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Assessing the impact of the Brexit Withdrawal Agreement on European and British citizens' rights

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To those who have been by my side during this journey.
And to those who wanted to, but couldn't be there.

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List of abbreviations

AFSJ	Area of Freedom, Security and Justice
CD	Citizenship Directive
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DA	Draft Agreement on the New Partnership with the United Kingdom
EEA	European Economic Area
EC (Maastricht)	Treaty Establishing the European Community, as amended in Maastricht
EP	European Parliament
ETD	Equal Treatment Directive
EU	European Union
EU27	European Union (excluding the United Kingdom)
EU28	European Union (including the United Kingdom)
EUWA	European Union (Withdrawal) Act
MEP(s)	Member(s) of the European Parliament
OJ	*Official Journal of the European Union*
PCA	Permanent Court of Arbitration
PQRD	Professional Qualifications Recognition Directive
TCN(s)	Third-Country National(s)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
WA	Withdrawal Agreement
UK	United Kingdom

1. Introduction

On 23rd January 2020, the UK Parliament finally voted in favour of the Agreement negotiated over the course of the last three years in order to ensure the orderly withdrawal of the United Kingdom from the European Union after the 2016 Brexit referendum. While the UK has effectively left the Union on 31st January 2020, the Withdrawal Agreement is yet to enter into force in its entirety, as it will only do so after a transitional period which will end on 31st December 2020.

The fact that the Brexit process would have, at least potentially, affected in some way the enjoyment of rights already acquired under EU law by both UK and EU citizens has been clear since the outset of the negotiations. With this in mind, "agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union"[1] was recognized in the European Council guidelines of 29th April 2017 as the "first priority" of the European Union for the upcoming negotiations; similarly, the United Kingdom stressed from the beginning the necessity to provide "certainty and clarity"[2] for everyone, and the UK notification of withdrawal underlined the importance for both the UK and the EU to "always put [their] citizens first", in order to "aim to strike an early agreement about their rights".[3]

Following these statements, which referred mainly to the mobility and residence rights attached to EU citizenship and to worker/self-employed status, the EU and the UK took an approach during Phase 1 of the negotiations which seemingly aimed at "freezing" the current situation existing under EU law, guaranteeing that rights already acquired by both EU and UK nationals at the end of the transition period are maintained. While this may seem pretty straightforward at first glance, academics have pointed out how specific categories of situations may enjoy less certainty than one would expect from these premises; in a similar fashion, questions and doubts remained on how the agreement reached on citizens' rights will be concretely implemented, and an even larger set of questions remains open on mobility and the acquisition of residence rights after 31st December 2020 under the prospective future mobility

[1] European Council, "European Council (Art. 50) Guidelines (29 April 2017)", *EUCO XT 20004/17*, 2017.
[2] Theresa May, "The Government's Negotiating Objectives For Exiting The EU: PM Speech", *GOV.UK*, 2020, https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.
[3] Theresa May, "Prime Minister's letter to Donald Tusk triggering Article 50", *GOV.UK*, 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

framework, which is yet to be agreed upon in the broader context of the negotiations of the future relations between the EU and the UK.

For this reason, this dissertation aims at providing an analysis of how the rights of EU and UK citizens will be impacted by the Brexit process and by the concluded Agreement in particular. Proceeding in a chronological fashion, the discussion will begin with a chapter surveying the rights currently enjoyed[4] by EU citizens and UK nationals under EU law – mostly rights related to mobility and residence –, in order to provide a starting point of reference for the subsequent analysis. The following chapter will then proceed to analyse how the situation will change under the Withdrawal Agreement after the end of the transition period – which rights will be maintained and which ones will be lost, and under which, if any, conditions. This second chapter will also attempt to highlight some new challenges which citizens will face after Brexit is concluded and their implications, such as the need for Union citizens in the UK to register for residence. The conclusion will assess the scope of protection granted to the rights mentioned above, including the potential future of rights which are not directly protected by the Agreement, and it will touch the issue of the possible future arrangements for mobility and residence in the context of the future EU-UK relations, also looking at the draft text of the Agreement on the New Partnership which is currently being negotiated between the UK and the EU, to try to envision the future shape of the relationship between the two in the field of rights for their citizens.

[4] As it will be clarified in the next section, at the time of writing EU law still applies to the United Kingdom until 31st December 2020.

2. The current situation: rights as usual?

A very brief statement to start describing the current situation can be that "in general terms, nothing changes until 2020".[5] In fact, Part Four of the Withdrawal Agreement (hereafter WA) establishes a transition or implementation period (reflecting the terminologies preferred, respectively, by the EU and the UK) starting from the date of entry into force of the Agreement (1st February 2020) and ending on 31st December 2020.[6] During this period, Union law will apply to the UK as usual "unless otherwise provided",[7] providing the EU and the UK with eleven months to prepare for the definitive exit of the United Kingdom from the Union. This period of transition is not only limited to the legal effects produced by Union law in the UK, but also to the whole set of institutional mechanisms responsible for supervision and enforcement of Union law. In fact, according to Article 128 WA:

> "During the transition period, the institutions […] of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and to natural and legal persons residing or established in the United Kingdom. *In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties.*"[8]

2.1. Two qualifications

From what was mentioned above, it may seem that any effect of Brexit on citizens' rights will not take place until 1st January 2020: for the effects of EU law, the UK is treated as a Member State and its citizens as EU citizens for the duration of the transition period, following an "assimilation principle".[9] There are, however, two fundamental caveats to the validity of this affirmation. The first one is that Article 127(1b) WA lists among the Treaty provisions which are not applicable to and in the UK even during the transition period:

> "Article 11(4) TEU, point (b) of Article 20(2), Article 22 and the first paragraph of Article 24 TFEU, Articles 39 and 40 of the Charter of Fundamental Rights of the European Union, and the acts adopted on the basis of those provisions."[10]

[5] Ornella Porchia, "Citizens' Rights In The Post Brexit Scenario"" *ERA Forum* 19, no. 4 (2019): 585-595, doi:10.1007/s12027-018-0545-0.
[6] Art. 126 WA.
[7] *Ibid.,* Art. 127.
[8] *Ibid.,* Art. 128 (emphasis added)
[9] Ornella Porchia, "Citizens' Rights In The Post Brexit Scenario" (see note 5).
[10] Art. 127 WA.

This is relevant for our discussion on Brexit and its impact on citizens' rights, since – as it will be discussed below – those provisions of primary Union law are the ones covering the rights of European citizens to participate in the democratic life of the Union and, for those residing abroad, of their host country: notably, the European Citizens' Initiative[11] and the right to vote and stand as a candidate in EP elections[12] and in local elections[13] in the host country. While this is less relevant in practical terms, now that the date of the entry into force of the WA has been postponed after 23rd May 2019 and the UK participated in the European elections as a full Member State, this still marks an important distinction between EU and UK citizens: while as protected *as* European citizens,[14] UK citizens are nationals of a country which is no longer a Member State of the Union but only treated as such. Thus, they do not enjoy the full political portion of the set of rights associated with citizenship of the EU – a citizenship granted to "every person holding the nationality of a Member State".[15]

In a similar fashion, Part Four of the Withdrawal Agreement also turns the UK from a rule-maker into a rule-taker. Articles 7(1) and several provisions in Part Four WA[16] essentially exclude the United Kingdom from participation in any of the institutional mechanisms of the Union, except from exceptional participation in specific committees, agencies or offices upon explicit invitation, while at the same time committing to follow and implement Union law "including as amended or replaced, as applicable on the last day of the transition period."[17] Hence, the UK will be required to follow Union law during the transition period, including any of its potential developments, but at the same time it will have little to no say (unless explicitly invited to do so) on these same developments.

Except from the qualifications made above, however, Part Four WA makes it clear that most of Union law will remain in force as it is for what concerns citizens' rights during the transition period. For this reason, before addressing the more substantial question of which situations will we face after the end of the transition, and thus which rights are actually covered by the Agreement and how, it is useful for the discussion at hand to review which are the provisions of Union law relevant to citizens' rights, to whom do they apply and which rights do they effectively confer upon Union citizens.

[11] Art, 11(4) TEU, Art. 20 TFEU.
[12] Art. 20(2b) TFEU, Art. 22 TFEU, Art. 39 CFREU.
[13] Art. 20(2b) TFEU, Art. 22 TFEU, Art. 40 CFREU.
[14] Ornella Porchia, "Citizens' Rights In The Post Brexit Scenario" (see note 5).
[15] Art. 20(1) TFEU (emphasis added).
[16] Art. 127(4), 127(7), 128, 129(2), 129(7) WA.
[17] Art. 6(1) WA.

2.2. Citizens' rights under Union law

European Union law confers a set of rights on individual Union citizens.[18] This was clear even before the establishment of the very concept of European Citizenship: the argument that EU law "not only imposes obligations on individuals but is also intended *to confer upon them rights which become part of their legal heritage*"[19] and which can be relied upon in national courts (albeit conditional on the "clear and unconditional provision" test[20]) is at the very core of one of the first principles of Union law to be established – the principle of direct effect, established in the landmark case *Van Gend en Loos*. This principle is particularly relevant for our analysis, as several important rights granted to EU citizens – most importantly, free movement provisions – are directly effective and thus do not depend on national transposition, but stem directly from Union legal instruments. Coupled with the principle of supremacy of Union law, this has elevated directly effective European rights conferred on citizens to a status comparable to the one enjoyed by constitutional rights within national legal orders.

Not all of the rights currently enjoyed by European citizens were envisioned from the outset: the Treaty of Rome started out from the simple right of seeking a job and working in another Member State, but EU citizens' rights then experienced a gradual expansion over time as the Treaties were reformed and CJEU case law expanded. Economic rights, while remaining at the core of EU law, were complemented by political and social rights, first imagined in the 1974 Paris summit[21] and in the idea of developing a "People's Europe" presented in the 1985 Adonnino Report.[22] The Maastricht Treaty established in 1992 the concept of European citizenship with rights attached to it stemming from EU law, establishing that "[c]itizens of the Union shall enjoy the rights conferred by this Treaty".[23] The inclusion of the goal to create an "area of freedom, security and justice" in the Amsterdam Treaty further built on these developments, as the 1999 Tampere European Council stressed the importance of free movement and human rights in the "freedom" component of the AFSJ.[24]

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[18] Since this section describes the rights enjoyed by citizens under EU law before the entry into force of the WA and the subsequent disapplication of EU law to the UK, the term "European citizens" and its synonyms will refer to EU28 citizens – thus including UK citizens, even if not specified – throughout the whole of Section 2.2.
[19] Case 26/62, *van Gend & Loos v Netherlands Inland Revenue Administration* (emphasis added).
[20] *Ibid.*
[21] Simon Hix and Bjorn Høyland, *The Political System Of The European Union*, 3rd ed. (Basingstoke: Palgrave Macmillan, 2011).
[22] European Communities, "A People's Europe. Reports from the ad hoc Committee" (The Adonnino Report), *Bulletin of the European Communities, Supplement 7/85*, 1985.
[23] Art. 8 of the Treaty Establishing the European Community, as amended in Maastricht (hereafter, EC (Maastricht)), now Art. 20 TFEU.
[24] Simon Hix and Bjorn Høyland, *The Political System Of The European Union* (see note 21).

Today, rights enjoyed by EU citizens under Union law can be grouped (albeit with some overlaps) into three broad categories:

- *Mobility and residence rights*, covering the right of EU citizens to move freely on Union territory and reside in the territory of other Member States, and the equal treatment rights attached to these;
- *Citizenship rights*, a limited set of political and fundamental rights attached to the status of EU citizen;
- *Rights derived from the Union's substantive competences,* resulting from the exercise of the latter in specific policy fields. Among these, particular attention will be given to *social rights*, mostly derived from secondary legislation comprising the Union's social policy.

It is to these three categories that we will now turn our attention.

2.2.1. Mobility and residence rights

The possibility of moving freely on the territory of the Union and, under some conditions, enjoying a residence right on the territory of a Member State other than one's State of nationality is perhaps the most visible right enjoyed by European citizens under EU law. The concept of the free movement of persons was already introduced with the Treaty of Rome as the second one of the four fundamental freedoms, but in the beginning it only followed an economic rationale: free movement was limited to two categories of economically active persons – "employed" and "self-employed" – in order to allow them to seek and take up employment (or establish their economic activity, in the case of the self-employed) in another Member State of the Community,[25] and for this reason it was mostly directed at the abolition of barriers to trade. These provisions are now contained, respectively, in Articles 45 and 49 TFEU. Only later, the introduction of the citizenship of the European Union established an "horizontal" (limited) right to free movement[26] to all EU citizens, regardless of their economic status.

[25] Robert Schütze, *European Union Law*, 2nd ed. (New York: Cambridge University Press, 2018).
[26] *Ibid.*

Free movement of workers

For what concerns the free movement of workers, Article 45 TFEU prohibits "any discrimination on nationality […] as regards employment, remuneration and other conditions of work and employment"[27] and grants EU workers the right to move on the territory of the Union to accept offers of employment, to reside in the Member State of employment under the same "provisions governing the employment of nationals of that State"[28] and, under conditions established trough secondary Union law, to stay in the country of employment even after they cease being employed in that State. These rights have been codified in Union secondary legislation under the legal base provided by Article 46,[29] with the most important piece of legislation in this regard being Regulation 492/2011[30] (the "Workers Regulation").

This latter piece of legislation specifies which are, concretely, the movement rights enjoyed by European workers and their families,[31] in particular for what concerns the ban on restrictions to the access to the labour market[32] and the principle of equal treatment.[33] The Regulation confirms the prohibition of practices which limit access to a Member State's labour market by nationals of another Member State, placing Member States under a duty to disapply not only provisions which "limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals",[34] but also provisions "applicable irrespective of nationality",[35] which may at first not appear to be discriminatory, when their "exclusive or principal aim or effect"[36] is to prevent or restrict access to employment offers by nationals of other Member States – in other words, indirectly discriminatory provisions. At the same time, the Regulation also restates the non-discrimination principle of Article 45 TFEU in its Article 7, both in a negative fashion – prohibiting different treatment regarding conditions of employment on the grounds of a worker's nationality[37] – and in a positive one – recognizing

[27] Art. 45 TFEU.
[28] *Ibid.*
[29] According to Art. 46 TFEU, "[t]he European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers".
[30] Regulation (EU) 492/2011 on freedom of movement of workers within the Union, *OJ L 141/1,* 2011.
[31] Regulation (EU) 492/2011, Art. 10. The personal scope of the provisions on the free movement of workers is also discussed more in detail below.
[32] Regulation (EU) 492/2011, Art. 1-6.
[33] *Ibid.*, Art. 7-9.
[34] *Ibid.*, Art. 3(1a).
[35] *Ibid.*, Art. 3(1b).
[36] *Ibid.*
[37] *Ibid.*, Art. 7(1).

for them a right to the "same social and tax advantages as national workers",[38] also for what it concerns access to training[39] and the content of individual or collective agreements.[40] The remainder of Section 2 of the Regulation ("*Employment and equality of treatment*") specifies two other areas covered by this principle – trade union membership[41] and housing rights.[42]

Through a series of cases, the CJEU has shown to be willing to recognize a broad material scope for the provisions contained both within the Treaties and within the Workers Regulation: in *Sotgiu*, it has established that the principle of equal treatment not only covers cases of direct, overt discrimination, but it also comes into play for cases of *indirect* discrimination – cases in which "the application of other criteria[43] of differentiation lead in fact to the same result"[44] as a rule which discriminates on grounds of nationality. The Court later specified that this is the case when, albeit the criterion of differentiation is not nationality, a national rule either mostly affects migrant workers from other Member States or applies criteria which are easier to satisfy for nationals of the Member State in question.[45] The Court went even further in recognising that measures which are *non-discriminatory* – not even in an indirect fashion – would nonetheless be covered by Article 45 TFEU as long as they "directly affect […] access to the employment market in other Member States".[46] Repeated in several notable cases,[47] this approach has been described as embracing a "federal integration model"[48] as it limits the sovereignty of Member States on the internal side, for what concerns its own nationals.[49] For what concerns the positive statement of the equal treatment principle stated in Article 7(2) of the Regulation, the Court has similarly adopted a wide interpretation of the provisions, by recognising in *Cristini* that the provision also grants equal access to social and tax advantages which are *not* attached to a worker's employment status.[50]

When it comes to the determination of *who* is covered by the provisions governing the free movement and equal treatment of workers, the CJEU has claimed from the outset the

[38] *Ibid.*, Art. 7(2).
[39] *Ibid.*, Art. 7(3).
[40] *Ibid.*, Art. 7(4).
[41] *Ibid.*, Art. 8.
[42] *Ibid.*, Art. 9.
[43] Other than nationality.
[44] Case 152-73, *Sotgiu v Deutsche Bundespost*.
[45] Robert Schütze, *European Union Law* (see note 25).
[46] Case C-415/93, *Union royale belge des sociétés de football association ASBL v Bosman.*
[47] For instance, see *Bosman* (Case C-415/93), *Commission v Cyprus* (Case C-515/14) and *Commission v Denmark* (Case C-464/02).
[48] Robert Schütze, *European Union Law* (see note 25).
[49] *Ibid.*
[50] Case 32-75, *Cristini v Société nationale des chemins de fer français*.

monopoly over the definition of their personal scope in a preliminary reference in *Hoekstra,*[51] in order to prevent Member States from circumventing EU rules by changing their own definition of workers as they saw fit. This means that the European definition of the concept of "worker" is to be found in the Court's case law. The broad criteria were set in *Lawrie-Blum*: a person who is *settled* in the host country and performs a *remunerated* activity *under someone else's direction* will be considered as a worker,[52] and thus be covered by Article 45 TFEU and by the Workers Regulation. In particular, the amount of remuneration was deemed to be irrelevant in *Levin*:[53] as long as the remunerated activity is not "on such a small scale to be regarded as purely marginal and ancillary",[54] someone receiving any form of remuneration from an employment relationship will be considered as a "worker" in the eyes of Union law, even in the case of a part-time job providing said person with less income than "the minimum required for subsistence".[55] This would also be the case if the result was that the person in question is not able to support themselves without receiving assistance from the host State.[56]

In other cases, the Court has also found that Article 45 TFEU grants rights to some categories which are not active workers as well: past workers, as long as the rights in question are in "some continuity [with] the previous occupational activity";[57] retired pensioners, as long as they actually exercised their free movement rights by working in a Member State other than their own;[58] and people seeking employment in the host State, even though Member States are allowed to place reasonable temporal limitations on their stay[59] and material limitations to the kind of equal treatment they are entitled to – only equal treatment for what concerns access to employment is covered, albeit unemployment benefits are included as they "were intended to facilitate access to employment".[60]

Family members of workers enjoy rights derived from the worker's right as well – rights which were once contained in Regulation 1612/68,[61] and which are now covered by the Citizenship Directive except for what it concerns the education of workers' children (which is

[51] Case 75-63, *Hoekstra (née Unger) v Administration of the Industrial Board for Retail Trades and Businesses.*
[52] Case 66/85, *Lawrie-Blum v Land Baden-Württemberg.*
[53] Case 53/81, *Levin v Staatssecretaris van Justitie.*
[54] *Ibid.*
[55] *Ibid.*
[56] Case 139/85, *Kempf v Staatssecretaris van Justitie*.
[57] Case 39/86, *Lair v Universität Hannover*.
[58] Case C-300/15, *Kohll and Kohll-Schlesser v Directeur de l'administration des contributions directes*.
[59] Case C-292/89, *The Queen v Immigration Appeal Tribunal, ex parte Antonissen.*
[60] Case C-138/02, *Collins v Secretary of State for Work and Pensions*.
[61] Regulation (EEC) 1612/68 on freedom of movement for workers within the Community, *OJ L 257*, 1968.

covered instead by Article 10 of the Workers Regulation).[62] As derived rights, these depend from the rights accorded to the worker in the first place, and are lost when the family member becomes independent from the rights-holding worker or when the worker ceases to enjoy rights in the first place. The CJEU, however, qualified this principle by establishing that the derived rights of family members "can, in certain circumstances, continue to exist even after the employment relationship has ended"[63] and that, in the event the holder of these retained rights was to be a child, their "primary carer" might in turn be able to derive a residence right in order to care for the child.[64] This has been codified by the Union legislator in the Citizenship Directive (discussed below).

Coordination of social security systems

One important obstacle to the free movement of workers which the Treaties had to address is the fact that States, normally, only allow access to their own national security systems to workers who either reside or work on their territory.[65] To prevent the deterrent effect to free movement which would be entailed by such a principle, Article 48 TFEU provides for a legislative competence to:

> "adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:
>
> (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
>
> (b) payment of benefits to persons resident in the territories of Member States."[66]

This is a *coordinating* competence, which does not allow for the harmonisation of the material scope of national security systems[67] but only for the coordination of their personal scope.[68]

[62] Regulation (EU) 492/2011, Art. 10.
[63] Case C-413/99, *Baumbast and R. v Secretary of State for the Home Department*.
[64] *Ibid.*
[65] Robert Schütze, *European Union Law* (see note 25).
[66] Art. 48 TFEU
[67] Joined Cases C-611/10 and C-612/10, *Hudzinski v Agentur für Arbeit Wesel — Familienkasse* (C-611/10) and *Wawrzyniak v Agentur für Arbeit Mönchengladbach — Familienkasse* (C-612/10).
[68] Robert Schütze, *European Union Law* (see note 25).

The main piece of legislation adopted to this end is Regulation (EC) 883/2004,[69] which is inspired by four main principles:

- *Equal treatment*: under Article 4 of the regulation, persons covered by it "shall enjoy the same benefits and be subject to the same obligations"[70] as the nationals of the Member State whose legislation they are being covered by. Equal treatment applies as well to the legal effects of benefits, income, facts and events received or happened in another Member State;[71]
- *Aggregation*: periods of "insurance, employment, self-employment or residence completed under the legislation of any other Member State"[72] should be taken into account when such periods constitute a condition for the access to benefits, the coverage by legislation or he access or exemption from insurance;
- *No-overlap*: the Regulation "shall neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance",[73] to prevent workers from applying for the same, overlapping benefits in different Member States at the same time;
- *Single legislation*: persons covered by the Regulation "shall be subject to the legislation of a single Member State only"[74] at a time. To this end, Title II of Regulation 883/2004 contains detailed rules to determine the Member State of competence (generally the State of work, but with important exceptions); however, the Court has importantly qualified its previous, strict interpretation of this principle in *Bosmann*, when it held that the Regulation only protects a non-competent State from the *obligation* to grant a social security benefit – the Member State in question still retains the *right* to grant it if it decides to do so.[75]

It is important to note that Regulation 883/2004 covers social security, but *not* social assistance;[76] as the CJEU interpreted extensively the notion of "social security", the category

[69] Regulation (EC) 883/2004 on the coordination of social security systems, *OJ L 166/1*, 2004.
[70] *Ibid.*, Art. 4.
[71] *Ibid*., Art. 5.
[72] *Ibid.*, Art. 6.
[73] *Ibid.*, Art. 10.
[74] *Ibid.*, Art. 11.
[75] Case C-352/06, *Bosmann v Bundesagentur für Arbeit - Familienkasse Aachen*.
[76] Regulation (EC) 883/2004, Art. 3(5a). Schütze (see note 25) marks the difference here by pointing out the non-contributory, needs-based nature of social assistance as opposed by the contributory nature of social security which entitles persons covered to a right to payment.

of "special non-contributory cash benefits" was included within the scope of the Regulation as well. These benefits constitute an ambiguous category as, since they are financed by general taxation but still address the branches of social security covered by the Regulation,[77] they display "characteristics both of the social security legislation referred to in Article 3(1) and of social assistance".[78] Because of their "hybrid" nature, these benefits have been included within the material scope of the Regulation, but the competent State will only be required to make them available to persons residing on its own territory – those who move to another EU Member State will not be entitled to export them to their new State of residence as they would be with proper social security benefits to which they are entitled.[79]

Free movement of the self-employed

In a similar fashion to the free movement of workers, Union law also includes provisions granting free movement rights to self-employed citizens of Member States. These provisions are the ones covering the *freedom of establishment* recognised by Article 49 TFEU, which recognises for Union nationals the "right to take up and pursue activities as self-employed persons and to set up and manage undertakings […] under the same conditions laid down for its own nationals by the law of the country where such establishment is effected"[80] and thus prohibits "restrictions on the freedom of establishment of nationals of a Member State",[81] including "restrictions on the setting-up of agencies, branches or subsidiaries".[82] These rights can directly be invoked by Union citizens, as Article 49 TFEU has been granted direct effect in *Reyners v Belgium*, and are recognised for both natural and legal persons[83] according to Article 54 TFEU.

As "self-employed", persons covered by Article 49 TFEU will need to perform some kind of economic activity in the host State but, contrarily respect to workers covered by Article 45 TFEU, these activities will not be performed under someone else's direction in exchange for a salary. When asked to delimit the personal scope of freedom of establishment provisions,

[77] *Ibid.*, Art. 70(2).
[78] *Ibid.*, Art. 70(1).
[79] *Ibid.*, Art. 70(4).
[80] Art. 49 TFEU.
[81] *Ibid.*
[82] *Ibid.*
[83] Albeit legal persons are included in the personal scope of the freedom of establishment, the provisions specifically related to them fall outside of the scope of the matter of citizens' rights, and thus will not be addressed in this dissertation.

the Court has found it to be a "very broad one",[84] covering "all kinds of self-employed activity".[85] The line of demarcation separating the freedom of establishment from the (different) provisions on the free movement of services was found in the fact that the former:

> "allow[s] a [Union] national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom […] In contrast, where the provider of services moves to another Member State, the provisions of the chapter on services […] envisage that he is to pursue his activity there on a temporary basis."[86]

Lacking the distinguishing criteria of direction and retribution, the attention of the Court then shifted to the stability and continuity of the presence on the territory of the host Member State. Without prejudice to the person's right to establish themselves in more than one Member State at the time, even if their presence in the host country only consists in an office,[87] whether Article 49 TFEU applies will depend on "the duration of the provision of the service, […] its regularity, periodicity or continuity".[88] Importantly, the Court stated in *Knoors* that Article 49 will apply to all the situations of establishment which are not "purely internal":[89] similarly to the provisions relative to workers, Union nationals who have exercised (or wish to do so) their freedom of movement to establish themselves in another Member State will be able to rely on Article 49 TFEU against their own home State as well.

For what concerns what kind of restrictions to the freedom of establishment are prohibited under Article 49 TFEU, the model adopted by the CJEU in its case law is similar to the federal one adopted for the free movement of workers: discriminatory measures on the grounds of nationality are prohibited both when they are directly discriminatory – such as when access to a profession is limited to a country's own nationals[90] – and when they are indirectly discriminatory – for instance, measures limiting the right of Union nationals to establish themselves in more than one Member State at the time.[91] In fact, as the wording of Article 49 TFEU explicitly states that it "shall also apply to restrictions on the setting-up of agencies,

[84] Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.
[85] *Ibid.*
[86] Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.
[87] Case 205/84, *Commission v Germany*.
[88] Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.
[89] Case 115/78, *Knoors v Staatssecretaris van Economische Zaken*.
[90] Case 2/74, *Reyners v Belgium*.
[91] Case 107/83, *Ordre des avocats au Barreau de Paris v Klopp*.

branches or subsidiaries",[92] the freedom of establishment recognised by the Treaties is not limited to primary establishment, but equally protects cases of secondary establishment as well.

For what concerns non-discriminatory measures, the Court adopted again an approach similar to the one concerning the free movement of workers by prohibiting them as well in *Vlassopoulou.* As it confirmed again in later cases, the test adopted by the Court to evaluate national measures in the light of Article 49 TFEU considered whether the measure in question impacted foreign nationals' market-access. If "the effect of such rules [was] to hinder and render less attractive the exercise by [nationals] from other Member States",[93] then the provisions would be found to be in violation of Article 49.

Article 49 TFEU is not the only provision in the Treaties related to the freedom of establishment: it is accompanied by two legislative competences, namely Articles 50 and 53 TFEU. Article 50 consists in a general competence to adopt directives for what concerns particular self-employed activities.[94] Its second paragraph establishes series of guidelines for the Union legislator in the adoption of such legislation. Notably for the topic at hand, some of these include abolishing administrative procedures and practices which pose an obstacle to the freedom of establishment[95] and restrictions stemming from conditions both on secondary establishment and on "the entry of personnel belonging to the main establishment into managerial or supervisory posts"[96] in these establishments, allowing Union migrant workers to remain in the host Member State and move to the category of "self-employed" by taking up an activity there[97] and allowing nationals of a Member State "to acquire and use land and buildings situated in the territory of another Member State"[98] for establishment purposes.

Article 53, on the other hand, relates to a much more specific legislative competence – the competence to "issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications".[99] This competence has been employed by the Union legislator to adopt several sector-specific directives and, later on, to adopt a more horizontal approach instead to consolidate together these vertical provisions. The two main directives to this end are Directive 2005/36 (the Professional Qualifications Recognition Directive, hereafter

[92] Art. 49 TFEU.
[93] Joined cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez v Consejería de Salud y Servicios Sanitarios* (C-570/07) *and Principado de Asturias* (C-571/07).
[94] Art. 50(1) TFEU.
[95] *Ibid.,* Art. 50(2c).
[96] *Ibid.,* Art. 50(2f).
[97] *Ibid.,* Art. 50(2d).
[98] *Ibid.,* Art. 50(2e).
[99] *Ibid.,* Art. 53(1).

PQRD)[100] and Directive 2006/123 (the Services Directive).[101] It is to be noted that these two directives were not adopted exclusively on the basis of Article 53 TFEU, and thus their scope of application is broader than just the freedom of establishment. The PQRD, in particular, aims at establishing rules for the mutual recognition between Member States of equivalent qualifications which allow access to several – but not all![102] – regulated professions.[103]

Free movement from European Citizenship

The personal scope of the provisions mentioned above, albeit broad in the interpretation provided by the CJEU, is still limited to economically active categories of Member States' nationals and their family members. A third, horizontal source of movement rights, however, was introduced into EU law with the creation of the concept of Union citizenship by the Treaty of Maastricht in 1992. Union citizenship is recognised to "[e]very person holding the nationality of a Member State",[104] it is meant to supplement national citizenship rather than replace it[105] and, most importantly for the discussion at hand, it grants Union citizens a series of rights which they enjoy *as citizenship rights*. Among these, a general right to free movement was recognised for Union citizens. This right is now contained into Article 21 TFEU, whose first paragraph reads:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."[106]

Early analyses immediately recognised that such a provision was meant to generalise, albeit not in an unlimited way (note the "limitations and conditions" mentioned in the article), already-existing constitutional rights by untying them from citizens' economic status,[107] in line with earlier proposals such as those from the Adonnino Committee[108] or those from the Spanish

[100] Directive 2005/36/EC on the recognition of professional qualifications, *OJ L 255/22*, 2005.
[101] Directive 2006/123/EC on services in the internal market, *OJ L 376/36*, 2006.
[102] Robert Schütze (see note 25) makes the example of the legal profession, which relies on nation-specific sets of knowledge which are not entirely transferable between Member States with different legal systems and which, for this reason, remains subject of separate, specific Union legislation.
[103] Directive 2005/36/EC, Art. 1.
[104] Art. 20(1) TFEU.
[105] *Ibid.*
[106] *Ibid.,* Art. 21(1).
[107] Carlos Closa, "The Concept Of Citizenship In The Treaty On European Union", *Common Market Law Review* 29, no. 6 (1992): 1137-1169.
[108] European Communities, "A People's Europe. Reports from the ad hoc Committee" (The Adonnino Report), *Bulletin of the European Communities, Supplement 7/85*, 1985.

Memorandum on European citizenship,[109] considered to be "[t]he first systematic contribution to the elaboration of the concept [of European citizenship]".[110] The fact that these rights had been directly granted by the Treaties upon all Union citizens was famously confirmed in *Baumbast*, when the Court found that the provision contained in Article 21 TFEU[111] had direct effect and thus that "the right to reside within the territory of the Member States […] is conferred directly on every citizen of the Union".[112] In doing so, the Court both confirmed the independence of free movement rights under Article 21 TFEU from economic status and rejected the UK's position that the "limitations and conditions" prevented the article from being directly effective; on the contrary, the very application of these limitations would be subject to judicial review on the basis of Article 21(1).[113]

Article 21(1) TFEU is complemented by a legislative competence under its second paragraph to "adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1".[114] This competence has been employed to adopt Directive 2004/38/EC (the "Citizenship Directive"),[115] whose goal was to consolidate the free movement rights enjoyed by Union citizens which, until that moment, had been covered by separate provisions of secondary Union law in a "sector-by-sector, piecemeal approach to the right of free movement and residence".[116] The personal scope of the Directive is outlined in Articles 2 and 3: according to the latter, the Citizenship Directive:

> "shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them".[117]

[109] Spanish Memorandum "The Road to European Citizenship", *Council Doc. SN 3940/90*, 1990, annexed to *The Intergovernmental Conference On Political Union. Institutional Reforms, New Policies And International Identity Of The European Community*, 328-332, Finn Laursen and Sophie Vanhoonacker (ed.), Dordrecht: Martinus Nijhoff Publishers, 1992.
[110] Carlos Closa, "The Concept Of Citizenship In The Treaty On European Union" (see note 107).
[111] At the time, the same provision was contained into Art. 18(1) EC.
[112] Case C-413/99, *Baumbast and R. v Secretary of State for the Home Department*.
[113] *Ibid.*
[114] Art. 21(2) TFEU.
[115] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ L 158*, 2004; hereafter, "Citizenship Directive" or "CD".
[116] Preamble 4 CD. To this end, Art. 38 CD repealed Art. 10 and 11 of Regulation (EEC) No 1612/68 and 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, and changed references to these repealed pieces of legislation to references to the Citizenship Directive.
[117] Art. 3 CD.

Article 2(2) CD lists as "family members" a Union citizen's spouse or "registered partner",[118] the citizen's or spouse/partner's direct descendants, if they are under 21 years old or dependants, and their "dependent direct relatives in the ascending line";[119] moreover, Article 3 places Member States under an obligation to "facilitate entry and residence"[120] for other family members who are dependants, household members or require the Union citizen's care due to "serious health grounds",[121] and for partners in a durable relationship with the citizen.

For what concerns *movement* rights, they are contained in Chapter II of the Directive. It grants Union citizens with a valid ID card or passport the right to leave the territory of their home Member State[122] and to be granted leave to entry the territory of other Member States;[123] the same rights are granted to family members who are not nationals of a Member State (hereafter referred to as third-country nationals, or TCN) who hold a valid passport.[124] Both categories are also protected by exit visas and "equivalent formalities",[125] while only Union citizens are protected by entry visas as well.[126] Paragraphs 2 and 3 of Article 5 limit the possibilities for Member States to impose entry visas on TCN family members, facilitate their obtainment[127] and present other privileges for TCN family members holding a residence card,[128] while paragraph 4 grants the possibility to obtain the necessary documents to those who do not have them in a "reasonable period of time".[129]

Residence rights, on the other hand, are covered by Chapters III to V CD and are divided in three categories. Article 6 CD grants a right to reside in the host State for up to three months to all Union citizens[130] and the TCN family members who join or accompany them and hold a valid passport.[131] The only condition to retain this right is not to become an "an unreasonable burden on the social assistance system of the host Member State".[132] Union citizens who want to reside in their host State for more than three months will need to fit one of the categories

[118] Art. 2(2b) CD refers to partnerships contracted "on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State".
[119] Art. 2(2d) CD.
[120] *Ibid.,* Art. 3(2).
[121] *Ibid.*
[122] *Ibid.,* Art. 4(1).
[123] *Ibid.,* Art. 5(1).
[124] *Ibid.,* Art. 4(1) and 5(1).
[125] *Ibid.,* Art. 4(1).
[126] *Ibid.,* Art. 5(1).
[127] *Ibid.,* Art. 5(2).
[128] *Ibid.,* Art. 5(3).
[129] *Ibid.,* Art. 5(4).
[130] *Ibid.,* Art. 6(1).
[131] *Ibid.,* Art. 6(2).
[132] *Ibid.,* Art. 14(1).

laid down in Article 7. They need either to be economically active (workers or self-employed)[133] or to have "sufficient resources […] not to become a burden on the social assistance system"[134] of the host State and have comprehensive sickness insurance. Students enjoy a slightly preferential treatment, as they are only required to declare to the authorities of the host State that they are in possession of such resources.[135]

Union citizens who fit within one of the categories above will be entitled to bring over their family members, both if they are Union citizens and if they are not,[136] but not relatives in the ascending line, who will instead only enjoy facilitated access under Article 3(2) CD.[137] These family members will generally be able to retain their derived right of residence in the event of death or departure of the Union citizen from whom they derived their right of residence[138] or in the event of divorce, annulment of marriage or termination of registered partnership with the same Union citizen.[139] Such retention is generally unconditional for family members who are Union citizens as well, while TCN family members will see the retention of their right of residence conditional on a minimum duration of residence in the host State or, in the case of an Article 13 situation, on a series of circumstances listed in its second paragraph. Both categories of family members, however, will not be able to acquire a right of permanent residence before fitting themselves within one of the categories listed in Article 7 CD.[140] In any case, even if Member States are entitled to check whether Union citizens and their family members actually satisfy the conditions for residence (but not on a systematic basis),[141] Article 14 CD limits the host State's possibility to resort to expulsion measures: in particular, expulsions cannot be an "*automatic* consequence of […] recourse to the social assistance system of the host Member State"[142] nor can they be adopted in any case against Union citizens or family members who are either workers or self-employed or are seeking employment with a "genuine chance of being engaged".[143]

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[133] *Ibid.,* Art. 7(1a). Paragraph 3 lists a series of circumstances in which formerly economically active Union citizens may retain their worker/self-employed status.
[134] *Ibid.,* Art. 7(1b) and 7(1c).
[135] *Ibid.,* Art. 7(1c).
[136] *Ibid.,* Art 7(1d) and 7(2).
[137] *Ibid.,* Art. 7(4).
[138] *Ibid.,* Art. 12.
[139] *Ibid.,* Art. 13.
[140] *Ibid.,* Art. 12 and 13.
[141] *Ibid,* Art. 14(2).
[142] *Ibid,* Art. 14(3) (emphasis added).
[143] *Ibid,* Art. 14(4). This, however, poses no prejudice to Member States' right to invoke Chapter VI justifications (discussed below) to legitimately restrict the freedom of movement and residence of these categories as well.

The third category of residence rights is governed by Chapter IV of the Directive and consists in the right of "permanent residence". According to Article 16 CD, this right is granted to Union citizens and TCN family members who "have resided legally for a continuous period of five years in the host Member State".[144] Continuous residence is the only condition: the article explicitly states that, once acquired, a permanent residence right is "not […] subject to the conditions provided for in Chapter III"[145] and can only be lost due to a period of continuous absence from the host State longer than two years.[146] Paragraph 3 of the articles excludes some categories of absences from those interrupting a period of continuous residence,[147] while Article 17 CD lists some categories of persons who are entitled to a right of permanent residence after a period of time shorter than five years. These regard workers and self-employed persons who are retired, are prevented to continue working before completing their five-year period or who become frontier workers, family members of persons obtaining a right of permanent residence and some categories of family members of economically active persons who die before completing their five-year period of residence.[148]

The rest of the chapter, together with part of Chapter V, deals with administrative formalities and the issuance of documentation related to the permanent residence. Something relevant for our analysis of the UK's terms of withdrawal is that, albeit Member States are entitled to request Union citizens to register if they reside on their territory for longer than three months,[149] the United Kingdom has never decided to introduce such a requirement, and has instead granted to Union citizens the rights they enjoy under the Directive upon simple presentation of an ID card or passport from their home Member State.[150] And while citizens enjoy the right to receive a document which certifies their permanent residence right once acquired under Article 19 CD,[151] it is rare for Union citizens to apply for such a document as the registration system the Directive provides for is declaratory rather than constitutive.[152] Article 25(1) CD reads:

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[144] *Ibid.*, Art 16(1) and 16(2).
[145] *Ibid.*, Art 16(1).
[146] *Ibid.*, Art 16(4).
[147] Art. 16(3) CD states that "temporary absences not exceeding a total of six months a year", "absences of a longer duration for compulsory military service" or "one absence of a maximum of twelve consecutive months for important reasons" (with examples listed) shall not affect continuity of residence.
[148] Art. 17 CD.
[149] *Ibid.*, Art. 8(1).
[150] Stijn Smismans, "EU Citizens' Rights Post Brexit: Why Direct Effect Beyond The EU Is Not Enough", *European Constitutional Law Review* 14, no. 3 (2018): 443-474, doi:10.1017/s1574019618000317.
[151] Art. 19 CD.
[152] Stijn Smismans, "EU Citizens' Rights Post Brexit: Why Direct Effect Beyond The EU Is Not Enough" (see note 150).

> "Possession of a registration certificate […], of a document certifying permanent residence, of a certificate attesting submission of an application […] may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, *as entitlement to rights may be attested by any other means of proof*".[153]

This means that entitlement to a right does not depend on the presence or absence of the registration certificate. On the contrary, (permanent) residents enjoy their rights as a direct consequence of fulfilling the requirements foreseen by Union law, and as such being able to prove in any way that these requirements have been met is enough to be entitled to the rights granted by the Directive. Member States are not even allowed to require non-nationals to always carry with them their registration documents unless "the same requirement applies to their own nationals as regards their identity card"[154] – and even in this case, the sanction must be the same imposed on the Member State's own nationals.[155]

The latter provision is a specific expression of a more general right granted by Article 24 CD – the right to equal treatment, which is granted to "all Union citizens residing *on the basis of this Directive* in the territory of the host Member State".[156] The emphasised passage established an important principle, namely that lawful residence according to the Directive is an "absolutely essential precondition for equal treatment".[157] The CJEU notably gave confirmation of this in *Dano*, when it stated that:

> "In order to determine whether economically inactive Union citizens, […] whose period of residence in the host Member State has been longer than three months but shorter than five years, can claim equal treatment with nationals of that Member State so far as concerns entitlement to social benefits, it must therefore be examined whether the residence of those citizens complies with the conditions in Article 7(1)(b) of Directive 2004/38."[158]

The Court itself specified how this approach was meant to protect Member States' welfare systems from "welfare tourism" – abuse by citizens who "exercise their right to freedom of movement solely in order to obtain another Member State's social assistance"[159] –

[153] Art. 25(1) CD (emphasis added).
[154] *Ibid.,* Art. 26.
[155] *Ibid.*
[156] *Ibid.,* Art 24(1) (emphasis added).
[157] Robert Schütze, *European Union Law* (see note 25).
[158] Case C 333/13, *Dano and Dano v Jobcenter Leipzig*.
[159] *Ibid.*

a protection explicitly envisaged by the Citizenship Directive, both in its recitals[160] and through the derogation contained in its Article 24(2). The latter excludes from equal treatment the right to have access to social assistance for the first three months of residence and to maintenance aid for studies before acquiring a right to permanent residence.[161] The exact scope of the concept of "social assistance" has been established in the case law of the CJEU in a troublesome fashion for what concerns the "clarity and consistency of European secondary law"[162] – on one hand, it includes "all assistance introduced by the public authorities […] that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family";[163] on the other hand, *Collins* benefits[164] – which are constitutionally protected under Article 45(2) TFEU, and thus not limitable through secondary law – were found not to be considerable as "social assistance".[165]

Other relevant case law

Besides the rights directly stemming from provisions of Union law, both primary and secondary ones, there are a few more CJEU judgements which are to be noted in this section. These cases mostly deal with the retention or derivation of residence rights, and regard situations which at first may seem not to be covered by Union law. A first example can be found the judgements *Teixeira*[166] and *Ibrahim*,[167] which deal with the possibility of both EU citizens and non-EU citizens[168] to derive a residence right from the fact of having a dependent (EU citizen) child in education in the host Member State. In both cases, the Court recognised that the child had an independent right to reside in the host State under Regulation (EEC) 1612/68,[169] and thus the "primary carers" of the child were able to derive a residence right from

[160] Preamble (10) CD specifies that "persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence".
[161] Art. 24(2) CD.
[162] Robert Schütze, *European Union Law* (see note 25).
[163] Case C 140/12, *Pensionsversicherungsanstalt v Peter Brey*.
[164] Unemployment benefits meant to facilitate access to the labour market. See the subsection "*Free movement of workers*".
[165] Joined cases C-22/08 and C-23/08, *Vatsouras* (C-22/08) *and Koupatantze* (C-23/08) *v Arbeitsgemeinschaft (ARGE) Nürnberg 900*.
[166] Case C-480/08, *Teixeira v London Borough of Lambeth and Secretary of State for the Home Department*.
[167] Case C-310/08, *London Borough of Harrow v Ibrahim and Secretary of State for the Home Department*.
[168] *Teixeira* dealt with the derived rights of a Union citizen who was a former worker in the host State and had a child in education in the UK, while *Ibrahim* dealt with the derived rights of a TCN who separated from her Danish spouse and had a child in education in the UK.
[169] Regulation (EEC) 1612/68 on freedom of movement for workers within the Community, Art. 12. The same provision is now contained in Art. 10 of Regulation (EU) 492/2011.

their children in order not to prevent them from enjoying their European right; moreover, this right would not be conditional on satisfying the conditions laid down in the Citizenship Directive – in particular, they would not be required to possess the "sufficient resources" demanded from economically inactive Union citizens.[170]

The concept of "primary carers" is not limited to *Teixeira* and *Ibrahim*. On the contrary, it famously appears in *Zambrano,* where the Court held that a TCN primary carer can derive a right of residence from their EU citizen child even if the child has not exercised yet their free movement rights.[171] Unable to rely only on Article 21 TFEU or on the Citizenship Directive as the child was still residing in their home country,[172] the Court resorted to Article 20 TFEU to find that the latter, establishing citizenship of the Union, included a right to reside on the territory of the EU,[173] as Union citizenship was "intended to be the fundamental status of nationals of the Member States".[174] Because of this, the Court found that:

> "A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit […] would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. […] *In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union*".[175]

Hence, Member States would not be entitled to refuse residence or work permits to such TCN primary carers. The Court subsequently stressed in *Dereci*[176] that these rights would have to be recognised "only insofar as doing otherwise would force the Union citizen to leave the Union territory", rather than merely when it would be desirable for the parent to remain;[177] at the same time, however, it excluded in *Chavez-Vilchez* the possibility that the mere fact that

[170] For a more detailed analysis of these cases, see Matthew Elsmore, "Taking a Logical or Giant Step Forward?: Comment on *Ibrahim* and *Teixeira*", *European Law Review 35, no.4* (2010): 571-589.
[171] Case C-34/09, *Zambrano v Office national de l'emploi*.
[172] For an example of when a similar right was recognised in a country of which the child was *not* a national, see Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department*.
[173] Charlotte O'Brien, "*Acte Cryptique*? Zambrano, Welfare Rights, And Underclass Citizenship In The Tale Of The Missing Preliminary Reference", *Common Market Law Review 56, no. 6* (2019): 1697–1732.
[174] Case C-34/09, *Zambrano v Office national de l'emploi*.
[175] *Ibid.* (emphasis added).
[176] Case C-256/11, *Dereci and Others v Bundesministerium für Inneres*.
[177] For a critique of the appropriateness of the permanence on Union territory test, and of the concept of "primary carer" for the "normative judicial expectations on the type and quality of care" it is loaded with, see Fulvia Staiano, "Derivative Residence Rights For Parents Of Union Citizen Children Under Article 20 TFEU: *Chavez-Vilchez*", *Common Market Law Review* 55, no. 1 (2018): 225–241.

"the other parent, a Union citizen, is actually able and willing to assume sole responsibility"[178] to care for the child can be enough to state that the relationship of dependence is not strong enough for the child to be forced to leave the EU's territory if the TCN parent was expelled.

Another category of situations in which the CJEU has shown to be ready to grant derivative residence rights for family members to Union citizens residing in their state of nationality is situations with a "transnational element".[179] One example of what this means is represented by the situation of dual nationals: while the Court recognised that neither Article 21 TFEU nor the Citizenship Directive can be applied to dual nationals who never exercised their free movement rights in *McCarthy*,[180] it has not held the same position for cases of naturalisation. In *Lounes*, the Court held that treating a Union citizen acquiring as a second nationality the one of the host Member State as a "purely internal situation" would mean to disregard both the fact that the citizen has exercised his or her freedom of movement and retained their home State nationality, and the fact that Article 21 rights are intended to promote a process of gradual integration of which naturalisation is the final, most permanent step.[181] For these reasons, Union citizens cannot be expected to forego the rights that they enjoyed before acquiring the host State's citizenship – and, as the Court explicitly recognised the "right to lead a normal family life" to be among these, when it comes to deriving a residence right for their TCN spouse the Citizenship Directive will apply by analogy even if such a situation is not covered by its personal scope.[182]

A second situation with a "transnational element" is the case of Union citizens returning to their home Member State after having exercised their free movement rights abroad for a period of time. The landmark case here is *Surinder Singh*, which established that a national of a Member State returning in the latter after a period of residence in another Member State can derive the same entry and residence rights for their TCN spouse that he or she could be able to obtain by moving to another Member State of which he or she is not a national.[183] The reasoning justifying this judgement was that:

[178] Case C-133/15, *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*.
[179] Vincent Réveillère, "Family Rights For Naturalized EU Citizens: *Lounes*", *Common Market Law Review* 55, no. 6 (2018): 1855–1878.
[180] Case C-434/09, *McCarthy v Secretary of State for the Home Department*.
[181] Case C-165/16, *Lounes v Secretary of State for the Home Department*.
[182] *Ibid.* For a detailed analysis of the case, see Vincent Réveillère, "Family Rights For Naturalized EU Citizens: *Lounes*" (see note 179).
[183] Case C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*.

> "A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity […] in the territory of another Member State if, on returning to the Member State of which he is a national […] the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by [Union] law in the territory of another Member State."[184]

This kind of approach has been described as a "typical figure of EU freedom of movement law: the obstacle experienced upon return is taken into account as an obstacle to leaving the Member State of nationality".[185]

Justifications for limitations to free movement

Union law prohibitions against restrictions to the free movement of persons are not absolute – the Treaties and the Citizenship Directive themselves provide an exhaustive list of justifications allowing Member States to place legitimate restrictions on persons' free movement rights. Albeit employing slightly different wordings,[186] Article 45(3) TFEU, Article 52 TFEU and Article 27(1) CD all allow restrictions "on grounds of public policy, public security and public health".[187]

Chapter VI of the Citizenship Directive provides further details and safeguards available for Union citizens. Article 27(2) CD specifies that limitations based on the first two justifications (public interest and public security) must respect the principle of proportionality and "be based exclusively on the personal conduct of the individual concerned"[188] when it "represent[s] a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society"[189] – specifying that previous criminal convictions alone are not enough to satisfy this test. Article 28 CD further protects Union citizens from expulsion on the grounds of these justifications by requiring Member States to consider a series of individual factors

[184] *Ibid.*
[185] Vincent Réveillère, "Family Rights For Naturalized EU Citizens: *Lounes*" (see note 179).
[186] Art. 45(3) TFEU mentions "*limitations*" to the free movement of workers, Art. 52 TFEU mentions "*special treatment* of foreign nationals" seeking establishment and Art. 27(1) CD allows Member States to "*restrict the freedom of movement and residence* of Union citizen" (emphasis added in all three cases).
[187] Art. 45(3) TFEU, Art. 52 TFEU and Art. 27(1) CD.
[188] Art. 27(2) CD.
[189] *Ibid.*

when taking the decision of expulsion[190] and by making it more difficult to expel citizens as the length of their stay in the host country increases[191] and in the case of minors,[192] unless the expulsion is deemed "necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child".[193] Article 33 CD prohibits the use of expulsion orders "as a penalty or legal consequence of a custodial penalty"[194] when they do not conform to the provisions contained in Articles 27, 28 and 29 CD. Article 29 limits the application of "public health" justifications to:

> "diseases with epidemic potential […] and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State."[195]

The same article excludes diseases occurring more than three months after arrival from the legitimate grounds for expulsion[196] and limits Member State's right to impose mandatory medical examinations "to certify that they are not suffering from any of the conditions referred to in paragraph 1"[197] so that they "may not be required as a matter of routine",[198] nor can the citizen in question be charged for it.[199] Articles 30 and 31 CD further protect Union citizens by providing for mandatory notification of decisions by the host State[200] and for procedural safeguards for citizens concerned by such provisions.[201]

While this list is exhaustive for discriminatory measures, the CJEU has recognised the implied possibility of justifying non-discriminatory restrictions on the grounds of "imperative" or "overriding" requirements in the public interest – a broad category with no defined limits.[202] Measures justified in this way must be:

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[190] *Ibid.,* Art. 28(1).
[191] Art. 28(2) CD requires "*serious* grounds of public policy or public security" to expel a Union citizen who has obtained a right of permanent residence, while Art. 28(3) requires "*imperative* grounds of public security" (note the exclusion of public policy grounds!) after ten years of residence.
[192] Art. 28(3) CD. The same requirement of "*imperative* grounds of public security" as above applies.
[193] *Ibid.*
[194] *Ibid.,* Art. 33(1).
[195] *Ibid.*, Art 29(1).
[196] *Ibid.*, Art. 29(2)
[197] *Ibid.*, Art. 29(3)
[198] *Ibid.*
[199] *Ibid.*
[200] *Ibid.,* Art. 30.
[201] *Ibid.,* Art. 31.
[202] Robert Schütze, *European Union Law* (see note 25).

> "applied in a non-discriminatory manner; […] justified by imperative requirements in the general interest […] suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it".[203]

Moreover, when analysing the proportionality of restrictions to Union citizens' free movement rights, the Court will also consider "whether the EU citizen has a sufficient link of integration with the host society".[204] And even if the Court recognised the possibility of requiring this sufficient link from citizens who are not economically active, to prevent the exploitation of a Member State's public finances, if a national provision is "too exclusive in nature"[205] or it "unduly favour[s] one element which is not necessarily representative"[206] of the connection in question, the Court will find it to violate the principle of proportionality.

2.2.2. Other citizenship rights

The rights stemming from citizenship of the European Union are not limited to free movement rights. First proposed in 1974, a symbolic set of civil and political rights[207] was introduced into the Treaties together with the establishment of Union citizenship with the Maastricht Treaty. Today, Article 20 TFEU states that these rights shall include, besides free movement, the right to vote and to run as a candidate for European Parliament and municipal elections in their Member State of residence under an equal treatment clause,[208] the right to diplomatic protection by other EU Member States in the territory of third countries in which their State of nationality is not represented[209] and the rights to petition the European Parliament, to apply to the European Ombudsman, and to obtain a reply from Union institutions after having addressed them in any of the Treaty languages.[210] These rights are developed further in detail by following Treaty articles and, together with free movement, they form a first nucleus of substantive citizenship rights which, albeit limited and not entirely comparable to national citizenship rights,[211] have been described as a "significant step towards a genuine 'post-national citizenship' of Europe".[212]

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[203] Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.
[204] Robert Schütze, *European Union Law* (see note 25).
[205] Joined cases C-523/11 and C-585/11, *Prinz v Region Hannover* (C-523/11) and *Seeberger v Studentenwerk Heidelberg* (C-585/11).
[206] *Ibid.*
[207] Simon Hix and Bjorn Høyland, *The Political System Of The European Union* (see note 21).
[208] Art. 20(2b) TFEU.
[209] *Ibid.,* Art. 20(2c).
[210] *Ibid.,* Art. 20(2d).
[211] Simon Hix and Bjorn Høyland, *The Political System Of The European Union* (see note 21).
[212] *Ibid.*

The first political right mentioned by Article 20 TFEU, the right to vote and stand for elections for the EP and for municipal elections in the host country, is also the object of Article 22 TFEU. The first paragraph of the article restates the right of Union citizens to vote and stand as a candidate in municipal elections in their Member State of residence under the same conditions as its nationals, makes it subject to "detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament",[213] and it allows for derogations due to "specific problems" which are particular of a Member State.[214] In a parallel fashion, the second paragraph makes the right to vote and run as a candidate in EP elections subject to the same conditions;[215] however, it also specifies that this poses no prejudice to Article 223(1) TFEU – the legislative competence to adopt provisions for the election of MEPs by direct universal suffrage, either through a "uniform procedure" or "common principles"[216] – nor to its implementing provisions.

Article 24 TFEU provides for a set of related political rights: the legislative competence to establish the procedure for a citizens' initiative, the right to petition the EP, the right to apply to the European Ombudsman and the right to contact any Union institution or body in any of the Treaty languages[217] and receive a reply in the same language of the application.[218] The paragraph mentioning the citizens' initiative cross-references Article 11 TEU, according to which:

> "Not less than one million citizens who are nationals of a significant number[219] of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties."[220]

The paragraph on the right of petition to the EP cross-references Article 227 TFEU, which broadens the personal scope of the provision to include "any natural or legal person residing or having its registered office in a Member State";[221] moreover, it limits its material scope to matters which "come within the Union's fields of activity and which affect [such

[213] Art. 22(1) TFEU.
[214] *Ibid.*
[215] *Ibid.,* Art. 22(2).
[216] *Ibid.,* Art. 223(1).
[217] The article refers to the languages mentioned in Art. 55(1) TEU.
[218] Art. 24 TFEU.
[219] This number has then been set, on the basis of the legislative competence mentioned above, to at least one quarter of the Member States of the European Union.
[220] Art. 11(4) TEU.
[221] Art. 227 TFEU.

person] directly".[222] A similar expansion of personal scope is applied to the Ombudsman provision by Article 228 TFEU, which establishes such an independent figure and empowers it to:

> "receive complaints […] concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, […] examine such complaints and report on them […] except where the alleged facts are or have been the subject of legal proceedings".[223]

Lastly, the external expression of Union citizenship – diplomatic or consular protection abroad – is repeated in Article 23 TFEU. According to it and to Article 20(2c) TFEU, Union citizens who find themselves in a third country where their home State is not represented will enjoy a right to "protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State".[224] Article 23 TFEU clarifies that international negotiations will be necessary for such a protection to be secured and puts Member States under a duty to start them, and provides for a legislative competence for the adoption of "coordination and cooperation measures" to facilitate such protection.[225]

The citizenship rights mentioned above have been restated in another legal document – the Charter of Fundamental Rights of the European Union. The latter is the written bill of rights of the Union, and it was proclaimed in 2000 to codify in a single text:

> "the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights."[226]

The use of the term "reaffirms" in the Charter[227] is important, as it underlines that the CFREU was not meant to create *new* fundamental rights, but only to codify together already existing ones.[228] In fact, when the Charter was adopted in 2000, it was merely meant to serve as an "*inspiration*"[229] instead of being binding on the Union or its Member States, and even

[222] *Ibid.*
[223] Art. 228(1) TFEU
[224] *Ibid.*, Art. 23.
[225] *Ibid.*
[226] Preamble 4 CFREU.
[227] *Ibid.*
[228] Robert Schütze, *European Union Law* (see note 25).
[229] *Ibid.* (emphasis in original).

when it was granted the "same legal value as the Treaties"[230] with the Treaty of Lisbon, the same provision that made the Charter binding also specified that it did "not extend in any way the competences of the Union as defined in the Treaties".[231] Today, the CFREU acts as a *lex generalis* to the Treaties[232] and as a "focal point" for cases regarding fundamental rights which are adjudicated by the CJEU.[233] Regarding its relationship with the (external) European Convention on Human Rights, it takes it as a baseline for the level of protection to be granted, allowing the Union to afford "more extensive protection",[234] but not a less extensive one. As several of the rights contained in the Charter are "new" with respect to the ECHR, as they reflect "changes in society since 1950",[235] it has been described as a contemporary product of our times[236] which also covers "new" fields such as data protection[237] and bioethics.[238]

It is to be noted that most of the rights of the Charter are not exclusive to Union citizens – as employing the term *everyone* "draws no distinction between citizens and human beings",[239] most of these rights are better qualifiable as human rights than as citizenship rights. The latter only comprise one chapter of the Charter – Chapter V, whose title is in fact "Citizens' Rights". This section mostly repeats the rights already discussed above, with the only exception being Article 41 CFREU. This article, regarding the "right to good administration", contains itself several rights, such as the right to impartial and fair treatment by the Union, the right to be heard before receiving adverse individual measures, the right to access their file, the right to receive reasons by the administration and the right to have the Union make good the damages it causes.[240] As Union action is not only concerned with its own citizens, but it also comes into contact with legal persons and TCNs, this is also the only "citizens' right" to be recognised to "every person" rather than to "citizen[s] of the Union".[241]

From these premises, the Charter may seem promising for the protection of (not only) citizens' rights; however, as this analysis of existing rights is meant to be related to the Brexit

[230] Art. 6 TEU.
[231] *Ibid.*
[232] Art. 52(2) CFREU establishes that, for rights which are also provided for by the Treaties, the "conditions" and "limits" established in the Treaties shall prevail.
[233] Robert Schütze, *European Union Law* (see note 25).
[234] Art. 52(3) CFREU.
[235] Simon Hix and Bjorn Høyland, *The Political System Of The European Union* (see note 21).
[236] Roy W. Davis, "Citizenship Of The Union... Rights For All?", *European Law Review* 27, no. 2 (2002): 121-137.
[237] Art. 8 CFREU.
[238] *Ibid.,* Art. 3(2d); note also the mention of "genetic features" in Art. 21 CFREU.
[239] *Ibid.*
[240] Art. 41 CFREU.
[241] *Ibid.*

Withdrawal Agreement – and thus to the UK – it is necessary to underline a major limitation of the Charter: a Protocol attached to the TFEU prevents "the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom"[242] to be found inconsistent with the CFREU, either by national courts or by the CJEU. The Protocol further specifies that Title IV ("Solidarity") in particular does not to create any "justiciable rights" which have not been provided for in national law in these two countries, and the same applies "to the extent that a provision of the Charter refers to national laws and practices".[243] This implies that, when it comes to the United Kingdom, rights enjoyed under the Charter will coincide with rights enjoyed under national law – severely limiting[244] the occasions for application of the Charter in the UK.

2.2.3. Beyond citizenship: social rights

European citizenship and the CFREU are not (and have never been) the sole sources in Union law of rights which can be directly enjoyed by nationals of EU Member States. On the contrary, there are plenty of examples of cases where substantive provisions of Union law had the result of creating rights for the persons falling within their specific areas of competence. Even though the personal scope of these rights is not as broad as to cover all holders of Union citizenship, they are nonetheless an important source of rights for large numbers of Europeans, and because of this the exit of the United Kingdom from the EU may have an impact on the several British holders of these rights. Enumerating all of these provisions would require significantly more space than this dissertation; for this reason, this section will only attempt to provide a broad, summary overview of the main provisions of one subset of this kind of legislation which is of particular concern– the ones providing for workers' rights adopted in the context the Union's social policy.

Social policy was not originally a broad Union competence in the Treaty of Rome – it was mostly to remain a prerogative of Member States,[245] with the only social policy-related right to be recognised being equal pay for men and women.[246] These competences were

[242] Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, *OJ C 115,* 2008. Art. 1.
[243] *Ibid.,* Art. 2.
[244] The fact that the protocol only "protects" national laws and practices from the CFREU rather than excluding its application from the UK's territory leaves open the possibility of recourse to the Charter when enforcing a fundamental right against Union action.
[245] Gerda Falkner, "The European Union's Social Dimension", in *European Union Politics*, 6th ed. (Oxford: Oxford University Press, 2019), 310-322.
[246] Now contained in Art. 157 TFEU.

gradually expanded through Treaty reform, with the Single European Act including the improvement of health and safety for workers and the Maastricht Treaty expanding the Union's competence on a broad array of social policy issues, which came to comprise the so-called Social Chapter. The UK's reticence against the latter was evident as it negotiated an opt-out from the Chapter, which only came to an end in 1997 after a general election brought about a new, Labour government.[247] Today, after some minor additions, the Union's social policy in the strict sense[248] mostly focuses occupational health and safety, working conditions and anti-discrimination measures.[249]

The Union's main legislative competence regarding social policy and labour law can be found in Article 153 TFEU. This Article codifies jurisprudence regarding the CJEU's broad interpretation of previous social policy competences (in particular, ex-Article 118a(1) EEC) by listing 11 fields of Union competence:

> "(a) improvement in particular of the working environment to protect workers' health and safety;
>
> (b) working conditions;
>
> (c) social security and social protection of workers;
>
> (d) protection of workers where their employment contract is terminated;
>
> (e) the information and consultation of workers;
>
> (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;[250]
>
> (g) conditions of employment for third-country nationals legally residing in Union territory;
>
> (h) the integration of persons excluded from the labour market, without prejudice to Article 166;[251]

[247] Gerda Falkner, "The European Union's Social Dimension", in *European Union Politics* (see note 245).
[248] Some authors also consider the Union's competences concerning free movement and equal treatment of workers and the ones concerning the provision of services across borders to be part of the Union's social policy, or at least to have relevant implications for the social realm. For a mention of Art. 56 TFEU and the Posted Workers Directive for what concerns the "home State principle", see Catherine Barnard, "Brexit And Employment Law", in *The UK After Brexit. Legal And Policy Challenges*, 1st ed. (Mortsel: Intersentia Publishing nv, 2017), 97-114.
[249] Gerda Falkner, "The European Union's Social Dimension", in *European Union Politics* (see note 245).
[250] Paragraph 5 excludes application of this article to "pay, the right of association, the right to strike or the right to impose lock-outs".
[251] Art. 166 TFEU regards the Union's vocational training policy.

(i) equality between men and women with regard to labour market opportunities and treatment at work;

(j) the combating of social exclusion;

(k) the modernisation of social protection systems without prejudice to point (c)."[252]

This provision finally empowered the Union with a specific competence to act in the broader field of social policy without having to rely only on a broad interpretation of its more general legal bases – ex-Articles 100[253] and 235[254] EEC – or to stretch the interpretation of the scope of specific competences[255] by relying on their use of vague terms which could be interpreted extensively.[256] Article 153 TFEU, in fact, allows the Union to "support and complement"[257] Member States' activity through "measures designed to encourage cooperation between [them]"[258] and, while it excludes the possibility of harmonisation of national laws, it also allows the Union to establish minimum requirements through directives in the fields listed above.[259] In any case, however, Union action in this field cannot affect the "fundamental principles" or "financial equilibrium" of national social security systems, nor it can prevent Member States from adopting higher standards of protection "compatible with the Treaties".[260]

Article 153 TFEU and, previously, the Union's subsidiary competences have been employed by the Union to adopt a series of employment-related Directives, including Council Directive 89/391.[261] The latter puts employers under a duty to "ensure the safety and health of workers in every aspect related to work"[262] and, importantly, empowered the Council to "adopt individual Directives, inter alia, in the areas listed in the Annex".[263] The Council has done so

[252] Art. 153(1) TFEU.
[253] Ex-Art. 100 EEC empowered the Council to unanimously adopt Directives to harmonise national rules "directly affect[ing] the establishment or functioning of the common market". A similar (but procedurally different and more detailed) competence is today contained in Art. 114 TFEU and it cross-references the goal of the common market contained in Art. 26 TFEU.
[254] Ex-Art. 235 EEC (now Art. 352 TFEU) allows Union action even in the absence of a specific competence in the Treaties where "action by the Union should prove necessary […] to attain one of the objectives set out in the Treaties.
[255] Ex-Art. 118a EEC provided a competence to improve the "health and safety of workers", which was interpreted broadly as to include all factors which can potentially influence health and safety. For a famous confirmation of this interpretation, see Case C-84/94, *United Kingdom v Council*.
[256] Gerda Falkner, "The European Union's Social Dimension", in *European Union Politics* (see note 245).
[257] Art. 153(1) TFEU.
[258] *Ibid.,* Art. 153(2).
[259] *Ibid.*
[260] *Ibid.,* Art. 153(4).
[261] Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. *OJ L 183/1*, 1989.
[262] Council Directive 89/391/EEC, Art. 5(1).
[263] *Ibid.,* Art. 16(1).

and adopted important provisions such as the Pregnant Workers Directive,[264] which entitles women to at least 14 weeks of maternity leave during which their employment rights remain protected[265] and is complemented by the Parental Leave Directive,[266] and the Working Time Directive,[267] establishing minimum periods of daily and weekly rest and annual leave for workers and limiting working time to no more than 48 hours every seven days.[268] The Union legislator has also provided for the protection of workers' rights through substantive[269] guarantees in the case of the transfer of an undertaking,[270] in which case "the transferor's rights and obligations [regarding employment] shall […] be transferred to the transferee"[271] and the transfer itself cannot be grounds for dismissal,[272] and through procedural[273] guarantees in the case of collective dismissals[274] and in the case of the employer's insolvency.[275]

A particularly important subfield of Union social policy is composed by equality measures. The principle of equal pay for men and women has been the first (and originally, only) principle of employment law in Union law, and today it finds its expression in Article 157 TFEU. Its first paragraph puts Member States under a duty to ensure that male and female workers receive "equal pay […] for equal work or work of equal value".[276] This provision was found to be directly effective by the CJEU,[277] and so it creates a right on which workers can rely in front of a court – even against private employers.

Article 157 TFEU also contains a legislative competence, which allows the Union to adopt measures which go beyond the mere "equal pay" principle and, instead, "ensure the application of the principle of *equal opportunities and equal treatment* of men and women in

[264] Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, *OJ L 348/1,* 1992.
[265] Robert Schütze, *European Union Law* (see note 25).
[266] Council Directive 2010/18/EU implementing the revised Framework Agreement on parental leave and repealing Directive 96/34/EC, *OJ L 68/13,* 2010.
[267] Directive 2003/88/EC concerning certain aspects of the organisation of working time, *OJ L 299/9*, 2003.
[268] Robert Schütze, *European Union Law* (see note 25).
[269] *Ibid.*
[270] Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, *OJ L 82/16,* 2001.
[271] *Ibid.,* Art. 3(1).
[272] *Ibid.,* Art 4(1).
[273] Robert Schütze, *European Union Law* (see note 25).
[274] Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies, *OJ L 225/16,* 1998.
[275] Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, *OJ L 283*/36, 2008.
[276] Art. 157(1) TFEU.
[277] Case 43-75, *Defrenne v Société anonyme belge de navigation aérienne Sabena*.

matters of employment and occupation".[278] This competence was used to adopt the Equal Treatment Directive,[279] whose scope is much broader than Article 157(1) TFEU: besides prohibiting direct and indirect discrimination[280] on grounds of sex regarding "all aspects and conditions of remuneration",[281] for instance, the Directive also bans discrimination in occupational social security schemes,[282] access to employment and self-employment, access to vocational training, working conditions and membership of professional organisations,[283] and it is also concerned with maternity leave,[284] protection against retortions for complaints regarding unequal treatment,[285] "harassment and sexual harassment in the workplace"[286] and gender mainstreaming in policy design.[287] The Directive also cross-references[288] Article 157(4) TFEU, which allows Member States (but not the Union!) to take *positive action* to ensure "full equality in practice"[289] where one sex is underrepresented in a specific sector or where it is necessary to prevent or compensate for disadvantages;[290] however, this possibility has been limited by the CJEU which excluded the possibility of "hard quotas" for women.[291]

This Union policy on equal treatment between sexes has been complemented by the so-called "Article 13 Directives",[292] which were adopted on the legal basis of ex-Article 13 EC (now Article 19 TFEU), a legislative competence allowing Union action against "discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".[293] These directives broadened the principle of equal treatment to other protected categories – first by addressing discrimination based on racial or ethnic origin,[294] and then by

[278] Art. 157(3) TFEU (emphasis added).
[279] Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, *OJ L 204/23*, 2006; hereafter, "Equal Treatment Directive" or "ETD".
[280] Direct and indirect discrimination find their definitions for the purposes of this Directive in Art. 2(1a) and 2(1b) ETD respectively. These definitions come close to usual CJEU case law as described above for what concerns free movement.
[281] Art. 4 ETD.
[282] *Ibid.,* Art. 5.
[283] *Ibid.,* Art. 14.
[284] *Ibid.,* Art. 15.
[285] *Ibid.,* Art. 24.
[286] *Ibid.,* Art. 26.
[287] *Ibid.,* Art. 29.
[288] *Ibid.,* Art. 3.
[289] Art. 157(4) TFEU.
[290] *Ibid.*
[291] Case C-407/98, *Abrahamsson and Anderson v Fogelqvist*, and Case C-450/93, *Kalanke v Freie Hansestadt Bremen*.
[292] Catherine Barnard, "Brexit And Employment Law", in *The UK After Brexit. Legal And Policy Challenges* (see note 248).
[293] Art. 19 TFEU.
[294] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L 180/22*, 2000.

addressing the remaining categories of Article 19 TFEU as well – discrimination based on age, sexual orientation, religion or belief and disability.[295]

The Union's legislative competences are complemented by the role played by Union-level collective agreements between social partners – management and labour. These agreements may be both cross-sectoral and sector-specific,[296] and the social partners can choose between seeing their implementation through "procedures and practices specific to management and labour and the Member States",[297] or they can choose to have them included into Union law through a joint request for a Council decision implementing the agreement.[298] The Parental Leave Directive[299] mentioned above is an example of this; other important cross-sectoral agreements which have been converted into directives concern the protection of part-time[300] and fixed-term[301] workers' rights through the principles of non-discrimination and *pro rata temporis*, regarding respectively equal treatment regarding working conditions and access to benefits, and (specific to fixed-term work) through the no-abuse principle, preventing abuse through the successive utilization of fixed-term contracts in place of stable employment.[302]

Lastly, social rights are covered in Title IV ("Solidarity") of the CFREU, with a scope broader than just workers' rights – for instance, the Title also mentions a right to access to health care[303] and the principles of environmental protection[304] and consumer protection.[305] However, the content and application of the Solidarity Title has been described as "disappointing", in particular in comparison to the Title III ("Equality") of the Charter.[306] This is exacerbated in the context of the United Kingdom considering that, as mentioned above in

[295] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, *OJ L 303/16*, 2000.
[296] Robert Schütze, *European Union Law* (see note 25).
[297] Art. 155(2) TFEU.
[298] *Ibid.*
[299] Council Directive 2010/18/EU (see note 266).
[300] Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC. *OJ L 14/9*, 1997.
[301] Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, *OJ L 175/43*, 1999.
[302] Robert Schütze, *European Union Law* (see note 25).
[303] Art. 35 CFREU.
[304] *Ibid.*, Art. 37.
[305] *Ibid.*, Art. 38.
[306] Catherine Barnard, "Brexit And Employment Law", in *The UK After Brexit. Legal And Policy Challenges* (see note 248).

Section 2.2.2, the UK negotiated a Protocol explicitly excluding the possibility of Title IV CFREU creating any "justiciable rights" which do not already exist under UK law.[307]

[307] Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, *OJ C 115,* 2008. Art. 2. For potential areas of application of the Charter in the UK, see note 244.

3. Rights under the Withdrawal Agreement: what changes?

3.1. Introduction: the Withdrawal Agreement and its structure

A first draft of the Withdrawal Agreement was published by the European Commission on 28th February 2018, paraphrasing in legal terms[308] the contents of the Joint Report published by the EU and UK negotiators in 2017 on the progress achieved so far in the negotiations for the Withdrawal Agreement.[309] It was soon followed by a version of the draft Agreement published by both EU and UK negotiators which employed different colours to show the progress achieved on different subject matters so far. From this draft, it comes to attention that agreement at negotiators' level had already been reached on the citizens' rights part and it was "only [going to] be subject to technical legal revisions in the [following] weeks".[310] Final agreement at negotiator's level was achieved on 17th October 2019, but the UK Government only managed to secure a majority in favour of the Agreement on 23rd January 2020, when the UK Parliament finally approved the text of the Withdrawal Agreement and the latter could be signed on 24th January.

After EP approval on 29th January[311] and approval and subsequent ratification from the Council of the European Union on 30th January,[312] the United Kingdom received notification from the Union on 31st January regarding the entry into force of the Agreement,[313] and subsequently left the European Union on the midnight of the same day. Starting from 1st

[308] Menelaos Markakis, "Citizens' Rights After Brexit: The Withdrawal Agreement And The Future Mobility Framework", in *Trade Relations After Brexit* (Nomos and Hart Publishing, 2019), 293-330, doi:10.5771/9783845293349-293.
[309] "Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union", *TF50 (2017) 19*, 2017.
[310] 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*, 2018. For a detailed timeline of events, debates, drafts and documents related to the Brexit negotiations, see "Brexit", *Consilium.Europa.Eu*, 2020, https://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/#.
[311] European Parliament legislative resolution of 29 January 2020 on the draft Council decision on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *Europarl.europa.eu*, 2020, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0018_EN.html.
[312] Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ L29/1*, 2020.
[313] Notice concerning the entry into force of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ L 29/189*, 2020.

February 2020, the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community entered into force, effectively making the UK a third country and starting the transition period previously mentioned which, according to Article 126 WA, will end on 31st December, 2020.[314]

The Withdrawal Agreement is structured as follows. Part One[315] covers some Common Provisions, including some provisions which are briefly discussed in the next paragraph. Citizens' Rights are the object of Part Two[316] of the Agreement, and will be the main object of discussion for this chapter. The subsequent parts cover Separation Provisions (Part Three);[317] the Transition period (Part Four)[318] and Financial Provisions (Part Five).[319] Institutional and Final Provisions (Part Six)[320] conclude the Agreement, which is complemented by three Protocols – one on Ireland/Northern Ireland, one on the Sovereign Base Areas of the UK in Cyprus and one on Gibraltar – and nine Annexes which, according to Article 182 WA, "shall form an integral part of [the] Agreement".[321]

Besides specifying definitions[322] relevant for the Agreement and its precise territorial scope[323] for the sake of legal clarity, Part One (Common Provisions) contains other provision which are important for the interpretation of the Agreement. Article 4(1) WA specifies that:

> "The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the *same legal effects* as those which they produce within the Union and its Member States."[324]

This includes the possibility for legal or natural persons to rely directly on those provisions mentioned above which, under Union law, would satisfy the criteria for direct effect,[325] and the UK is placed under a duty to employ primary legislation to ensure compliance with this provision.[326] This includes providing its judiciary and administration with the power to "disapply inconsistent or incompatible domestic provisions"[327] in a fashion similar as under

[314] Art. 126 WA.
[315] *Ibid.*, Art. 1-8.
[316] *Ibid.*, Art. 9-39.
[317] *Ibid.*, Art. 4-125.
[318] *Ibid.*, Art.
[319] *Ibid.*, Art. 133-157.
[320] *Ibid.*, Art. 158-185.
[321] *Ibid.*, Art. 182.
[322] *Ibid.*, Art. 2.
[323] *Ibid.*, Art. 3.
[324] *Ibid.*, Art. 4(1) (emphasis added).
[325] *Ibid.*
[326] *Ibid.*, Art. 4(2).
[327] *Ibid.*

the currently existing doctrine of supremacy of Union law. The rest of Article 4 contains specific instructions for the interpretation of the rest of the Agreement: it will have to be interpreted and applied "in accordance with the methods and general principles of Union law"[328] and following CJEU case law handed down before the end of the transition period;[329] while the UK judiciary and administration will only be required to have "due regard" of CJEU case law which is posterior to the end of the transition.[330] Further interpretation instructions are contained in Article 6 WA, which covers the meaning of references to Union law. These:

> "shall be understood as references to Union law, including as amended or replaced, as applicable on the last day of the transition period. [These include], where relevant, […] a reference to Union law or provisions thereof that, although replaced or superseded by the act referred to, continue to apply in accordance with that act [including] references to the relevant Union acts supplementing or implementing those provisions."[331]

Markakis[332] notices how Article 5 WA as well, if taken together with other provisions of the Agreement, may be useful for interpretation in light of the Union law principle of sincere cooperation which it cross-references. In fact, Article 5 WA entails an obligation of good faith to "assist each other in carrying out tasks which flow from this Agreement"[333] – including taking "all appropriate measures" to this end and "refrain[ing] from any measures which could jeopardise the attainment of the objectives of this Agreement".[334]

The rest of this chapter is structured in the following manner. The next section will analyse in detail the provisions contained in Part Two WA on citizens' rights and their implications both for those who are covered by the Agreement and for those who are excluded from its personal scope. It will be followed by a second section looking at the institutional side of the Agreement, by focusing in particular on the governance and oversight mechanisms envisioned to ensure a correct implementation of Part Two WA, on the future role which will be played by the CJEU and on the mechanisms included in the Agreement in order to solve disputes which may arise over its implementation and interpretation after the end of the transition period.

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[328] *Ibid.*, Art. 4(3).
[329] *Ibid.*, Art. 4(4).
[330] *Ibid.*, Art. 4(5).
[331] *Ibid.*, Art. 6. This is relevant as Part Two WA contains references to EU law provisions such as, for instance, the Citizenship Directive or the Workers Regulation (further discussed below).
[332] Menelaos Markakis, "Citizens' Rights After Brexit: The Withdrawal Agreement And The Future Mobility Framework", in *Trade Relations After Brexit* (see note 308).
[333] Art. 5 WA.
[334] *Ibid*.

One important premise has to be made: even though Brexit has implied not only the UK's withdrawal from the EU, but from the European Economic Area (EEA)[335] and from the Agreement on the Free Movement of Persons between the EU and Switzerland as well, the Withdrawal Agreement analysed in this dissertation only governs the exit of the UK from the Union and, thus, the provisions analysed below only regard the treatment of EU/UK citizens. The UK has concluded two separate Agreements which govern, respectively, the UK's withdrawal from the EEA Agreement[336] and the reciprocal treatment of citizens between the UK and Switzerland.[337] These two Agreements largely mirror the Withdrawal Agreement's provisions for what concerns citizens' rights; however, considerations of space and relevance prevent a more accurate discussion of the provisions contained within them.

3.2. Citizens' rights under the Agreement: Part Two WA

Protecting the already-acquired rights of EU and UK citizens, the financial settlement (the "Brexit bill") and the Northern Ireland border question were from the outset the three main issues to be addressed during Phase I of the negotiations before moving to the talks on the future EU/UK relationship. Citizens' rights, in particular, were the object of an early agreement[338] and are found today in Part Two of the Agreement. After a first Title on General Provisions, the bulk of the substantive rights granted by Part Two WA is now contained into its Title II, which is itself subdivided in three chapters – one on residence rights and documents, one on workers' and self-employed persons' rights and one on professional qualifications – and its Title III on the coordination of social security systems. These rights will be protected for the whole lifetime of their holders, provided that they continue to meet the conditions stated

[335] For a preliminary analysis of the UK's duty to withdraw from the EEA as a consequence of Brexit and of the process and possible outcome of such withdrawal, see Christophe Hillion, "Brexit means Br(EEA)xit: the UK withdrawal from the EU and its implications for the EEA", *Common Market Law Review* 55, no. 1 (2018): 135–156.
[336] "Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union", *MS* no. 1/2020, 2020.
[337] "Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on citizens' rights following the withdrawal of the United Kingdom from the European Union and the Free Movement of Persons Agreement", *CS Switzerland* no.5/2019, 2019.
[338] Catherine Barnard and Emilija Leinarte, "Brexit and Citizens' Rights", *Working Paper N. 10 – 2019*, DCU Brexit Institute, 2019, doi:10.2139/ssrn.3471839.

in the relevant provisions,[339] and both the UK and EU Member States are left free to grant a more favourable treatment to the persons enjoying these rights.[340]

Who is included in the personal scope of the Withdrawal Agreement? The main provision to this end is Article 10 WA, which is to be read in conjunction with Articles 9, 11 and 17 WA. According to Article 10 WA, Part Two of the Agreement shall apply to EU citizens who exercised their residence rights in the UK before the end of the transition period and continue to reside there thereafter,[341] UK nationals[342] similarly residing in the EU,[343] frontier workers[344] and the family members of those belonging to these categories.[345] For what concerns the former categories, it is to be noted that both residents and frontier workers need to be exercising their rights *in accordance with Union law* in order to qualify for coverage under the Withdrawal Agreement. This has the important consequence of excluding persons whose immigration status was governed entirely by national law, who would not have been able to qualify for a residence right – let alone a permanent one – under the Citizenship Directive,[346] from acquiring one under the Withdrawal Agreement. Art. 9(b) WA defines who qualifies as a frontier worker by referring to those who "pursue an economic activity in accordance with Article 45 or 49 TFEU in one or more States in which they do not reside",[347] thus incorporating the case law on the definition of what constitutes "economic activity" for the purposes of frontier work into the CJEU jurisprudence relevant for the interpretation of the Withdrawal Agreement. Article 11 WA cross-references Article 15(2) (discussed in the next section) to specify which kind of absences from the host State will not affect continuity of residence for what concerns Articles 9 and 10 WA.[348]

The precise scope of the category of "family members" for the purpose of the Agreement, on the other hand, is defined by Article 9(a) WA. This scope is slightly larger than the one

[339] Art. 39 WA.
[340] *Ibid.*, Art. 38. This no-prejudice clause, however, does not apply to Title III on the coordination of social security systems.
[341] *Ibid.*, Art. 10(1a).
[342] As for the meaning of "UK national", Art 2(d) WA refers to the New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland of 31 December 1982 on the definition of the term 'nationals', *OJ C 23/1*, 1983, together with the Declaration No 63 annexed to the Final Act of the intergovernmental conference which adopted the Treaty of Lisbon, *OJ C 306/270*, 2007. For a mention of the difference between the legal concepts of "UK nationals" and "British citizens", see Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs, ebook* (European Parliament's Policy Department for Citizen's Rights and Constitutional Affairs, 2018), http://www.europarl.europa.eu/supporting-analyses.
[343] *Ibid.*, Art. 10(1b).
[344] *Ibid.*, Art. 10(1c) and 10(1d).
[345] *Ibid.*, Art. 10(1e) and 10(1f).
[346] Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs* (see note 342).
[347] Art. 9(b) WA.
[348] *Ibid.,* Art. 11.

accorded by the text of the Citizenship Directive: if point (i) makes reference to the definition of "family members" contained in Article 2(2) CD, point (ii) broadens it to include other persons "whose presence is required […] in order not to deprive those Union citizens or United Kingdom nationals of a right of residence granted by this Part"[349] – thus incorporating the *Chen* case law on derived residence rights for the carers of non-nationals directly into the text of the Agreement.[350] At the same time, Article 10(1e) WA makes sure to incorporate as well those family members who did not reside in the host State at the end of the transition period[351] and the children born to or adopted by residents/frontier workers after the end of the transition period,[352] provided that they fulfil the criteria set out in Article 2(2) and 2(2c) CD respectively at the moment they seek residence to join their rights-holder family member. These persons will still be able to join their rights-holder family member in the host State after the end of the transition period.

Article 10 WA provides as well for the inclusion of those family members and partners who qualified for facilitation of entry and residence under Article 3(2) CD[353] and for those who have applied for it before the end of the transition and who are still in the process of facilitation.[354] The same article also provides for facilitated entry and residence for the partners with whom EU/UK citizens covered by the Agreement have a "durable relationship, duly attested".[355] The requirement of the relationship having been durable before the end of the transition period, however, may result in troubled situations for EU citizens in the UK who, in order to be joined by their partner after the end of the transition period, will have to deal with a UK Home Office committed to a low migration target which has already held that genuine marriages and relationships can still be classified as marriages and relationships of convenience, and thus result in the expulsion of the partner in question.[356]

Lastly, Article 17 WA governs changes in status, which shall not affect the rights granted by Part Two WA. This allows EU/UK citizens covered by the Agreement to move between different residence categories without falling outside its personal scope of application.[357] It is

[349] *Ibid.*, Art. 9(a(ii)).
[350] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis", *European Law Review* 45, no. 2 (2020): 193-206.
[351] Art. 10(3e(ii)) WA.
[352] Art. 10(3e(iii)) WA.
[353] *Ibid.*, Art. 10(2).
[354] *Ibid.*, Art. 10(3).
[355] *Ibid.*, Art. 10(4).
[356] Elspeth Guild, "Brexit and the Treatment of EU citizens by the UK Home Office", *CEPS Policy Insights*, no. 2017–33 (2017).
[357] Art. 17(1) WA.

to be noted, however, that this only applies to *primary* right-holders as listed in Article 10(1a) to 10(1d) WA: persons residing "in their capacity as family members"[358] in the host State will not be able to switch their category of residence to one of the ones mentioned above. This serves the practical purpose of limiting the temporal scope of Part Two WA,[359] as only primary right-holders are granted the right to be joined by other family members under the Agreement. If such changes were not explicitly excluded, younger family members would be able to join their relatives in the host State, change status to one of the categories under points (a)-(d) of the article and then be joined by their own relatives, and so on – a situation which would be well beyond the purpose of the Agreement to protect those rights which had *already been acquired*. At the same time, however, Article 17 WA does not leave dependants unprotected against the loss of their Part Two rights when their dependence relationship comes to an end: Article 17(2) WA, in fact, provides for continued enjoyment of those rights even after such relationship is ceased.[360]

It is also worth to mention some categories of persons who are not covered by the Withdrawal Agreement. Spaventa[361] notes that the fact that the Agreement only applies to the host State implies that both *Singh*[362] and *Zambrano*[363] situations will fall outside from the personal scope of the Agreement. This means that migrants returning from the UK to their EU home State, or to the UK from an EU host State, will not be able to rely on the more generous family reunification rules which they previously enjoyed under the Citizenship Directive because of *Singh*,[364] and that *Zambrano* carers of UK children in the UK will not be able to derive a residence right anymore from their child under the Agreement. As the UK has become a third country for the purposes of Union law, on the other hand, UK primary carers of EU children will become able to derive a *Zambrano* right of residence, as being expelled back to the UK would force their EU citizen child to leave the territory of the Union – which is exactly what the *Zambrano* jurisprudence seeks to avoid.

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[358] *Ibid.*
[359] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350).
[360] Art. 17(2) WA.
[361] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350).
[362] Case C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*.
[363] Case C-34/09, *Zambrano v Office national de l'emploi*.
[364] Spaventa (see note 350) has argued that Union citizens returning to the EU after the end of the transition period should still be able to enjoy *Singh* protection, as when they moved to the UK they were exercising their European free movement rights and, thus, the same reasoning underlying the *Singh* ruling should apply.

With that being said, nonetheless, the UK has decided to still grant unilateral protection to *Singh* and *Zambrano* situations as well,[365] as the Agreement only provides for a minimum standard of protection without prejudice to more favourable national provisions.[366] However, doubts have been raised on the precise status of rights granted through a unilateral, more favourable application of the Agreement and not through the Agreement's provisions themselves:[367] under some interpretations of Part Two WA, they could be exposed to the risk of future changes in national policy, or simply to cases of adverse treatment, without the possibility of invoking protection through the direct application of the Withdrawal Agreement.[368]

This same, uncertain status is similarly relevant also for other groups who are likely to "fall through the cracks" of the Agreement in the same way as they did under EU free movement law. Dougan makes the example of "those with "non-linear" or "non-standard" migration experiences […] [and] those resident outside the strict scope of Union law yet without any objection by their host country"[369] – two more groups which could fail to meet the criteria listed in Title II WA (discussed below) and so fall outside the scope of application of the provisions under that Title. Even when those groups were nonetheless to receive more favourable treatment from their host State,[370] the same considerations as above on the soundness of their status would apply.

For what concerns the material scope of the citizens' rights provisions, the only clause contained within Title I of Part Two WA is Article 12 WA – a non-discrimination clause which prohibits "discrimination on grounds of nationality within the meaning of the first subparagraph of Article 18 TFEU […] in the host State and the State of work"[371] against

[365] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350). It is to be noted that the UK's unilateral protection of *Singh* situations is conditional both on the marriage/partnership being pre-existent to the UK's withdrawal from the EU and on the fact that the return to the UK does not happen later than 29 March 2022.
[366] Art. 38(1) WA.
[367] Michael Dougan, "So long, farewell, auf wiedersehen, goodbye: The UK's withdrawal package", *Common Market Law Review* 57, no. 3 (2020): 631–704, doi:10.2139/ssrn.3553407.
[368] Dougan (see previous note) makes reference to Joined Cases C-424 & 425/10, *Ziolkowski and Szeja*, and Case C-333/13, *Dano and Dano v Jobcenter Leipzig*, as legal precedents warranting such a "strict" approach to rights granted trough more favourable treatment, while he brings Case C-85/96, *Sala v Freistaat Bayern* and Case C-456/02, *Trojani v Centre public d'aide sociale de Bruxelles* as examples of a more generous approach suggesting that, even in the case of unilateral more favourable treatment, "if the host State offers or recognizes protected status under the Agreement, the individual is entitled to its full range of protections".
[369] Michael Dougan, "So long, farewell, auf wiedersehen, goodbye: The UK's withdrawal package" (see note 367).
[370] The United Kingdom has announced it will do so by waiving some requirements to qualify for residence; see section 3.2.1 for a more detailed discussion.
[371] Art. 12 WA.

persons belonging to one of the categories mentioned in Article 10 WA. The bulk of the substantive provisions on citizens' rights is instead covered by Titles II and III, which are discussed below. The next sections will in fact explore the provisions regarding residence rights, the rights of workers and of the self-employed and the rules for the recognition of professional qualifications and for the coordination of social security systems under the Withdrawal Agreement, before turning our attention to the situation of some categories who fall outside the scope of application of the Agreement.

3.2.1. Residence rights

Residence rights under the Withdrawal Agreement are conferred by Article 13 WA, whose paragraphs 1, 2 and 3 discipline respectively the situation of EU citizens/UK nationals, family members with EU citizenship/UK nationality and TCN family members. Each one of those paragraphs recognises a residence right for the category of persons it covers "under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU"[372] and those in the provisions of the Citizenship Directive relevant for that specific category. The choice of referring to TFEU articles as well as to the residence provisions of the Citizenship Directive is to be noted, as it opens up the possibility of granting WA protection to derived residence rights which are the result of the CJEU case law on Article 21 TFEU itself rather than of the application of the Directive.[373]

Markakis[374] refers as examples to cases such as *Lounes*[375] and *Coman*[376] to make this point; however, I raise some doubts on the applicability of the Agreement to these specific cases, since they both regarded actions brought against a Member State by one of its own nationals – a situation which Spaventa[377] and Dougan[378] noticed not to be covered by the Agreement. On the other hand, *Lounes* did not regard a "simple" own national but a dual national, and *Coman* involved the recognition of a same-sex marriage lawfully concluded in another Member State – two transnational elements which might warrant a derogation from the "own nationals" principle. Regardless of how (and if) the relevant case law will develop in the

[372] *Ibid.*, Art. 13.
[373] Menelaos Markakis, "Citizens' Rights After Brexit: The Withdrawal Agreement And The Future Mobility Framework", in *Trade Relations After Brexit* (see note 308).
[374] *Ibid.*
[375] *Lounes v Secretary of State for the Home Department* (Case C-165/16)
[376] *Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*
[377] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350).
[378] Michael Dougan, "So long, farewell, auf wiedersehen, goodbye: The UK's withdrawal package" (see note 367).

future, however, the more general argument holds: rights deriving directly from Article 21 TFEU will be preserved thanks to this inclusion – an argument supported by the formulation "resid[ing] […] in accordance *with Union law*"[379] rather than "in accordance with Directive 2004/38/EC" in Article 13 WA. The mention of Articles 45 and 49 TFEU, on the other hand, serves the same practical purpose as mentioned above for the definition of frontier work, including the CJEU case law on what constitutes "economic activity" for the purpose of these provision into the jurisprudence relevant to interpret Part Two WA.[380]

For what concerns the provisions from the Citizenship Directive referred to in the same article, instead, it is notable that all kinds of residence under the Directive are mentioned: short-term residence under Article 6 CD, residence for more than three months under Article 7 CD (including retained rights under Articles 13 and 14 CD) and permanent residence under Articles 16 and 17 CD. This makes sure that "any EU/UK citizen who, on the day of the end of transition, is present within the territory of the UK/EU respectively is potentially entitled to Brexit status"[381] – at the same time, however, the missed inclusion of short-term residence in Article 18 WA on the issuance of residence documents (discussed below) makes it so that, if short-term residence makes it sure that such persons will fall within the scope of application of the Agreement, but not that they will necessarily be granted a residence right if they do not satisfy the economic activity/independence and comprehensive health insurance requirements set out in the Citizenship Directive after the first three months.[382]

The UK has decided to unilaterally waive the requirement for comprehensive sickness insurance, stating that "the UK has decided, as a matter of domestic policy, that the main requirement for eligibility under the [EU] [S]ettlement [S]cheme will be continuous residence in the UK."[383] This is a welcome development, as the UK Home Office had so far interpreted such a requirement strictly, by not considering access to the National Health Service as satisfying the requirement[384] and demanding either private insurance or continued registration

[379] Art. 13 WA (emphasis added).
[380] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis", *European Law Review* 45, no. 2 (2020): 193-206.
[381] *Ibid.*
[382] *Ibid.*
[383] Home Office, "EU Settlement Scheme: Statement of Intent", *GOV.UK,* 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf.
[384] Such an approach has been criticized by the European Commission as a breach of Union law. For this and other issues raised by the Commission against the UK's approach to free movement rules, see European Commission, *Free Movement: Commission Asks The UK To Uphold EU Citizens' Rights*, 2012, https://ec.europa.eu/commission/presscorner/detail/en/IP_12_417.

with the home State's health insurance system instead.[385] In the same fashion as the unilateral UK *Singh* and *Zambrano* protection, however, this leaves open the question of future policy changes and the one of the possibility to seek redress for adverse treatment. This will particularly be the case if such a broadening of the scope of protection will happen in a similar fashion to the implementation of most of the EU Settlement Scheme – namely, through changes to the Immigration Rules which, as a form of secondary UK legislation, will easily be vulnerable to regulatory changes at the whim of future governments.[386] For what concerns UK nationals in the EU27, instead, whether this same, more favourable treatment will be accorded to them as well will depend on which Member States, if any, will choose to adopt provisions to this end. Leaving this choice to Member States is understandable, as it mirrors the more favourable treatment clause contained in Article 37 CD; however, it has the unfortunate consequence of opening up the possibility of comparable situations (UK nationals in the EU who do not fully fit within the WA/CD requirements) being treated differently according to the host Member State.

The right to enter and exit the host State is governed by Article 14 WA, which largely mirrors the provisions set out in Articles 4 and 5 CD – entry and exit with either a passport or a national ID card for those with Union/UK nationality and with a passport in the case of TCNs. There are two main differences between entry and exit under Union law and under the Agreement. The first one is that, starting from five years after the end of the transition period:

> "the host State may decide no longer to accept national identity cards […] if such cards do not include a chip that complies with the applicable International Civil Aviation Organisation standards related to biometric identification."[387]

The second one regards the prohibition on the requirement for entry and exit visas: if such a ban was unconditional for Union citizens under the Directive, the Agreement only prohibits to require such documents from holders of a residence or workers' rights document issued, respectively, under Articles 18 and 26 WA.[388] This makes Article 14(2) WA more akin to Article 5(2) CD on visas for TCN family members[389] than to the Directive's regime for Union citizens, as they are only exempted from the visa requirement if they hold a residence

[385] Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs* (see note 342).
[386] Ornella Porchia, "Citizens' Rights In The Post Brexit Scenario"" *ERA Forum* 19, no. 4 (2019): 585-595, doi:10.1007/s12027-018-0545-0.
[387] Art. 14(1) WA.
[388] *Ibid.*, Art. 14(2).
[389] Steve Peers, "Analysis 4 Of The Revised Brexit Withdrawal Agreement: Citizens' Rights", *Eulawanalysis.Blogspot.Com*, 2019, http://eulawanalysis.blogspot.com/2019/10/analysis-4-of-revised-brexit-withdrawal.html.

card under Article 10 CD.[390] This comparison is strengthened by the fact that, where such visa is required by the host State from family members joining a resident, the same obligations to facilitate stated in the second paragraph of Article 5(2) CD will apply.[391] This choice makes sense for the UK, as the only persons covered by the Agreement entering the UK after the end of the transition (and of the grace period for application for residence documents mentioned below) but without a residence document will be family members joining their Union citizen relatives. However, this provision is in principle less favourable for UK nationals residing in EU Members States which will *not* decide to require registration for residence, as they might not feel the need to apply for such a certificate anyway and thus, if faced with a strict interpretation of the Article 14(2) WA exemption, be required to apply for a visa.

Another point to be made is that Article 14 only refers to the right to enter *the host State*: no reference is made to the right for UK nationals to enter *other* Member States of the Union, so that the Agreement does not provide for onward free movement rights for Brits covered by it. While it is likely that such rights will be discussed in the context of a future EU-UK trade deal,[392] in the meantime UK nationals who wish to move from one Member State to another one will have to rely on existing Union legislation which applies to TCNs: Markakis[393] makes the example of the Long-term Residents Directive,[394] granting a residence right for more than three months in a second Member State after five years of lawful, continuous residence in a first one, for the purposes of work, self-employment, study or vocational training or other purposes; of the Blue Card Directive,[395] allowing mobility in order to take up highly-qualified employment in another Member State; and of the provisions for intra-EU mobility included in the Intra-Corporate Transfers Directive[396] and in the Students and Researchers Directive.[397] Where these provisions are not applicable, UK nationals who wish to move will need to do so according to the national laws of the State they intend to move to.

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[390] Art. 5(2) CD.
[391] Art. 14(3) WA.
[392] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350).
[393] Menelaos Markakis, "Citizens' Rights After Brexit: The Withdrawal Agreement And The Future Mobility Framework", in *Trade Relations After Brexit* (see note 308).
[394] Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, *OJ L 16/44*, 2003.
[395] Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ L 155/17*, 2009.
[396] Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, *OJ L 157/1*, 2014.
[397] Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, *OJ L 132/21*, 2016.

A similar "lock-in" effect will be experienced by British frontier workers in the Union, as there are no provisions in the Agreement for the possibility of changing the State of work – resigning from the workplace they occupy at the end of the transition period could imply for them to fall outside from the scope of application of the Withdrawal Agreement, even if the purpose of such a resignation was to be able to take up employment in another Member State.[398] This constitutes a "significant [reduction of] existing rights"[399] and opportunities for UK nationals in the EU27 compared to the ones they enjoyed pre-Brexit.

Articles 15 and 16 WA cover the right of permanent residence and the accumulation of periods to this end. Similarly to the analogous Citizenship Directive provisions, such a right is granted to Union citizens/UK nationals who lawfully resided in the host State for five continuous years or for the shortened period of time provided for in Article 17 CD.[400] Again, the choice of the formula "in accordance with Union law" has the effect to broaden the scope of the provision by including periods of residence which did happened under EU rules different than the Directive – notably, periods of stay of TCN family members under EU immigration law for TCNs and EU asylum law[401] and the parents or carers of children in education[402] such as under the *Teixeira* and *Ibrahim* case law. The inclusion into Article 15(1) WA of "periods of legal residence or work […] before and after the end of the transition period"[403] into the calculation of the five years makes it so that those who do not qualify yet for permanent residence at the end of the transition period will still be able to obtain their permanent residence rights, once they complete their five years stay – a fact which is confirmed by the explicit reference to this kind of situations in the (somewhat repetitive) Article 16 WA. Continuity of residence is determined in accordance with Citizenship Directive rules,[404] which allow absences up to six months per year with the exception of some cases in which longer absences are allowed.[405]

As under the Citizenship Directive, permanent residence is not conditional on the fulfilment of the criteria necessary for long-term, non-permanent residence,[406] but can only be

[398] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350).
[399] *Ibid*.
[400] Art. 15 WA.
[401] Steve Peers, "Analysis 4 Of The Revised Brexit Withdrawal Agreement: Citizens' Rights" (see note 389).
[402] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350).
[403] Art. 1581) WA.
[404] Art. 15(2) WA.
[405] Art. 16(3) CD.
[406] Art. 15(1) WA cross-references the entirety of Art. 16 CD, including Art. 16(4) CD on the loss of permanent residence rights.

lost through prolonged absence from the host country – with the difference that, in the case of permanent residence under the Withdrawal Agreement, five consecutive years of absence – rather than two – will be necessary to lose the right to permanent residence.[407] This compensates for the fact that, while a Union citizen who loses a permanent residence right in the host State can still come back and obtain it again through the exercise of their free movement rights, no equivalent possibility exists under the Withdrawal Agreement – the loss of permanent residence under Article 15 WA is permanent.

The possibility to restrict the rights of entry and residence mentioned above and the safeguards enjoyed by citizens and their families in this regard are governed, respectively, by Articles 20 and 21 WA. The main difference, here, is a temporal one: for what regards conduct precedent to the end of the transition period, the same regime as Chapter VI CD analysed in the last chapter applies,[408] while conduct happened after the end of the transition period will be assessed against the (stricter)[409] standards provided for in national legislation.[410] This choice has been commented as entailing a greater risk of deportation for Union citizens residing in the UK and their families, as the threshold for expulsion is lower under UK norms than under EU norms;[411] in particular, Spaventa has noted that this includes the possibility of expulsion being used as a penalty, the lack of enhanced protection for long-time residents, which raises the bar for expulsions after five and ten years of residence, and the fact that "the principle of proportionality applies only insofar as it is provided for in national law".[412]

Similarly to the regime under Article 35 CD, cases of fraud or abuse of rights can be grounds to "refuse, terminate or withdraw any right conferred by [Title II]"[413] under Article 20(3) WA – a provision which, consistently with the CJEU case law on Article 35 CD, will need to be interpreted restrictively.[414] Such refusals, together with other forms of restrictions to rights, will be the covered of the procedural safeguards of Article 21 WA, which cross-references both Article 15 CD and the other safeguards contained in Chapter VI CD.

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[407] Art. 15(3) WA.
[408] Art. 20(1) WA.
[409] Catherine Barnard and Emilija Leinarte, "Brexit and Citizens' Rights" (see note 338).
[410] Art. 20(2) WA.
[411] Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs* (see note 342).
[412] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350).
[413] Art. 20(3) WA.
[414] Peers (see note 389) makes the example of *Metock and Others v Minister for Justice, Equality and Law Reform* (Case C-127/08) and *McCarthy and Others v Secretary of State for the Home Department* (Case C-202/13). to support such a position.

This protection, however, is qualified in the case an applicant seeks judicial regress against the rejection of a fraudulent or abusive application submitted from the territory of the host State or the State of work: in such a case, the latter will not be required to wait for a final judgement in order to remove the applicant from its own territory.[415] The article requires such applications to be fraudulent "under the conditions set out in Directive 2004/38/EC",[416] and makes particular reference to Articles 31 and 35 CD. The explicit mention of Article 31 CD makes the situation somewhat less clear, as Article 31 allows for removal before the final decision on an interim order only in a more limited set of circumstances, which do not coincide with the abuse of rights mentioned in Article 35[417] – namely:

> "where the expulsion decision is based on a previous judicial decision; or where the persons concerned have had previous access to judicial review; or where the expulsion decision is based on imperative grounds of public security under Article 28(3)."[418]

Steve Peers interpreted this as possibly meaning that pre-judgement removal is only possible when the person being removed falls simultaneously within the scope of Articles 31 *and* 35 CD,[419] but this is only one tentative interpretation of this provision. More generally, Article 20(3) and 20(4) WA's regime broadens the scope for expulsions as well, in particular if Article 20(2) WA is interpreted as Strik et al.[420] did – meaning that also matters such as the definition of "abuse of rights" will only need to be interpreted in line with the CJEU's restrictive approach for conduct which is antecedent to the end of the transition period. Albeit it is possible to convincingly argue on legal grounds that this is not the intended interpretation of Article 20 WA, if such a permissive approach was preferred for political reasons it would expose Union citizens/UK nationals to the risk of a broader application of the pre-judgement removals allowed by Article 20(4) WA.

Lastly, Articles 22 and 23 WA cover respectively the right of family members to work or to take up a self-employed activity in the host State[421] and the right to equal treatment with the nationals of the host State.[422] These two articles essentially re-state, *mutatis mutandis*, the

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[415] Art. 20(4) WA.
[416] *Ibid.*
[417] Steve Peers, "Analysis 4 Of The Revised Brexit Withdrawal Agreement: Citizens' Rights" (see note 389).
[418] Art. 31(2) CD.
[419] Steve Peers, "Analysis 4 Of The Revised Brexit Withdrawal Agreement: Citizens' Rights" (see note 389).
[420] Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs.* (see note 342).
[421] Art. 22 WA.
[422] *Ibid*., Art. 23. One important qualification to this (and to the non-discrimination clause contained in Art. 12 WA) is constituted by Art. 38(2) WA, which derogates from these provisions for what concerns cases of more favourable treatment resulting from the Common Travel Area arrangements between the United Kingdom and the Republic of Ireland.

analogous provisions of the Citizenship Directive which they cross-reference – Articles 23 and 24 CD, including the exemption from social assistance for short-term residents and work-seekers and from maintenance grants for studies for non-permanent residents.[423] The explicit inclusion of these provisions serves the useful purpose of bringing on board the case law on Articles 23 and 24 CD – something important for "families where a non-EU citizen spouse or partner earns the sole or higher income".[424]

Residence documents

The Withdrawal Agreement provides as well for the registration and documentation of Union citizens residing in the UK and UK nationals in the EU27 who will be covered by it, introducing residence documents issued in accordance with it.[425] The provisions to this end are contained in Articles 18 and 19 WA, which govern respectively the issuance of residence documents and the possibility to start issuing them before the end of the transition period.

The first paragraph of Article 18 WA is the bulkiest and most substantial provision on residence documents. It allows the host State to:

> "require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form."[426]

The choice of words "*which confers the rights*" here is very important, as it marks a switch away from the declaratory registration system of the Citizenship Directive – which was opposed during the negotiations by the United Kingdom[427] – and towards the possibility for the host State to introduce a constitutive system. Under such a regime, obtaining the residence status is conditional on a successful application for a residence document, and rejection of the application or failure to apply mean the loss of all entitlements[428] – even if the person in question would, in theory, fall within the scope of application of the Agreement. This is a major departure from the current regime of the Citizenship Directive, under which "[p]ossession of a

[423] Art. 24(2) CD, restated in Art. 23(2) WA.
[424] Steve Peers, "Analysis 4 Of The Revised Brexit Withdrawal Agreement: Citizens' Rights" (see note 389).
[425] Art. 18(1r) WA explicitly calls for the documents to "include a statement that it has been issued in accordance with this Agreement".
[426] Art. 18(1) WA.
[427] Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs* (see note 342).
[428] Stijn Smismans, "EU Citizens' Rights Post Brexit: Why Direct Effect Beyond The EU Is Not Enough" (see note 150).

registration certificate […] may under no circumstances be made a precondition for the exercise of a right",[429] and the implications for citizens' rights of such departure are discussed further down below.

Article 18(1) WA contains also a (long) list of conditions governing the issuance of residence documents. Point (a) specifies that the application process shall have the purpose of verifying entitlement to residence rights,[430] and has been commented as entailing that no discretion is allowed against applicants who are able to prove their entitlement.[431]

Points (b) to (d) govern the deadline for applications, which is set not before than six months after the end of the transition period[432] or, for those arriving after the end of the transition, three months after arrival if such a date comes later than the six months deadline.[433] Such a deadline can be postponed by one year in the case of unilateral notification of "technical problems" either by the EU or the UK.[434] The deadline, however, is not entirely inflexible: in the case an assessment of personal circumstances was to show "reasonable grounds for the failure to respect [it]"[435] from a person who has not applied in time, they shall be accorded a "reasonable" amount of time to submit a late application anyway.[436] This is, in theory, a welcome addition, as it attempts to reduce as much as possible the amount of entitled persons falling through the cracks of the Agreement because their personal circumstances prevented them from applying in time – something important for the less advantaged groups of persons covered by the Agreement, in particular if the application process ends up requiring the completion of online forms, which may be problematic for the less educated and the elderly. This, however, will mostly depend on how strictly the vague concept of *reasonable grounds* is interpreted by the national authorities handling applications.[437]

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[429] Art. 25 CD.
[430] Art. 18(1a) WA.
[431] Steve Peers, "Analysis 4 Of The Revised Brexit Withdrawal Agreement: Citizens' Rights" (see note 389).
[432] As of today, this date falls on June 30th 2021. Peers (see note 389) notices how, if the transition period was to be extended, this date would automatically be extended as well.
[433] Art 18(1b) WA.
[434] *Ibid.*, Art. 18(1c).
[435] *Ibid.*, Art. 18(1d).
[436] *Ibid.*
[437] Spaventa (see note 350) argues in favour of an extremely broad interpretation of such a requirement, including also "the steps taken by the national authorities to discharge their duty to communicate to claimants the need to register before the deadline", and that - in light of the harsh consequences of losing the WA's protection for failure to apply – there should be "an almost absolute presumption" in favour of late applicants, except for exceptional cases. Even though such an approach would surely be laudable from the point of view of the protection of citizens' rights, such an interpretation would make some serious qualifications to the constitutive character of the registration regime under the Agreement. Because of this, whether such an interpretation would be politically acceptable – and hence practically feasible without major backslash, in particular from the point of view of the UK – is questionable at best, and (lamentably) highly unrealistic at worst.

Points (e) to (g) establish some specifications on the application procedure itself, which should avoid unnecessary administrative burdens[438] and happen through "short, simple and user-friendly" application forms.[439] There is a provision for the residence document being issued free of charge or "for a charge not exceeding that imposed on citizens or nationals of the host State for the issuing of similar documents";[440] moreover, point (h) introduces the possibility to exchange permanent residence documents already issued under the Citizenship Directive or under national law free of charge: these persons will only be subjected to an "identity [check], a criminality and security check […] and confirmation of their ongoing residence"[441] – thus excluding the possibility of requiring proof of work, means of subsistence and past residence from persons who already did so to obtain their previous document.

Which documents may be required when submitting an application is a matter governed by points (i) to (n). Identity will be proved through valid national passports or, in the case of EU/UK nationals, of valid ID cards,[442] while all other supporting documents may be submitted in copy unless in the case of "reasonable doubts" on their authenticity.[443] These points govern as well what kind of documents can be required from Union citizens/UK nationals[444] and from their family members who were already present before the end of the transition period[445] or who entered the country after it,[446] through a series of cross-references to the relevant articles of the Citizenship Directive. For cases which do not fall into the categories above, point (n) establishes a necessity and proportionality requirement to establish what kind of documents can be demanded from these persons.[447]

Regarding documentation, Markakis[448] noted how the task of collecting documentation on the possession of sufficient resources not to become a burden on the social assistance of the host State could likely be problematic for applicants, and thus how CJEU case law on whether resources from a family member or partner count to satisfy this criterium will be important for

[438] Art. 18(1e).
[439] *Ibid.*, Art. 18(1f).
[440] *Ibid.*, Art. 18(1g). This raises the question of what kind of document for own nationals would qualify as "similar" to one granting residence rights to non-nationals.
[441] *Ibid.*, Art. 18(1h).
[442] *Ibid.*, Art. 18(1i).
[443] *Ibid.*, Art. 18(1j).
[444] *Ibid.*, Art. 18(1k).
[445] *Ibid.*, Art. 18(1l).
[446] *Ibid.*, Art. 18(1m).
[447] *Ibid.*, Art. 18(1n).
[448] Menelaos Markakis, "Citizens' Rights After Brexit: The Withdrawal Agreement And The Future Mobility Framework", in *Trade Relations After Brexit* (see note 308).

economically inactive applicants; to this end, he makes the examples of *Chen*[449] and *Commission v Belgium*[450] as examples of how such resources do count even in the absence of a "legal link" between the provider and the beneficiary. In any case, the Agreement provides some procedural protections against incomplete applications by putting the competent authorities under a double obligation to help the applicants to prove their entitlements, on one hand, and to grant them the opportunity to correct and supplement their applications in the case of "deficiencies, errors or omissions"[451] on the other one.

Point (p) covers "criminality and security checks", and marks a major shift away from the regime of the Citizenship Directive: it allows these checks to be performed in a *systematic* fashion, including by requiring to declare prior convictions at the time of the application, albeit the checks in question can only serve the purpose to verify whether Article 20 WA restrictions apply to the applicant. The host State is also allowed to invoke the enquiry procedure set out in Article 27(3) CD when it considers it to be "essential" to assess the applicant's criminal record. The cross-reference to Article 27(3) is curious, as according to its text "[s]uch enquiries shall not be made as a matter of routine"[452] – raising the question of how this provision sits with the authorization to carry out systematic checks provided for by the Agreement. I argue that the most convincing interpretation is for the two provisions to coexist, rather than for Article 18(1p) WA prevailing over Article 27(3) CD, so that the host State will be allowed to systematically carry out criminality checks (for instance, by including them in the application procedure), but it will *not* be able to systematically apply the enquiry procedure, which will remain limited to cases of "essential" necessity.

Lastly, access to "judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status"[453] is granted to applicants by point (r). Through similar phrasing (but no cross-reference)[454] to Article 31(3) CD, such procedures will examine both the legality of the decision and the "facts and circumstances" on which it is based, ensuring it is not disproportionate. Noting the change in the choice of wording from "proportionate" as employed in the February 2018 Draft

[449] Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department*.
[450] Case C-408/03, *Commission of the European Communities v Kingdom of Belgium*.
[451] Art. 18(1o) WA.
[452] Art. 27(3) CD.
[453] Art. 18(1r) WA.
[454] The lack of cross-referencing has been noted by Peers (see note 389), together with the removal of the reference to the regime of enhanced protection against expulsion under Art. 28 CD. An attempt to exclude any possibility to interpret Art. 18(1r) WA as re-including such enhanced protection anyway through the cross-reference contained in Art. 31(3) CD can then be a likely explanation for the lack of such a cross-reference.

Withdrawal Agreement to "not disproportionate" in the final text of the Agreement, Spaventa suggests that this might imply "a lighter duty on the authorities as well as a potential reversal of the burden of proof",[455] with claimants having to show how the relevant authorities' decision was disproportionate rather than vice versa. Because of this choice of wording, she considers the regime under Article 18(1r) WA to be less generous than the *Baumbast*[456] regime, entailing a duty to assess the personal circumstances of the claimant, but more generous than the *Dano*[457] one, which excludes such a duty.[458]

Article 18 WA contains three more provisions as well. According to Article 18(2) and 18(3) respectively, rights under Part Two will apply to all persons covered by it during the six-months "grace period" for applications[459] and pending a final decision on an application or a final judgment in the case an applicant seeks judicial redress against the refusal of their application.[460] This has been described as a useful protection against any attempt from national authorities to "jump the gun"[461] – as only the residence document itself confers the residence right on its holder, the absence of these two provisions could have been interpreted as allowing such authorities to start treating (prospective) applicants as irregular immigrants before they had the opportunity to receive their document, as their stay in the country in the meantime would not have found a legal basis in the Agreement. The last paragraph of Article 18 WA, instead, covers the situation of those countries which have decided *not* to require registration of the persons residing on its territory under the Withdrawal Agreement, opting thus to maintain a declaratory system analogous to the one of the Citizenship Directive: in this case, EU citizens/UK nationals and their family members will still be able to receive a residence document according to the relevant provisions of the Directive.[462] This serves the double purpose of providing them with a proof of the fact that they are covered by the Agreement rather than by national immigration law[463] and to activate the visa-free entry regime provided for in Article 14(2) WA.

Article 19 WA regulates the issuance of residence documents during the transition period. The article *allows* (but does not oblige) the host State to start accepting applications

[455] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350).
[456] Case C-413/99, *Baumbast and R. v Secretary of State for the Home Department*.
[457] Case C 333/13, *Dano and Dano v Jobcenter Leipzig*.
[458] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350).
[459] Art. 18(2) WA.
[460] *Ibid.*, Art. 18(3).
[461] Steve Peers, "Analysis 4 Of The Revised Brexit Withdrawal Agreement: Citizens' Rights" (see note 389).
[462] Art. 18(4) WA.
[463] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350).

before the end of the transition period.[464] Decisions on such applications will be subject to the same requirements set out above for applications received after the end transition, but they will have no effect until such a date.[465] This places persons who apply during the transition period in a situation which is more favourable than it would be if they applied after it: while a successful application will not be withdrawable by the host State after being accepted,[466] in case of refusal the applicant will not only be able to invoke the redress procedures under Article 18(1r) WA,[467] but he or she will be able to apply again before the end of the grace period.[468] Such a "second chance" clause is not provided for in Article 18 WA, and thus it will likely only be available to those applying before the end of the transition period – providing prospective applicants with a strong incentive to apply for residence as soon as possible.

The residence documents regime envisaged by Articles 18 and 19 WA has not been immune from criticism. The most potentially critical situation has been individuated in the registration of Union citizens residing in the UK, which has opted for the constitutive approach to residence documents, as the UK hosts three times the amount of Union citizens than the amount of UK nationals in the whole EU27 and it has never introduced a population registration system,[469] let alone required Union citizens in particular to register to be able to enjoy their Treaty rights.[470] Worries had been raised about a possible repetition of the Windrush scandal[471] involving Union citizens entitled to their Agreement rights who could nonetheless not be able to prove their entitlement, as they were never asked to keep track of the legality of their stay in the UK before Brexit.[472] The latest data published by the UK Home Office on the number of applications received and concluded seem to disperse the most severe worries of this kind, as

[464] Art. 19(1) WA.
[465] *Ibid.*, Art. 19(2).
[466] *Ibid.*, Art. 19(3).
[467] *Ibid.*, Art. 19(5).
[468] *Ibid.*, Art. 19(4).
[469] Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs* (see note 342).
[470] Stijn Smismans, "EU Citizens' Rights Post Brexit: Why Direct Effect Beyond The EU Is Not Enough" (see note 150).
[471] The Windrush scandal saw immigrants from the Caribbean being suddenly considered illegal and suffering the consequences of the "hostile environment" to immigration after decades of residence because they were not able to prove legal entry and residence on the country's territory as a result of tightened immigration controls. These people had been granted the right to reside indefinitely in the UK as subject of former colonies, but they had never received a document testifying their status, nor had they been asked to maintain proof of their legal entry nor of their entitlement to residence, so that many of them failed to prove the legality of their status when asked to do so. For a preliminary comparison between the Windrush scandal and the situation of EU27 citizens in the UK, see Stijn Smismans, "Protecting EU citizens in the UK from a Brexit 'Windrush on Steroids': A Legislative Proposal for a Declaratory Registration System", *Working Paper N. 8 – 2019*, DCU Brexit Institute, 2019, doi:10.2139/ssrn.3433055.
[472] Stijn Smismans, "Protecting EU citizens in the UK from a Brexit 'Windrush on Steroids': A Legislative Proposal for a Declaratory Registration System" (see previous note).

3.81 millions applications have been reported as of 31st July 2020[473] – a number which comes close to the latest estimates of the numbers of Union citizens currently residing in the UK.[474] Given the high number of Union citizens in the UK, however, it remains true that even a small percentage of failed applications may have consequences for thousands of people:[475] the 2.1% of refused, invalid, withdrawn or void applications reported by the Home Office still amount to 76.000 applications not resulting in a residence status, and 220.000 more applications still had to be evaluated as of 31st July 2020.[476] Because of these numbers, a definitive assessment of the consequences of the UK's implementation of its new residence documents regime will need to wait until after the "grace period" deadline, to see whether the most dramatic previsions will have been right or if a smooth transition will have taken place instead.

At the moment, the UK's EU Settlement Scheme provides for two different categories – "settled status" and "pre-settled status". "Settled status" is the British term of choice for the right of permanent residence under the Withdrawal Agreement; besides the already-mentioned waiver of some of the requirements (such as the requirement to hold comprehensive sickness insurance), it is more generous than the provisions of the Withdrawal Agreement as it provides for the automatic naturalisation of the children of its holders[477] rather than the mere inclusion into the personal scope of Title Two under Article 10(3e(iii)) WA. "Pre-settled status", on the other hand, is the status granted to those who have a right to reside in the UK under the Withdrawal Agreement but do not have accrued five years of continuous residence yet. It allows its holders to stay in the UK for a further five years, providing them with a time frame to complete their period of continuous residence and be able to apply for settled status before its expiry.[478]

This distinction has however received some criticism, both for the difficulty in proving the length of residence which may have led some people entitled to settled status to receive the pre-settled one instead[479] and for the possibility of creating the risk of a second "bottleneck"

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[473] Home Office, "EU Settlement Scheme Statistics", *GOV.UK*, 2020, https://www.gov.uk/government/collections/eu-settlement-scheme-statistics.
[474] Georgina Sturge, "Migration Statistics", *House of Commons Library Briefing Paper No. CBP06077*, House of Commons Library, 2020, http://researchbriefings.files.parliament.uk/documents/SN06077/SN06077.pdf.
[475] Stijn Smismans, "Protecting EU citizens in the UK from a Brexit 'Windrush on Steroids': A Legislative Proposal for a Declaratory Registration System" (see note 471).
[476] Home Office, "EU Settlement Scheme Statistics" (see note 473).
[477] Home Office, "Apply to the EU Settlement Scheme (settled and pre-settled status)", *GOV.UK,* 2020, https://www.gov.uk/settled-status-eu-citizens-families/what-settled-and-presettled-status-means.
[478] *Ibid.*
[479] Eleanor Spaventa, "The rights of citizens under the Withdrawal Agreement: a critical analysis" (see note 350). For (dated) news coverage of instances of such incidents, see Amelia Gentleman, "Rising Proportion Of EU Citizens In UK Given Temporary 'Pre-Settled Status'", *The Guardian*, 2019,

five years from now, when these persons' pre-settled status will come close to expiry in a moment in which there will no longer be a focused effort to inform residents of their duty to apply again.[480] Smismans[481] has similarly criticised the choice not to provide successful applicants with a physical document, but only with a digital code.[482] This is something which, he claims, unreasonably exposes status-holders to the risk of being deprived of the effective enjoyment of their rights in cases of system failure or accidental loss of access credentials, and also disregards the fact that private actors "may not be able or not be inclined to check this status via electronic means"[483] – *de facto* making EU27 citizens "less attractive" compared to persons in other immigration categories to those prospective employers, landlords and so on[484] who are less inclined towards the use of digital documents.

3.2.2. Workers' and self-employed rights

The rights of workers and self-employed persons under the Withdrawal Agreement are covered by Chapter Two of Part Two WA, which is composed by only three articles. It is complemented by a separate chapter – Chapter Three – containing the provisions which cover the recognition of professional qualifications.

Article 24 WA covers the rights recognised to workers under the Agreement. In a similar fashion to the chapter on residence rights, the article builds upon Article 45 TFEU and on secondary Union legislation by cross-referencing the Workers Regulation and the Citizenship Directive; in fact, Article 24(1) WA contains a list recapitulating the rights attached to the status of worker under Union law which are recognized in the Agreement. These include:

> "(a) the right not to be discriminated against on grounds of nationality as regards employment, remuneration and other conditions of work and employment;
>
> (b) the right to take up and pursue an activity in accordance with the rules applicable to the nationals of the host State or the State of work;

https://www.theguardian.com/politics/2019/nov/14/rising-proportion-of-eu-citizens-being-granted-presettled-status.

[480] Stijn Smismans, "Protecting EU citizens in the UK from a Brexit 'Windrush on Steroids': A Legislative Proposal for a Declaratory Registration System" (see note 471).

[481] *Ibid.*

[482] Such a possibility is expressly provided for in Art. 18(1) and 18(4) WA.

[483] Stijn Smismans, "Protecting EU citizens in the UK from a Brexit 'Windrush on Steroids': A Legislative Proposal for a Declaratory Registration System" (see note 471).

[484] As such private actors would have to check the immigration status of these non-UK nationals as a result of the UK's "hostile environment" to immigration policy.

(c) the right to assistance afforded by the employment offices of the host State or the State of work as offered to own nationals;

(d) the right to equal treatment in respect of conditions of employment and work, in particular as regards remuneration, dismissal and in case of unemployment, reinstatement or reemployment;

(e) the right to social and tax advantages;

(f) collective rights;

(g) the rights and benefits accorded to national workers in matters of housing;

(h) the right for their children to be admitted to the general educational, apprenticeship and vocational training courses under the same conditions as the nationals of the host State or the State of work, if such children are residing in the territory where the worker works."[485]

The first part of the article states that the enjoyment of these rights will be "[s]ubject to the limitations set out in Article 45(3) and (4) TFEU",[486] thus allowing to restrict these on grounds of public policy, public security or public health[487] and incorporating the Treaties' public service exception[488] into the Agreement. In the light of the fact that the Agreement is to be interpreted consistently with the CJEU case law handed down before the end of the transition period, Markakis[489] mentions the possibility for host States to rely as well on "imperative requirements in the public interest", to justify non-discriminatory restrictions,[490] and on restrictions allowed by the Workers Regulation – he makes the example of "conditions relating to linguistic knowledge required by reason of the nature of the post to be filled".[491]

Article 24(2) WA codifies and includes in the Agreement the CJEU case law[492] on the residence rights derivable from the direct descendants of (former) workers in education mentioned in Article 24(1h) for their "primary carer".[493] These carers will be entitled to stay

[485] Art. 24(1) WA.
[486] *Ibid.*
[487] Art. 45(3) TFEU.
[488] *Ibid.*, Art. 45(4) and Art. 51. The public service exception allows Member States to discriminate in favour of their own nationals for what concerns access to employment and self-employment which is connected with the exercise of official authority.
[489] Menelaos Markakis, "Citizens' Rights After Brexit: The Withdrawal Agreement And The Future Mobility Framework", in *Trade Relations After Brexit* (see note 308).
[490] Markakis (see previous note) actually mentions "cases of indirect discrimination"; however, this is at odds with the criteria established by the Court in *Gebhard* (see note 203) which expressly mentions how the measures in question should be "applied in a non-discriminatory manner".
[491] Regulation (EU) 492/2011, Art. 3(1).
[492] Notably, *Teixeira* and *Ibrahim* situations.
[493] Art. 24(2) WA.

either until the descendant reaches the age of majority or as long as they are enrolled in education and need the carer's presence, if this latter circumstance happens after the age of majority.[494]

Article 24(3) WA covers the retention of the status of frontier worker and the rights attached to it in the State of work in the cases provided for in the Citizenship Directive[495] – temporary inability to work, involuntary unemployment or vocational training.[496] Limiting the circumstances for retention to *involuntary* unemployment, here, has one important consequence – workers who *voluntarily* resign from their place of work will not retain their frontier worker status, and thus lose their entitlement to protection under the Withdrawal Agreement.[497] This is a significant reduction of rights compared to Union law, as those losing frontier work status under Union law still have the possibility to exercise their free movement of workers rights to access other Member States' labour market again and recover their previous status. This is not possible under the Withdrawal Agreement.

Most of the rights recognised for workers are also recognised for self-employed persons under Article 25 WA, which directly refers to Article 24(1c) to (1h), 24(2) and 24(3) WA. The only difference here is the replacement of the rights mentioned in points (a) and (b) with:

> "the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down by the host State for its own nationals, as set out in Article 49 TFEU."[498]

What is notable in this article is the explicit inclusion of the equal treatment rights mentioned in Article 24, as the Workers Regulation does not apply to the self-employed and the latter derive their rights to equal treatment directly from the interpretation of the Treaties.[499] Such an inclusion thus provides a more sound legal foundation for the protection of the rights of self-employed persons than mere reliance on previously-handed case law would have done.

Lastly, Article 26 WA introduces the possibility for the State of work to require EU/UK frontier workers covered by Title Three to apply for "a document certifying that they have such rights under this Title",[500] and grants to the interested Union citizens and UK nationals with the corresponding right to receive such a document. Besides remembering that such a document

[494] *Ibid.*
[495] Art. 24(3)
[496] Art. 7(3) CD.
[497] Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs* (see note 342).
[498] Art. 25(1a) WA. Note how such a paragraph employs an almost identical wording to Art. 49 TFEU.
[499] Steve Peers, "Analysis 4 Of The Revised Brexit Withdrawal Agreement: Citizens' Rights" (see note 389).
[500] Art. 26 WA.

serves the purpose to activate Article 14(2) WA providing for visa-free cross-border movement, it is noteworthy that Article 26 employs the formulation "*certifying* that they have such rights" rather than "which *confers* the rights" as employed in Article 18(1) WA when covering residence documents. Such a choice of wording seems thus to point towards a declaratory-only system of registration for frontier workers, but the UK Home Office has stated instead that it will require such a "permit"[501] to allow entry into the UK as a frontier worker.[502] Whether this implies a constitutive reading of Article 26 WA by the UK or if such a statement simply refers to the fact that only holders of a document certifying frontier work will be able to enter the UK *as a frontier worker* (and thus under the Article 14(2) visa-free regime) rather than having to apply for a visa to be able to cross the border[503] is a question which will likely be answered only after the UK will have made more information on such a permit scheme available.[504]

Recognition of professional qualifications

The situation of professional qualifications under the Withdrawal Agreement is governed by Articles 27, 28 and 29 WA; while these articles, composing Chapter Three of Part Two WA, establish a regime for the continued recognition of professional qualifications, this regime has been described as "limited"[505] as it does not come close to the one currently established under the PQRD and the other sectoral Directives cross-referenced by Article 27 WA.

In fact, Article 27 WA provides, through extensive cross-referencing to Union legislation, for the continued effect of the recognition of qualifications recognised *before the end of the transition period* if such a recognition was made in accordance with Title III PQRD or with other sectoral Directives,[506] while Article 28 WA extends the recognition system provided for in Union law to decisions which are still pending after the end of the transition

[501] Note the choice of wording, as the term "permit" carries a very different connotation than "document" or "certificate".
[502] Home Office, "Working in the UK as a frontier worker from 1 January 2021", *GOV.UK*, 2020, https://www.gov.uk/government/publications/rights-and-status-of-frontier-workers-in-the-uk-from-1-january-2021/working-in-the-uk-as-a-frontier-worker-from-1-january-2021.
[503] Such an approach would have almost the same *practical* effects as introducing a constitutive system, given the impracticalities of relying on a visa for frequent, continued back-and-forth trips, but national authorities could attempt to justify it from a *formal* standpoint as a declaratory interpretation of Art. 26 WA read together with a strict interpretation of Art. 14(2) WA.
[504] As of the end of August 2020, this has not happened yet.
[505] Michael Dougan, "So long, farewell, auf wiedersehen, goodbye: The UK's withdrawal package" (see note 367).
[506] Art. 27 WA.

period but for which application was nonetheless made before such a date.[507] This chapter, however, does not contain any legal base for the *future* recognition of professional qualifications after the end of the transition period – not even for persons who fall anyway under the scope of Part Two WA,[508] nor if the qualification had been already obtained before the end of the transition period.[509]

Similarly, no provision at all is made for the subsequent recognition in another State of a qualification already recognised (or whose holder applied for recognition) after the end of such a period,[510] confirming the land-locking effect of the Agreement on UK nationals working or residing in a EU27 Member State. This latter limitation should generally not be an issue for Union citizens working in the UK with a EU27 qualification, as the PQRD (and other sectoral Directives) still applies between EU27 Member States and thus they would still be able to rely on it to obtain recognition if they were to move from the UK to a Member State different than the one where they obtained their qualification. However, this would not be the case for Union citizens who acquired their professional qualification *in the UK and after the date of withdrawal*: the Commission has stated that, as the UK has become a third country starting from 1st February 2020, Article 2(2) PQRD on third-country qualifications would apply to these cases and thus their recognition (or lack of) would be governed by national rules only.[511]

3.2.3. Coordination of social security systems

Title III of Part Two WA covers the regime of coordination of social security systems which will be applicable between the EU and the UK after Brexit. Despite the prominent role played by arguments on the access to the British social security system by EU migrants in the debates preceding the 2016 referendum,[512] this Title remains in line with the general objective of Part Two WA to protect already acquired rights through the maintenance of several provisions of Union law. In particular, Article 31 WA provides for the continued application

[507] *Ibid.*, Art. 28. This article is supplemented by Art. 29 WA, which provides for a regime of administrative cooperation after the end of the transition period which is mostly centered on the exchange of information and has the purpose to facilitate the processing of Art. 28 applications.
[508] Michael Dougan, "So long, farewell, auf wiedersehen, goodbye: The UK's withdrawal package" (see note 367).
[509] Steve Peers, "Analysis 4 Of The Revised Brexit Withdrawal Agreement: Citizens' Rights" (see note 389).
[510] *Ibid.*
[511] European Commission. *Notice to stakeholders: withdrawal of the United Kingdom and EU rules in the field of regulated professions and the recognition of professional qualifications*. Brussels: Directorate-General for the Internal Market, Industry, Entrepreneurship and SME, 2018. https://ec.europa.eu/info/sites/info/files/file_import/professional_qualifications_en.pdf.
[512] Catherine Barnard and Emilija Leinarte, "Brexit and Citizens' Rights" (see note 338).

of Article 48 TFEU, Regulation (EC) 883/2004 and the corresponding implementing piece of legislation – Regulation (EC) 987/2009[513] –[514] and it also cross-references several additional pieces of Union legislation concerning TCNs who moved to the EU – notably, Regulation (EC) 859/2003.[515]

The personal scope of Title III covers a broader category of persons[516] than the one defined in Article 10 WA;[517] it is defined by Article 30 WA and complemented by Article 32 WA. First of all, Article 30 does not only cover EU citizens/UK nationals who find themselves in a cross-border jurisdictional situation at the end of the transition period and their family members and survivors,[518] but also – in line with Regulation (EC) 883/2004[519] – stateless persons, refugees[520] and TCNs who fulfil the conditions of Regulation (EC) 859/2003[521] who find themselves in the same situations as those EU citizens/UK nationals.

Moreover, Article 32 WA extends the (partial) application of Title III to some categories of "special situations". Most notably, EU citizens/UK nationals who were covered respectively by UK/Member State legislation before the end of the transition period but do not fall anymore within the personal scope of Article 30 WA will still be able to rely on the rules on the aggregation of periods of Regulation (EC) 883/2004[522] – an important deviation from the tendency of Part Two WA to limit the recognition of rights to *ongoing* situations.[523] Other "special situations" mentioned comprise authorisations to receive a course of planned health

[513] Regulation (EC) 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, *OJ L 284/1*, 2009.
[514] Art. 31(1) WA.
[515] Council Regulation (EC) 859/2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, *OJ L 124/1*, 2003.
[516] Michael Dougan, "So long, farewell, auf wiedersehen, goodbye: The UK's withdrawal package" (see note 367).
[517] Which, in fact, begins with the statement "Without prejudice to Title III, this Part shall apply […]".
[518] Art. 30(1a) to (1e), in fact, provides for the following situations: EU citizens covered by UK legislation; UK nationals covered by legislation of a Member State; EU citizens residing in the UK covered by the legislation of a Member State; UK nationals residing in the EU covered by UK legislation; and self-employed persons not falling in the former categories but exercising their activity in the EU/UK and being covered by UK/Member State legislation respectively.
[519] Regulation (EC) 883/2004, Art. 2.
[520] Art. 30(1f) WA.
[521] *Ibid.*, Art. 30(1g). Peers (see note 389) notices that social security coordination with third countries is governed by EU external agreements which will apply to the UK during the transition period, but that "[a]fter that point their continued application will depend upon whether the UK has "rolled over" the relevant treaty with the country concerned".
[522] *Ibid.*, Art. 32(1a).
[523] Note the inclusion of the words "and continue to reside there/do so thereafter" in several points of Art. 10 WA, and the fact that even permanent residence rights are lost after five years of continued absence. Art. 31(1a) does not provide for a comparable qualification to the entitlement to see one's periods of insurance, employment, self-employment or residence recognised – even years after the end of the cross-border situation.

care treatment requested before the end of the transition period,[524] persons on a stay in a Member State or the United Kingdom,[525] family benefits[526] and derived rights for sickness benefits in kind for family members.[527]

Unsurprisingly, the Agreement does not provide instead for the coordination of social security systems for what concerns situations which will *begin* after the end of the transition period[528] – a choice in line with the rest of Part Two WA, which only aims at the protection of already acquired rights. The remaining Title III provisions make the Title applicable to nationals of Iceland, Liechtenstein, Norway and Switzerland as well,[529] provide for some forms of administrative cooperation[530] and maintain the provisions for reimbursement, recovery and offsetting of Regulations (EC) 883/2004 and (EC) 987/2009 for some events related to persons not covered by Article 30 WA.[531]

A particular feature of the cross-references to Union legislation contained in Title III is that, unlike the rest of Part Two WA, they are intended to be dynamic[532] rather than remain "frozen" at the date of the end of the transition period: to this end, Article 36(1) WA reads:

> "Where Regulations (EC) No 883/2004 and (EC) No 987/2009 are amended or replaced after the end of the transition period, references to those Regulations in this Agreement shall be understood as referring to those Regulations as amended or replaced, in accordance with the acts listed in Part II of Annex I to this Agreement."[533]

This is to be achieved through amendments to Part II of Annex I to the Agreement, made by the Joint Committee "as soon as [the] act is adopted";[534] when the amendment or replacement of the Regulations in questions regards the matters covered by Article 3 of Regulation (EC) No 883/2004 or the exportability of cash benefits, however, the alignment of Annex I will be subject to an assessment in good faith of:

> "the scale of the changes […] as well as the importance of the continued good functioning of [the Regulations in question] and the importance of there being a

[524] Art. 32(1b) WA.
[525] *Ibid.*, Art. 32(1c).
[526] *Ibid.*, Art. 32(1d).
[527] *Ibid.*, Art. 32(1e).
[528] Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs* (see note 342).
[529] Art. 33 WA. This is conditional on the conclusion of corresponding agreements between these countries and the Union regarding UK nationals, and between these countries and the UK regarding Union nationals.
[530] *Ibid.*, Art. 34.
[531] *Ibid.*, Art. 35.
[532] Ornella Porchia, "Citizens' Rights In The Post Brexit Scenario" (see note 5).
[533] Art. 36(1) WA.
[534] *Ibid.*

> competent State in relation to individuals within the scope of Regulation (EC) No 883/2004."[535]

Such an assessment allows the Joint Committee to decide that no alignment will take place,[536] so that the rules applicable between the Union and the UK will not be updated to reflect the newly-adopted Union legislation. This provides a useful failsafe for the UK to claim that no red lines on "taking back control" were disregarded when it comes to two politically sensitive aspects of social security coordination, as it will not be able to provide inputs in the process of adoption of post-Brexit Union legislation on social security anymore.

3.3. Looking at the institutions: governance, oversight and dispute settlement

Besides spelling out the obligations to which the European Union and the United Kingdom are made subject, the Withdrawal Agreement provides as well for an institutional framework to organise the governance and oversight of the application of the Agreement during and after the transition period, and for the settlement of eventual disputes over its interpretation and application. Besides the provisions on definitions and interpretation contained in Part One WA and already discussed above, these provisions are now mostly found in Part Six WA ("Institutional and Final Provisions"), with the addition of some provisions contained in Title X ("Union Judicial And Administrative Procedures") of Part Three WA ("Separation Provisions"). Such provisions establish an institutional mechanism based on a Joint Committee, the gradual phasing out of the role of the CJEU and an arbitration mechanism for the resolution of disputes. This section will provide an overview of these mechanisms, but for considerations of relevance it will not cover those provisions which are exclusive to the oversight and enforcement of sections of the Agreement different from Part Two WA.

Institutional mechanisms: the Joint Committee and the Independent Authority

The main institutional body to this end is the Joint Committee established by Article 164 WA. This Committee will be composed and co-chaired by Union and UK representatives,[537] it will meet at the request if any of the two (and in any case, at least annually)[538] and it will have the responsibility for "any issue relating to the implementation, application and interpretation

[535] *Ibid.*, Art 36(2).
[536] *Ibid.*
[537] Art. 164(1) WA.
[538] *Ibid.*, Art. 164(2).

of [the] Agreement".[539] Organs of this kind are not entirely new to the Union legal order – it is not uncommon to find them in international agreements stipulated by the EU with a third country which establish an ongoing relationship between the two.[540]

The tasks of the Joint Committee include, *inter alia*, the supervision and facilitation of the implementation of the Agreement, the prevention of problems arising in areas covered by it and the resolution of potential disputes;[541] to this end, it will be empowered to take binding decisions and submit recommendations to the EU and the UK,[542] supervise the specialised committees established by Article 165 WA[543] and establish (or dissolve) new ones if necessary,[544] and amend some parts of the Agreement as necessary.[545] The importance of "mutual consent"[546] for the operation of the Joint Committee, both to set its own agenda and to adopt decisions and recommendations, underlines the "purely intergovernmental"[547] character of these arrangements which, as instruments of international law, require the sovereign consent of both parties to operate,[548] thus marking the distinction of the new legal situation established by the Agreement from the supranational Union legal order.

The Withdrawal Agreement provides as well for the creation of an Independent Authority in the United Kingdom for the specific purpose of monitoring the application and implementation of Part Two WA.[549] Such an Authority will enjoy:

> "powers equivalent to those of the European Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries [and], following such complaints, to bring a legal action before a competent court or tribunal

[539] *Ibid.*, Art. 164(3).
[540] Alan Dashwood, "The Withdrawal Agreement: Common Provisions, Governance And Dispute Settlement", European Law Review 45, no. 2 (2020): 183-192.
[541] Art. 164(4) WA.
[542] *Ibid.*, Art. 166.
[543] Note the inclusion of a specialized Committee on citizens' rights in Art. 165(1a) WA.
[544] Art. 164(5a), (5b) and (5c) WA.
[545] *Ibid.*, Art 164(5d).
[546] *Ibid.*, Art. 164(1), 165(2) and 166(3).
[547] Joris Larik, "Decision-Making and Dispute Settlement for the Withdrawal of the United Kingdom from the European Union", *Working Paper N. 04 – 2020*, DCU Brexit Institute, 2019, doi:10.2139/ssrn.3572033.
[548] *Ibid.*
[549] Art. 159(1) WA.

in the United Kingdom in an appropriate judicial procedure with a view to seeking an adequate remedy."[550]

The Authority and the Commission will both refer annually to the specialised Committee on citizens' rights about the application and implementation of Part Two in the respective territories of competence.[551] The specific reference to the "number and nature of complaints received"[552] confirms the (implied) existence of analogous powers and duties for the Commission to protect the rights of UK nationals and their families in the EU.

However, the Authority differs from the Commission in two fundamental aspects. First of all, after more than eight years from the end of the transition period, the UK will be able to abolish the Authority following a decision of the Joint Committee which authorises it to do so.[553] Secondly, the Agreement does not foresee any direct link between the Authority and the CJEU,[554] charging the UK courts instead with the task of providing remedies to the complaints of Union citizens in the UK. This does not, however, mean that the Court will play no role at all when it comes to the Withdrawal Agreement: for this reason, the next subsection will turn our attention towards the role which is foreseen for it under the Agreement.

The role of the Court of Justice

The temporal factor is crucial when it comes to the role of the CJEU in the context of Brexit, as the Withdrawal Agreement provides for the gradual phasing out of its involvement. The first and main cut-off date to this end is the date of the end of the transition period, as the Court is granted jurisdiction as usual over all pending cases and requests for preliminary rulings which were brought before it before the end of the transition period.[555] This jurisdiction is extended to cases which are brought before the Court after the end of that period but which relate to matters which are antecedent to the cut-off date – specifically, when the UK has failed to comply with a Treaty obligation or an obligation under Part Four WA *before the end of the*

[550] *Ibid.* Spaventa (see note 350) has argued that the notion of "adequate remed[ies]" mentioned in the article should be construed as including *Francovich* damages (see Joined cases C-6/90 and C-9/90, *Francovich and others v Italian Republic*).
[551] *Ibid.*, Art. 159(2).
[552] *Ibid.*
[553] *Ibid.*, Art. 159(3).
[554] Joris Larik, "Decision-Making and Dispute Settlement for the Withdrawal of the United Kingdom from the European Union" (see note 547).
[555] Art. 86 WA.

transition period[556] or with a decision of the kind referred to in Article 95(1) WA,[557] the Commission will be empowered to start an infringement procedure against the UK[558] as if it was a Member State.[559]

This enforcement power has a time limit as well: the Commission will have either four years after the end of the transition to initiate these proceedings (in the case of Treaties or Part Four breaches)[560] or four years after the adoption of the Article 95(1) decision at hand.[561] Steve Peers[562] noticed that this time limit was not present in the March 2018 draft of the Agreement, and it was added later together with the removal of the possibility for UK courts to use the preliminary reference procedure for all cases pending before them at the end of the transition period – two victories for the Brexiteers eager to end as soon as possible the Court's jurisdiction over the UK.

The articles following Articles 86 and 87 WA regulate the handling of the cases mentioned above: they will be handed down following the same CJEU rules of procedure as provided for in Union law,[563] have binding force in the UK[564] and be enforceable under the regime established by Articles 280 and 299 TFEU.[565] The Agreement preserves as well the right of UK lawyers to represent or assist a party in the relevant proceedings[566] and the UK's right to intervene and participate "in the same way as a Member State" in the proceedings before the CJEU, when the latter regard a request for a preliminary ruling or obligations and provisions which applied to the UK as well before the end of the transition period.[567] This latter right will be preserved by the UK until the CJEU has handed down final judgements over all cases covered by Article 86 or 87(1) WA.[568]

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[556] *Ibid.*, Art. 87(1).
[557] *Ibid.*, Art. 87(2). The decisions referred to in Art. 95(1) are Union decisions adopted before the end of the transition period or for which the procedure was still pending on the date of the end of the transition, plus new cases regarding State aid under Art. 93 WA.
[558] *Ibid.*, Art. 87(1) and 87(2).
[559] *Ibid.*, Art. 87(3).
[560] *Ibid.*, Art. 87(1).
[561] *Ibid.*, Art. 87(2).
[562] Steve Peers, "Analysis 3 Of The Revised Brexit Withdrawal Agreement: Dispute Settlement", *Eulawanalysis.Blogspot.Com*, 2019, http://eulawanalysis.blogspot.com/2019/10/analysis-3-of-revised-brexit-withdrawal.html.
[563] Art. 88 WA.
[564] *Ibid.*, Art. 89(1).
[565] *Ibid.*, Art. 89(3).
[566] *Ibid.*, Art. 91.
[567] *Ibid.*, Art. 90.
[568] *Ibid.*

The phasing out of the role played by the CJEU with respect to citizens' rights has been designed to be even more gradual. In fact, Article 158 WA allows British tribunals to refer a question on the interpretation of Part Two of the Agreement to the Court for a preliminary ruling as long as the case commenced within eight years from the end of the transition period,[569] and grants the corresponding jurisdiction to deliver such rulings to the CJEU.[570]

The choice of wording, here, is particular: as noted by Peers,[571] the use of the formulation "*commenced* […] within 8 years"[572] implies that this jurisdiction will be extended to proceedings initiated during the eight-years period which will still be pending at the end of that time frame; while the fact that, according to Article 158 WA, "that court or tribunal *may* request the [CJEU] to give a preliminary ruling"[573] means that the British courts will not be under an *obligation* to invoke the preliminary reference procedure when the interpretation of the Agreement is concerned.[574] This deviation from the regime of Article 267 TFEU[575] underlines the new situation of the UK as a third country outside the European Union, whose national courts no longer comprise an integral part of the Union's judicial system.

While eight years may be enough to "allow the EU courts to resolve the most pressing legal issues arising from the UK's withdrawal from the EU"[576] through the preliminary reference procedure, there are still two ways through which cases on citizens' rights may reach the CJEU after the end of this extended period. First of all, the Agreement does not provide for a limit to the jurisdiction of the Court to deliver preliminary rulings and adjudicate on infringement proceedings in cases regarding UK nationals in the EU27,[577] as the Agreement

[569] *Ibid.*, Art. 158(1). The only exception to this time frame regards cases about residence documents under Art. 18(1), 18(4) and 19 WA. In these cases, a preliminary ruling may be asked only if the case commenced within eight years from the entry into force of Art. 19 WA, which is the date of entry into force of the Agreement rather than the end of the transition period.
[570] *Ibid.*, Art. 158(2).
[571] Steve Peers, "Analysis 3 Of The Revised Brexit Withdrawal Agreement: Dispute Settlement" (see note 562).
[572] Art. 158(1) WA (emphasis added).
[573] *Ibid.* (emphasis added).
[574] This is potentially unfortunate for citizens' rights, as it opens up the possibility for the UK judiciary to deliberately fail to refer questions on politically sensitive topics to preempt the CJEU from interfering with the preferred national interpretation of an unclear rule. For the critique of a similar example of British "judicial gatekeeping" in failing to refer a question on citizens' rights to the Court, see Charlotte O'Brien, "*Acte Cryptique*? Zambrano, Welfare Rights, And Underclass Citizenship In The Tale Of The Missing Preliminary Reference" (see note 173).
[575] Art. 267 TFEU, instead, provides for such an obligation when there is no judicial remedy under national law against the decisions of the referring national court. This obligation has been expanded by the CJEU case law to include as well cases before courts of all level when the doubt regards the validity of a Union act.
[576] Menelaos Markakis, "Citizens' Rights After Brexit: The Withdrawal Agreement And The Future Mobility Framework", in *Trade Relations After Brexit* (see note 308).
[577] Steve Peers, "Analysis 3 Of The Revised Brexit Withdrawal Agreement: Dispute Settlement" (see note 562). Such rulings, however, will not be binding on the UK judiciary if they are handed down after the end of the transition period, but the UK courts will only have to have "due regard" for them under Art. 4(5) WA.

has become an integral part of the (monist) Union legal order.[578] Moreover, the Court may be asked to interpret the Agreement after the eight years period as a part of the arbitration procedure foreseen by its dispute settlement provisions. It is to this institutional mechanism that we will turn our attention now.

Dispute settlement

The dispute settlement mechanism envisioned by the Withdrawal Agreement is the result of a careful compromise between the Union and the UK, allowing both of them to be able to claim that their "red lines" on governance were respected. On the UK side, this meant escaping the direct jurisdiction of the CJEU, something which had been a key objective for the UK Government starting from Theresa May's commitment to "take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain".[579] For what concerns the Union side, the chief negotiator Michael Barnier stressed how:

> "As opposed to a classic international agreement, the Withdrawal Agreement […] will create rights that are directly enforceable by litigants. We do not want, and cannot, move from a community of law based on the supervision of the Court of Justice to a simple political dialogue. For us, on the EU side, it is essential to settle disputes in a legal or arbitration-based framework. This is a question of legal certainty and efficiency. […] For these provisions or the concepts […] which come from EU law, we cannot accept that another jurisdiction, other than the Court of Justice of the European Union, says what the law is, or imposes its interpretation on the institutions of the Union. The case law of the Court of Justice is clear on this point. The autonomy of Union law must be preserved."[580]

The result of this compromise was the creation of an *ad hoc* arbitration system, which is inspired (albeit with some adaptations) by the WTO dispute settlement mechanism,[581] functions with the support of the Permanent Court of Arbitration (PCA)[582] and in which the CJEU plays the role of being the final interpreter on questions on Union law. The Agreement

[578] Alan Dashwood, "The Withdrawal Agreement: Common Provisions, Governance And Dispute Settlement" (see note 540).
[579] Theresa May, "The Government's Negotiating Objectives For Exiting The EU: PM Speech" (see note 2).
[580] European Commission, *Speech By Michel Barnier At The 28Th Congress Of The International Federation For European Law (FIDE)*, 2018, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_18_3962.
[581] Alan Dashwood, "The Withdrawal Agreement: Common Provisions, Governance And Dispute Settlement" (see note 540).
[582] Art. 170 and 171 WA.

explicitly provides for such a mechanism to be the sole set of procedures to be used to solve disputes.[583]

Arbitration is not activated as an instrument of first resort: if a dispute arises between the EU and the UK, the first step towards its resolution consists in seeking a political, rather than legal, solution through consultations within the Joint Committee under a good faith obligation.[584] Were such consultations to fail, the matter may be brough in front of an arbitration panel, either by mutual agreement or unilaterally if the dispute is not settled after three months of consultations.[585] Article 171 WA contains detailed rules on the establishment of such a panel; without delving too much into detail, it is interesting to note how the process provides for the involvement of the Secretary-General of the PCA in the case of difficulties in the appointment process.[586] This provides a useful procedural failsafe in the light of the United States' "successful effort to render the WTO Appellate Body non-operational […] by blocking the appointment of new members for an extended period of time",[587] so that neither the EU nor the UK will be able to do the same by failing to participate in the selection process.

After the appointment process is completed, the panel will have twelve months (with some exceptions)[588] to deliver a binding[589] ruling on the matter. This is when cases have the possibility to reach the CJEU again even after the eight-years: under Article 174 WA, the arbitration panel is barred from interpreting the provisions of Union law referred to in the Agreement or from determining whether the UK has complied with its obligations under Article 89(2) WA.[590] In such cases, the proceedings before the arbitration panel will be suspended and the question will be referred to the CJEU (which is granted by the same article the necessary jurisdiction) for a ruling which will be binding on the panel.[591]

After a final ruling has been handed down by the arbitration panel, the same panel which delivered it can then be called again to deliver on matters such as on what constitutes a

[583] *Ibid.*, Art. 168.
[584] *Ibid.*, Art. 169.
[585] *Ibid.*, Art. 170.
[586] *Ibid.*, Art. 171(5), 171(6), 171(8) and 171(9).
[587] Joris Larik, "Decision-Making and Dispute Settlement for the Withdrawal of the United Kingdom from the European Union" (see note 547).
[588] Art. 173 WA. The article provides both for the possibility of the arbitration panel considering that it cannot respect the twelve months deadline, and for the possibility of one of the parties to request that the case be considered "urgent" – if such a claim is accepted by the panel, the deadline will be reduced to six months.
[589] *Ibid.*, Art. 175.
[590] *Ibid.*, Art. 174
[591] *Ibid.*

"reasonable period of time" to comply with the ruling,[592] on whether the responding party has failed or not to do so[593] and on the imposition of potential penalty payments, if the latter is found not to have complied with the ruling in time.[594] In the case of missed payment or continued noncompliance, the Agreement provides for the escalation of the penalty[595] by allowing for retaliatory suspensions of the obligations to which the complainant is subject in order to attempt to induce compliance.[596] Such a possibility is not unrestrained: the suspension has to be proportionate, can only regard provisions different from Part Two WA or, in the case of provisions of a separate EU-UK agreement, it has to be subject to the conditions of that agreement,[597] and is in any case subject to the possibility of being brought before the original panel to assess whether it is excessive.[598]

Among these conditions, the exclusion of Part Two provisions from the scope of the possible retaliation is of particular importance, as it prevents one of the two parties to the Agreement to use the rights of the citizens/nationals of the other party as a bargaining chip to gain leverage in the dispute.[599] This laudable choice is perhaps one of the best translations into practice of how, as already quoted above, "the Withdrawal Agreement is *not limited to creating rights and obligations between two sovereign parties*. It will create rights that are directly enforceable by litigants."[600] By isolating the provisions on citizens' rights from the retaliation system of Article 178 WA, the Agreement ensures that the standard international law practice of suspending obligations between the two "sovereign parties" to induce compliance will not affect the "directly enforceable" rights of citizens who escape this classical classification of reciprocal rights and obligations.

[592] *Ibid.*, Art. 176(2).
[593] *Ibid.*, Art. 177.
[594] *Ibid.*, Art. 178.
[595] Steve Peers, "Analysis 3 Of The Revised Brexit Withdrawal Agreement: Dispute Settlement" (see note 562).
[596] Art. 178(2) WA.
[597] *Ibid.*
[598] *Ibid.*, Art. 178(3).
[599] Joris Larik, "Decision-Making and Dispute Settlement for the Withdrawal of the United Kingdom from the European Union" (see note 547).
[600] European Commission, *Speech By Michel Barnier At The 28Th Congress Of The International Federation For European Law (FIDE)* (see note 580; emphasis added).

4. Conclusion: what's in for the future?

This dissertation has attempted to provide an overview of what the Brexit Withdrawal Agreement means from the point of view of the rights enjoyed by citizens of the EU and nationals of the UK. After a recap of which are the main provisions of Union law which were relevant to citizens' rights before Brexit, we have seen how the Agreement tries to preserve the acquired rights of Union and UK expats by "freezing" the situation at the time of Brexit. The Agreement, however, was only partially successful in securing such a result: its scope of application is limited to "persons who exercise(d) their free movement rights within a limited period of time"[601] and the rights of both Union citizens and UK nationals covered by it have still been impacted – and in some cases diminished[602] – in several ways.

For Union citizens in the UK this is true in two ways. First of all, they will have to apply to be able to remain in their homes,[603] and will risk losing all of their entitlements in the case they fail to do so – even when they have already built their own life in the UK over the course of several years. Secondly, the recognition of residence rights for EU27 expats in the UK does not come with the full set of opportunities[604] and rights that residence in the UK as a Member State of the Union did. For instance, the Agreement does not come with any specific provisions on how Union citizens will be able to participate in the elections for the European Parliament, nor if they will be able to do so for municipal elections. Although the latter consequence is a reasonable and predictable consequence of the UK "taking back control", the fact that Union citizens in the UK will have to fall back to national options to vote from third countries for the EP will create the potential for disparity of treatment and enfranchisement for persons who, until 31st January 2020, were all able to exercise their Treaty voting rights – an integral part of Union citizenship – in the same way.

Some of these considerations will apply, *mutatis mutandis*, to UK expats in the EU as well. While the registration requirement will depend on the individual Member States' choice to introduce a constitutive residence documents regime as well, all UK nationals residing or working in the Union will see their life opportunities affected by the choice not to include onward free movement rights in the Agreement, which will leave them "landlocked" in the

[601] Catherine Barnard and Emilija Leinarte, "Brexit and Citizens' Rights" (see note 338).
[602] Menelaos Markakis, "Citizens' Rights After Brexit: The Withdrawal Agreement And The Future Mobility Framework", in *Trade Relations After Brexit* (see note 308).
[603] *Ibid.*
[604] Markakis (see note 308) makes the example of the loss of access to EU research funding for researchers based in the UK.

State of residence/work, as well as by the loss of Union citizenship and all the related rights other than residence rights.

The recognition of these important consequences has sparked off debates about new categories of "citizenship" which would recognise the particular situation of these people, following the lines of the idea of "associate citizenship" proposed by Guy Verhofstadt. From Dora Kostakopoulou's "special EU protected citizen status"[605] to Eleanor Spaventa's "former EU citizen" status[606], its proponents have been fuelled both by concerns for the individual situation of citizens affected by Brexit and by broader concerns on the constitutional nature of EU citizenship as the "fundamental status" of citizens of the Union.

Such a nature, Spaventa argues, would be put into question if Union citizenship could be "erased, literally, at the stroke of a pen".[607] These proposals have, however, not found their way into the Agreement nor in other Union policies regarding UK nationals;[608] what this implies for the nature of Union citizenship has not been analysed in this dissertation, but it will likely provide material for discussion for EU citizenship scholars in the years to come – also in the light of the developments which will be brought about by the implementation of the Agreement.

What's in for the future, then? If the EU and the UK will not manage to find an agreement on their future relationship (which will most likely take the form of a free trade agreement) before the end of the transition period, mobility between the two will be regulated by national/Union law until such a deal is reached. For UK nationals wishing to move to the EU, this will imply being subject to the patchwork of national and Union rules already mentioned above;[609] for Union citizens wishing to move to the UK, they will be covered by a UK immigration policy which "has become ever more divergent from that of the EU"[610] in the recent years. Without delving into detail with the analysis of future British immigration policy, which would be well beyond the scope of this dissertation, it suffices to say that the system

[605] Dora Kostakopoulou, "*Scala Civium*: Citizenship Templates Post-Brexit And The European Union's Duty To Protect EU Citizens", *Journal Of Common Market Studies* 56, no. 4 (2018): 854-869, doi:10.1111/jcms.12683.
[606] Eleanor Spaventa, "Mice or horses? British citizens in the EU 27 after Brexit as 'former EU citizens'", *European Law Review* 44, no. 5 (2019): 589-604.
[607] *Ibid.*
[608] European Parliament Liaison Office in the United Kingdom, *Associate Citizenship For Brits Was Not Included In Final Resolution Draft*, 2016, https://www.europarl.europa.eu/unitedkingdom/en/media/euromyths/associatesitizenship.html.
[609] See Section 3.2.1.
[610] Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs* (see note 342).

envisioned in the 2018 White Paper[611] effectively provides for the end of free movement of persons, with the introduction of a single immigration regime from both EU Member States and third countries[612] and which, as later clarified, will rely on a points-based system.[613] Also, national UK immigration rules will be relevant as well for UK nationals who remained in their country but wish to bring over their family members from abroad, as the (more favourable) Union family reunification rules will cease to apply to the UK.[614]

For what concerns the future in the UK of EU-derived rights different from residence rights, such as the social rights mentioned in Chapter 2, there are no specific provisions regarding their preservation to be found in the Withdrawal Agreement. At the same time, however, the UK's European Union (Withdrawal) Act 2018 has provided for the preservation of all EU-derived domestic legislation as well as the inclusion within domestic law of directly effective EU legislation[615] applicable at the end of the transition period.[616] It is to be noted, however, that the principle of supremacy of EU law will only apply anymore to these (now domestic) provisions of law (and to the corresponding rights they create) with respect to conflicts with provisions prior to the end of the transition period:[617] as such, the UK Parliament will then be free to "to decide which elements of that law to keep, amend or repeal once [the UK has] left the EU".[618]

In a preliminary analysis on the future of EU-derived workers' rights, Catherine Barnard[619] contrasted Theresa May's commitments to preserve and enhance the legal protections available for workers on one hand with other Conservative MPs' calls for the deregulation of the labour market and with the threats of May's own Government to be ready

[611] Secretary of State for the Home Department, "The UK's future skills-based immigration system", *Cm 9722*, 2018, https://www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system.
[612] Catherine Barnard and Emilija Leinarte, "Brexit and Citizens' Rights" (see note 338).
[613] Secretary of State for the Home Department, "The UK's Points-Based Immigration System Further Details", *CP 258*, 2020, https://www.gov.uk/government/publications/uk-points-based-immigration-system-further-details-statement.
[614] The unilateral decision of the UK to leave the *Singh* immigration route open falls withing this category as well, as it will no longer be based on EU law (and its corresponding remedies) and because it will only be available for a limited period of time.
[615] European Union (Withdrawal) Act 2018.
[616] This has become so only with the European Union (Withdrawal) Act 2020; the EUWA 2018 mentioned instead Brexit day as the cut-off date.
[617] EUWA 2018, s. 5 (as amended by EUWA 2020).
[618] Department for Exiting the European Union, "The United Kingdom's exit from and new partnership with the European Union White Paper", *Cm 9417*, 2017, https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper. This commitment was translated into law by EUWA 2018, s. 7.
[619] Catherine Barnard, "Brexit And Employment Law", in *The UK After Brexit. Legal And Policy Challenges* (see note 248).

to "become something different [than a European-style economy]"[620] if "forced" to do so. Barnard identified a body of legislation to which British workers and employers are used and which is likely to be maintained[621] and a set of rules which, instead, will likely be excluded or fall into desuetude: surely the CFREU, as it only applies to Member States when operating within the scope of Union law, as well as EU legislation and CJEU case law which never actually became ingrained within the UK's social model.[622]

She argues, however, that such rights will be safe "only for so long as a future deal between the UK and the EU is reached",[623] as the Union has insisted on the maintenance of a "level playing field" against unfair (de)regulatory competition. This principle has found its way within Title III of the Draft text of the Agreement on the New Partnership with the United Kingdom[624] published by the Commission in the first half of 2020. Given the recently encountered difficulties in the negotiations between the EU and the UK[625] and the approaching mid-October deadline set by Prime Minister Boris Johnson to conclude such a deal,[626] however, the social rights derived from Union law may be less secure than promised by Theresa May.[627]

Social and workers' rights are not the only set of rights enjoyed by persons in the EU and the UK whose future will depend, at least partly, from the above-mentioned Draft Agreement: in the future absence of Union free movement of persons law in the relations between the Union and the UK, this second Agreement – if concluded – will represent the sole legal instrument complementing national migration laws and Union law on TCN migration in the future EU-UK relationships. Here, academics expected a shift of paradigm away from "broader ideas of

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[620] Olaf Gersemann and Ileana Grabitz, "Philip Hammond Issues Threat To EU Partners", *Die Welt*, 2017, https://www.welt.de/english-news/article161182946/Philip-Hammond-issues-threat-to-EU-partners.html.
[621] This legislation overlaps, approximately, with the legislation presented above in Section 2.2.3.
[622] Catherine Barnard, "Brexit And Employment Law", in *The UK After Brexit. Legal And Policy Challenges* (see note 248).
[623] *Ibid.*
[624] Draft text of the Agreement on the New Partnership with the United Kingdom (hereafter Draft Agreement or DA), Art. LPFS.2.27, LPFS.2.28 and LPFS.2.29 (the unconventional numbering of the DA's articles reflects its status as a provisory draft).
[625] The difficulties in question arise from two main stumbling blocks: on one hand, the Internal Market Bill proposed by the UK Government which would grant the Government the power to breach some of the rules on customs and State aid contained in the Northern Ireland Protocol "notwithstanding any relevant international or domestic law with which they may be incompatible" (IM Bill, s. 5); on the other one, the impasse encountered on the issues of fair competition (in particular, State aid) and fisheries. For more details on the state of affairs after September 2020's eight round of negotiations from the Union's perspective, see European Commission, *Statement By Michel Barnier Following Round 8 Of Negotiations For A New Partnership Between The European Union And The United Kingdom*, 2020, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1612.
[626] BBC News, "Brexit: Ministers Plan Laws Overriding Part Of Withdrawal Deal", *BBC.com,* 2020, https://www.bbc.com/news/uk-politics-54051933.
[627] Chief Brexit negotiator Michael Barnier (see note 625) has underlined the lack of "important guarantees on non-regression from social [and] labour […] standards" so far.

citizenship and State building"[628], returning back to "the recognition of specific economic rights to individuals".[629]

The Draft Agreement dedicates a whole Title to the mobility of natural persons,[630] proposing a regime which would be based on "full reciprocity", "non-discrimination" and "equal treatment".[631] It translates into legal text the commitments already stated in the Political Declaration[632] which accompanied the Withdrawal Agreement, providing for visa-free travel for short-term stays which do not include the performance of a paid activity,[633] for the establishment of reciprocal conditions for the mobility of "students, researchers, trainees and certain categories of youth exchange",[634] for continuing social security coordination[635] and for cooperation in certain civil justice matters regarding family law.[636] The only other mobility provisions contained within the Draft Agreement relate solely to temporary stays for business purposes[637] – a category closer to the movement of services than to the movement of persons, and which anyway can subject to enough requirements and conditions not to come close to the Union law model of *free* movement.

The mobility framework envisioned by the Draft Agreement is way more limited than the free movement provisions existing under Union law: besides not being linked, as expected, to broader concepts of transnational citizenship, the provisions of the Draft Agreement also fall short of the "specific economic rights" mentioned above, which marked the birth of the idea of free movement of workers and of the self-employed under the Treaty of Rome. In fact, no provision is made for residence rights beyond short-term stays, except for students and alike categories, nor are EU/UK workers granted particular access to the UK/EU labour market respectively, so that, even if the Draft Agreement was to be concluded in time for the 15th October deadline, economic migration would be covered only by national legislation and Union rules on the entry and stay on TCNs – with Union citizens moving to the UK (and,

[628] Menelaos Markakis, "Citizens' Rights After Brexit: The Withdrawal Agreement And The Future Mobility Framework", in *Trade Relations After Brexit* (see note 308).
[629] Ornella Porchia, "Citizens' Rights In The Post Brexit Scenario" (see note 5).
[630] Title XI DA.
[631] *Ibid.*, Art. MOBI.3.
[632] "Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom", *TF50 (2019) 65*, 2019.
[633] Art. MOBI.4 DA.
[634] *Ibid.*, Art. MOBI.5.
[635] *Ibid.*, Art. MOBI.6.
[636] *Ibid.*, Art. MOBI.7.
[637] *Ibid.*, Chapter Four of Title VI ("Entry and Temporary Stay of Natural Persons for Business Purposes")

reciprocally, UK nationals moving to the EU) being placed in the "general customs queue"[638] together with migrants from the rest of the world.

Before the publication of the Draft Agreement, academics have attempted to imagine what the future mobility framework could have looked like by looking at the currently existing Union agreements with third countries which contain mobility provisions, from the more favourable EEA and Switzerland models to the less favourable CETA model.[639] The analyses mentioned above showed how, while a comprehensive mobility framework opening up more opportunities than the currently proposed Draft Agreement would be possible, it would come at the "price" of increased regulatory approximation between the EU and the UK – something which did not and does not sit well with the UK's concerns for "taking back control" of its own laws and migration policy.

Such a development became even more unlikely in the light of the recent difficulties encountered during the negotiations, which already put at risk the conclusion of the Draft Agreement in its current form, let alone a potential revision which would touch upon a sensitive topic for the British electorate such as migration. Because of this, it is likely that the Union's intention to include "*ambitious* provisions on movement of natural persons"[640] will (sadly) remain little more than words on paper in the next future. Except in the eventuality of a sudden breakthrough during the last weeks of the negotiation process, Brexit really will mean Brexit for the future of free movement rights.

[638] Catherine Barnard and Emilija Leinarte, "Brexit and Citizens' Rights" (see note 338).
[639] For such a detailed analysis covering the different types of EU agreements in respect to the different possible migration categories, see Tineke Strik et al., *Brexit And Migration. Civil Liberties, Justice And Home Affairs* (see note 342). For an analysis of Mode 4 access under the GATS and its inclusion and, sometimes, expansion in modern day FTAs, see Catherine Barnard and Emilija Leinarte, "Brexit and Citizens' Rights" (see note 338).
[640] European Council, "European Council (Art. 50) Guidelines (23 March 2018)", *EUCO XT 20001/18*, 2018.

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Riassunto

Sin dall'inizio dei negoziati riguardanti l'uscita del Regno Unito dall'Unione Europea, entrambe le parti hanno riconosciuto l'importanza di fornire garanzie riguardanti i diritti, derivanti dal diritto europeo, acquisiti prima della Brexit dai cittadini europei e britannici. Questa tesi si pone l'obiettivo di analizzare l'impatto della Brexit e, in particolare, dell'*Accordo sul recesso del Regno Unito di Gran Bretagna e Irlanda del Nord dall'Unione europea e dalla Comunità europea dell'energia atomica*[1] su tali diritti, seguendo una logica cronologica. Iniziando dall'analisi della situazione attuale prima dell'entrata in vigore della parte dell'Accordo riguardante i diritti dei cittadini, la tesi procede poi con l'analisi di quest'ultima parte e delle altre disposizioni rilevanti, prima di concludere immaginando il futuro di questi diritti nel contesto dei negoziati riguardanti il nuovo rapporto tra l'UE ed il Regno Unito.

La situazione attuale dei diritti dei cittadini nel contesto della Brexit è caratterizzata da un periodo di transizione stabilito e regolato dalla Parte Quarta dell'Accordo, iniziato con l'uscita del Regno Unito dall'UE il 1° febbraio 2020 e che finirà il 31 dicembre 2020. Durante questo periodo, la maggior parte del diritto dell'Unione (inclusa la giurisdizione della Corte di Giustizia) continua ad applicarsi al e nel Regno Unito. Per questo motivo, dato che la Parte Seconda sui diritti dei cittadini interessati dalla Brexit entrerà in vigore alla fine del periodo di transizione, essi rimarranno governati dalle disposizioni europee fino al 31 dicembre 2020, fatta eccezione per due casi: da un lato, alcuni diritti politici parte dello status di cittadino dell'Unione, che non saranno più goduti dai cittadini del Regno Unito (diritto di voto alle elezioni europee e municipali nello Stato membro di residenza, diritto di partecipare alle Iniziative dei Cittadini Europei); dall'altro, l'esclusione del Regno Unito dal funzionamento dei meccanismi istituzionali europei, privandolo così *de facto* della possibilità di influenzare (se non invitato) eventuali sviluppi del diritto europeo che dovrebbe poi in ogni caso seguire ed implementare.

Dato il ruolo importante giocato dal diritto dell'Unione durante il periodo di transizione, il Capitolo 2 della tesi procede presentando le principali disposizioni di quest'ultimo riguardanti i diritti dei cittadini. Esse sono composte soprattutto da misure per la libera circolazione delle persone, comportanti diritti di circolazione, residenza e parità di trattamento – in particolare, misure per la libera circolazione dei lavoratori dipendenti, dei lavoratori autonomi e riguardanti i diritti di circolazione associati alla cittadinanza dell'Unione –, ma

[1] Da qui in avanti, "l'Accordo".

includono anche dei diritti politici, legati alla partecipazione alla vita democratica dell'Unione, dei diritti ribaditi nella Carta dei Diritti Fondamentali dell'Unione Europea ed altri, creati per specifiche categorie di persone da disposizioni secondarie europee. Per questi ultimi, viene fatto l'esempio dei diritti riconosciuti ai lavoratori nel campo della politica sociale dell'Unione.

Il Capitolo 3 della tesi procede poi analizzando le parti dell'Accordo rilevanti per i diritti dei cittadini dopo la fine del periodo di transizione, cioè la Parte Seconda sui diritti dei cittadini ed alcuni Titoli della Parte Sesta, relativi al ruolo che la Corte di Giustizia continuerà a ricoprire e ai meccanismi istituzionali stabiliti sia per garantire la corretta applicazione dell'Accordo sia per risolvere eventuali dispute. In generale, l'Accordo cerca di preservare i diritti già acquisiti, disponendo il "congelamento" dei diritti dei cittadini europei nel Regno Unito, dei cittadini britannici nell'Unione Europea, dei lavoratori frontalieri e delle loro famiglie alla data della fine del periodo di transizione, tramite estesi riferimenti alle disposizioni europee rilevanti.

Questa conservazione, tuttavia, non equivale *in toto* alla situazione di tali cittadini fino a quando erano coperti dal diritto europeo: se, da un lato, protegge la maggior parte dei diritti di residenza/di lavoro frontaliero già acquisiti dalle persone in questione, è anche vero che alcune categorie rimangono escluse dall'ambito di applicazione dell'Accordo (per esempio, le situazioni derivanti dai casi *Singh* e *Zambrano*) e che i diritti di residenza in questione possono essere resi dipendenti dall'ottenimento di un documento di residenza (scelta, quest'ultima, ripetutamente criticata nella letteratura accademica). Inoltre, gli altri diritti menzionati in precedenza (di cittadinanza e dei lavoratori) non vengono preservati dall'Accordo: i primi, per ovvie ragioni, non saranno più goduti dai cittadini britannici, mentre il mantenimento dei secondi nel Regno Unito dipenderà dalla decisione del Parlamento del Regno Unito di non abrogarli dopo la fine del periodo di transizione.

Dopo una breve valutazione dell'impatto complessivo di questi cambiamenti, la conclusione della tesi si rivolge infine al futuro, cercando di fornire una bozza delle relazioni UE-UK dopo la fine del periodo di transizione per quanto riguarda i diritti dei cittadini e, in particolare, le possibili forme di mobilità internazionale tra il territorio del Regno Unito e dell'Unione Europea. Questa analisi si basa sulla bozza dell'Accordo sulla Nuova Partnership, pubblicato dalla Commissione Europea nella prima metà del 2020, e sottolinea l'ambito di applicazione limitato, sia dal punto di vista personale che materiale, delle disposizioni riguardanti la circolazione delle persone naturali rispetto al regime stabilito dal diritto dell'Unione.

Considerando le recenti difficoltà incontrate nel corso dei negoziati tra il Regno Unito e l'Unione Europea sulla loro futura relazione e l'avvicinarsi della scadenza per la conclusione di un accordo, la tesi si conclude considerando come altamente improbabile una rinegoziazione delle disposizioni che toccano un argomento politicamente sensibile come la politica migratoria con lo scopo di garantire diritti di libera circolazione paragonabili a quelli stabiliti dal diritto europeo.