by secondary legislation, both prior to exit day (on the basis of Article 9) and post exit day (on the basis of delegation powers granted in the WAIB). This all comes down to the exact role that will be played by the WAIB.

It is important to note in this context that the Government has by now declared that in order to implement the WA, it will first propose a Motion in the two Houses approving the WA in general terms, and subsequently, but still prior to Brexit day, the WAIB, which would set out the rules for its implementation. The Motion has a political nature and would not constitute a 'statute' in the sense of Article 9(1). The Article 9(1) powers can thus only be applied between the adoption of the WAIB and exit day.

The key question then is how much detail is set out in the WAIB, and whether, and to what extent, it provides a new delegation of powers to the Government.

One can easily imagine a scenario in which the WAIB does not set out in full detail all rules needed to implement the WA. From the WB perspective, the requirement of the amended Article 9(1) to enact a Statute to approve the WA does not mean that Act has to set out all implementation measures in detail. Moreover, as analysed above, the WA itself has failed to live up to the promises of the Joint Report that the WA has to be fully incorporated into primary legislation. The WA's requirement that the Agreement has to be given effect via primary legislation might be complied with by adopting a primary act ensuring direct effect and supremacy, while detailed implementation measures could be set out in secondary legislation.

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[42] The House of Lords adopted a further amendment to Article 9, making the Government's power to implement the WA via delegated legislation not only dependent on prior Parliamentary approval of the WA, but also subject to the approval by Parliament of a mandate for negotiations about the United Kingdom's future relationship with the EU. This is clearly a further attempt to give Parliament more say on the further direction of Brexit, but does not directly influence our analysis here, except for potentially further shortening the time the Government has available to make use of Article 9 powers. European Union (Withdrawal) Bill, Version of the Bill showing changes made on Report, 8.05.2018, https://publications.parliament.uk/pa/bills/lbill/2017-2019/0102/EU-Withdrawal-Bill-AOR-Tracked-Changes.pdf

[43] As the Dominic Grieve amendment has been approved in both Houses we can reasonably assume this will make the final cut of the WB. As argued above, whether the additional amendment to the Article proposed in the House of Lords makes it into the final WB does not really affect the argumentation here.

A 'minimal' WAIB could thus be combined with many WA implementation measures being set out in secondary legislation. The Government could adopt those measures on the basis of Article 9(1) WB between the adoption of the WAIB and exit day. Time pressure contributes to the logic of such a scenario. The Government has always defended Article 9(1) particularly with reference to the limited time that will be available between the adoption of the WA (expected at earliest in October 2018) and exit day on 29 March 2019, leaving little time to debate and adopt a detailed WAIB in Parliament. The Government might well be inclined therefore to introduce a minimal WAIB to Parliament while at the same time proposing detailed measures via secondary legislation.
However, one also needs to take into account whether and to what extent the WAIB will introduce a new delegation to Government to further implement its (basic) provisions. In any event, Article 9(1) WB powers cannot be used after Brexit day. Hence, unless the WAIB implements the WA exhaustively, it is likely to set out rules on delegated powers to be applied after Brexit. Yet, doing this, it might as well set out the rules to be applied immediately once the WAIB is adopted. This would likely void the powers provided by Article 9(1) WB given they cannot come into force prior to the adoption of the WAIB. So, this will depend on whether the WAIB does provide new delegation powers, whether they become applicable immediately and explicitly override Article 9(1) or are so comprehensive that they make the latter delegation useless.
Hence, the Grieve amendment to Article 9 has the effect of inviting Parliament to set down the rules on how much of the WA will be implemented by the WAIB directly and how much by secondary legislation. Unfortunately, that does not imply that EU citizens are out of the woods and do not risk being subject to potentially rather fluid and ever changing rules of secondary legislation. In the absence of the WA clearly requiring EU citizens' rights to be set out fully into primary legislation, judgement on what will be set out in primary and secondary legislation will mainly be up to Parliament when adopting the WAIB. Several aspects play to the disadvantage of EU citizens. Obviously the WAIB will be introduced in Parliament by the Government. Again, time constraints might be invoked by the Government to propose large delegation of powers to itself in the WAIB. Moreover, while the debate on the WB shows that Parliament has been keen to carve itself a role in the decision and direction of Brexit, it is much less clear whether it has a particular concern to defend the status of EU citizens rather than leaving that issue primarily dealt with by the Government. Finally, as I will show in the following section, the Government is already attempting to pre-empt the regulatory space on EU citizens' rights, even prior to debating the WAIB. By introducing a registration system prior even to the WA and WAIB being adopted, it reduces the likelihood that the WAIB will set out in detail the implementation of the citizens' part of WA, and therefore leaving it to delegated legislation.

The intentions of the Government

As argued above, the UK intends to set up a constitutive registration system through which all EU citizens residing in the UK prior to the end of the transition period will have to apply to obtain settled status. Doubts remain about the exact

way in which the Government will put in place the new registration system, but political statements and communications from the Home Office have provided a picture of the Government's intentions.
The Government plans first to set up a 'voluntary registration' system, prior to Brexit.[44] This is remarkable, as it is setting up a registration to obtain a status that still has to be defined in the WA. This is clearly putting the cart before the horse. Even if the voluntary registration were to comply with the draft WA, it is questionable how it can assign people a status prior to Brexit, as citizens' rights are a *sui generis* status protected by the WA and thus only coming into force after Brexit. What will be the exact status of those who successfully went through the voluntary registration; and what of those who failed?
After Brexit, the Government then intends to introduce an obligatory registration procedure, meaning that all EU citizens will need to be registered by the end of the 'grace period' (which ends six months after the end of the transition period). In terms of procedure and substantive requirements, the obligatory registration system is likely to be a (close) copy of the voluntary system.
By making use of a voluntary system prior to Brexit, and then copying its (main) features for the obligatory system post Brexit, the Government seems intent on trying to bypass the constraints of the WB in terms of parliamentary scrutiny. This is the second way in which it puts the cart before the horse. If it can quickly set out the parameters of the voluntary registration scheme by executive action, it can pre-empt the regulatory space and may be able to avoid substantive parliamentary involvement even on the subsequent obligatory system.

How exactly the Government intends to set up the voluntary system is not clear, but it consistently presents the issue as a merely technical one and not as a topic that requires substantial debate in Parliament.[45] While it intends to set up the system via secondary legislation, it is not clear on what legal basis it will do so. It may consider the creation of the voluntary registration system as an implementation of the current EU Citizens' Directive. Except for a single reference to EU citizens in the Immigration Act 1988, the status of EU citizens is not dealt with in any primary legislation.[46] Instead, based on the powers conferred on it by the European Communities Act, the Government has implemented the EU Citizens' Directive via secondary legislation by way of 'Immigration (European Economic Area) Regulations'. This might induce the Government to attempt a similar approach for the voluntary registration. As the voluntary registration will tend to comply with the WA, and the latter is primarily based on the Citizens' Directive, the voluntary registration might be presented as simply a new implementation of the Citizens' Directive. However, the 'settled status' and constitutive registration allowed in the WA do not

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[44] HM Government, "Technical Note. Citizens' rights - Administrative procedures in the UK", 7 November 2017, paragraph 4; at https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk
[45] Indicative is its focus on presenting the problem mainly as one of developing an appropriate software system for the registration process rather than providing a legal framework that affects people's lives.
[46] Helena Wray and Alison Hunter (2014) *Implementation of Directive 2004/38 in the United Kingdom.* Revista del Ministerio de Empleo y Seguridad Social: Migraciones Internacionales (110). pp. 63-93.

provide exactly the same rights as the Citizens' Directive.[47] Hence, a voluntary registration copying in advance the registration system allowed by the WA system, would not fully comply with the Citizens' Directive, while the latter needs to be fully respected (at least)[48] until exit day.

Hence, it is more likely that the Government will introduce the voluntary registration as a new procedure under UK immigration law. From the start of the Brexit negotiations, the Government has been keen to stress that the new status would be one of UK immigration law, insisting that the concept of 'settled status' (known in immigration law) would be used, rather than the EU law concept of 'permanent residence'. This again leaves considerable scope to bypass Parliament as immigration law relies widely on executive action, and as far as Parliamentary involvement is concerned it often relies simply on the negative resolution procedure, which does not require express approval from Parliament. Immigration law is therefore particularly criticised for sidelining Parliament as substantive changes may often not be debated, considered or scrutinised by Parliament.[49]

Once the voluntary registration has been set up in secondary legislation, the Government will likely propose a (near) copy of it for the obligatory registration system. The latter will implement the WA, so will only be set out by or after the adoption of the WAIB, thus assuming a role for Parliament. Yet, as analysed above, both the WB and the WA leave considerable scope for such implementation to happen via secondary legislation. In theory, Parliament can use the WAIB to set out details of citizens' rights and registration procedure into primary legislation. However, the Government will argue that the system is already (substantially) in place; so why the need to re-discuss it, particularly given the time pressure of having the system in place by Brexit day? Furthermore, the Government is likely to ask Parliament to accept continuing delegated powers in the WAIB allowing the Government in future to continue dealing with EU citizens' rights mainly via secondary legislation. As mentioned above, there is not much sign that there is a majority in Parliament that shows a particular concern for the protection of EU citizens' rights or the belief that there is a need for guarantees in primary legislation, rather than rubberstamping a solution the Government has already set up and wants to protract via secondary legislation.

One might counter-argue that the problem is more procedural than substantive in nature. Whether the registration system is set out in primary or secondary legislation, it will have to comply with the WA. However, as analysed above, this faces two key problems. Firstly, compliance and monitoring of the WA is more

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[47] See above on the limitations of the material scope of the status provided by the EU, and the difference between declaratory and constitutive system.

[48] Most of the EU citizens Directive will need to be respected until the end of the transition period. Article 162WA allows introducing a constitutive registration system from the start of that period, but the status obtained through it would only come into force after transition.

[49] Joint Council for the Welfare of Immigrants, "How Immigration rules evade democracy", 22 December 2010, http://www.jcwi.org.uk/2010/12/22/how-immigration-rules-evade-democracy

difficult when norms are set out in secondary legislation. Secondly, the discretion allowed to Member States in the implementation of the Citizens' Directive becomes highly problematic when still available to a country that is no longer part of the EU, particularly as it never had an initial registration system and the system suddenly becomes constitutive in nature. Leaving this discretion in the hands of Government, with limited Parliamentary involvement is doubly problematic. In practice this means that, despite political promises about a simple registration procedure and guaranteeing the rights of all EU citizens residing in the UK prior to Brexit, the UK Government could set out through evolving acts of secondary legislation demanding conditions (and changing burden of proof requirements) on access to 'settled status', as well as on grounds on which one can lose such status.[50] Anything as difficult as the previous PR application system with a rejection rate of 28% could be imposed, even gradually by ever changing burden of proof requirements, and potentially even beyond what the WA allows. Once the spotlights have dimmed over the WAIB, monitoring of implementation of the WA becomes more difficult, and as the Windrush scandal has illustrated, being at the mercy of ever changing secondary legislation and implementation rules of UK immigration law is not a comfortable position to be in.

CONCLUSION

Despite promises from both the UK and the EU that EU citizens residing in the UK and British citizens residing in the EU would be fully protected after Brexit, the proposed legal framework does not live up to that expectation. The EU has rightly insisted that citizens' rights require a particular protection, and the introduction of direct effect and supremacy for these provisions in the WA can be considered an important achievement, given in particular the UK's initial refusal and the unique character of applying these mechanisms outside the EU. At the same time, the EU (and particularly the European Commission) has been too complacent and formalistic in its approach. One cannot take for granted that by copying substantive provisions of EU law (such as the Citizens' Directive), and procedural mechanisms (such as direct effect) into a country that is no longer fully part of the EU judicial system, citizens would be equally protected as when that country was still part of the EU. The substantive flaw of the WA is that it fails to recognise that applying the Citizens' Directive main criteria has very different consequences when it is done with a declaratory system within an EU Member State than when it is applied to a constitutive system in a non-EU country (particularly as the latter never applied a registration system). The consequence is that many EU citizens may fail to prove their entitlement and will automatically be faced with the harsh consequences of the UK's 'hostile environment' approach to immigration policy.

The procedural flaw of the WA is the assumption that by simply copying direct effect, EU citizens will be properly protected, even when the UK is no longer part of the EU. Yet, direct effect is only one aspect of the EU's judicial framework. In

[50] The latter is particularly possible as the WA allows the UK to set the grounds of criminal conduct on the basis of which one can lose settled status post Brexit.

the absence of other supranational guarantees such as the infringement procedure and Francovich damages, but equally in the context of doubts about how the UK will put into practice direct effect, the requirement to set out citizens' rights provisions into primary legislation provides a welcome complementary guarantee. Unfortunately, the WA remains, unlike the Joint Report, evasive on such a requirement.

The WB also leaves considerable scope for important aspects of EU citizens' rights provisions to be implemented via secondary legislation, and the Government's intention to introduce a voluntary registration scheme prior to Brexit may function as a strong impetus to pre-empt further parliamentary debate and guarantees on citizens' rights.

In order to protect its citizens properly, the EU should abandon its formalistic approach and take into account that the particular challenges of implementation in the UK outside of the EU require particular guarantees that go beyond a simple copy and paste of substantive EU law norms and EU procedural principles. Such guarantees can be provided by specific provisions in the WA, or in an attached Protocol, on how the UK will implement a simple registration system, and by a clearer requirement that the WA citizens' rights provisions should be set out in primary legislation. In the absence of further guarantees in the final WA, it is up to the UK Parliament to take up its responsibility in the WAIB and set out clear guarantees for EU citizens' rights, both by ensuring a solid definition of direct effect and setting out rights in detail in the Bill itself, leaving little leeway for discretion for Government action to decide on the most fundamental rights to reside, work and have access to services for people who have already been residing in the country legally for years.