

THE UK REFERENDUM ON MEMBERSHIP OF THE EU

One Choice Hides Another – To Keep or Give up European Citizenship

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*ECIT (a Foundation on European citizens' rights, involvement and trust)
is a newly created think tank working exclusively on European citizenship*

INTRODUCTION

On 23 June 2016, British voters go to the polls in a referendum in which they are asked whether the United Kingdom should remain a member of the European Union (EU) or leave. At the time of writing, the polls suggest the result is too close to call. The debate is wide-ranging covering whether the country would be better off in or out of the EU and what would be the impact of BREXIT on the average family. Economic forecasts are being made about the balance of risk or advantage. More fundamentally the campaign is about sovereignty and whether the country should remain in the EU or become an independent global player.

The Government is arguing that the UK is stronger within a reformed EU but is not participating in a number of its policies and therefore enjoys the best of both worlds. Much of the debate is about the role of the UK and its relationship with Europe. This paper takes a different line and suggests that the choice is also about how voters see their own role as purely national or also European citizens, how that relates to citizens of other EU Member States and the possibility that they could play their own role in Europe as many already do from the UK. This question is overshadowed by the economic arguments and is addressed only indirectly as part of the debate about free movement of persons in the EU. This debate is highly contentious and polarises the 'in' and 'out' campaigns, so also overshadows any broader debate about the citizen and the EU.

EU citizenship is a hidden aspect of the debate leading up to the referendum, which is not explicitly addressed either by the 'remain' in the EU or the 'leave' campaign. The question is inescapable however. This is because Article 20 of the Treaty on the Functioning of the European Union (TFEU) states: "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the

Union shall be additional to and not replace national citizenship”. Whether or not voters are aware of this article or not, their vote is an automatic trigger to keep or give up part of their citizenship. For example, if in September 2014 the Scottish referendum had resulted in a majority in favour of secession from the UK as a Member State, the Scots would have lost their EU citizenship at least for the period before the country would be able to re-enter the EU independently. In case of BREXIT, UK citizens may still regard themselves as citizens of Europe, but will lose this formal status because they will no longer have the nationality of a Member State of the Union. Does this matter? It does and this paper explains why.

The first part,” *Union citizenship: state of the art* “provides a short explanation of European citizenship. Freedom of movement is the first right of the European citizen, but that is not all. Pieces of this citizenship are scattered and still under construction without clarity as to what it is, so it remains below the surface. Yet it exists and not just because the Treaties say so. At the same time, the Treaties ensure that European citizenship is complementary and does not threaten national citizenship.

The second part,” *Implications of the choice for free movement of persons within Europe*” takes the ‘remain’ and ‘leave’ scenarios to assess their impact on the first right of the European citizen – to move freely. In the settlement with the UK reached by the European Council on 18-19 February 2016, the restrictions on the free movement rights of EU citizens in the UK was the most contentious of all issues. The impact would be far less than the leave option and the loss of European citizenship for UK citizens.

The decision as to whether to keep or give up EU citizenship should not be based only on short term considerations and its current status but on what it could become for future generations. The jury is very much out on answers to the questions this raises and which are put in the conclusions.

European citizenship not only provides for individual rights – it is also the framework for European action not just from the top down but also from the bottom up. To an increasing extent, citizenship is seen as more than just a set of formal individual rights; it is also about people coming together to act in civil society. This creates a grass roots Europe, which could be called sociological Europe and which can be quite different from political Europe. This distinction is particularly relevant in the case of the UK. The Government stresses the “best of both worlds” being inside the EU but with safeguards against adopting the Euro, Schengen, aspects of security and justice and with the February settlement, the additional exemption from the aim of “ever closer Union”. This “special status in a reformed EU” puts the Government in a semi-detached position in its relations with the EU. The EU is not however just about the “Brussels” Institutions and intergovernmental negotiations, but also European networking. The official EU provides the background for citizens, associations of

business or the third sector, interest groups and stakeholders to become involved. They may do so as advocates for a particular cause in relation to the EU, or to run European networks to exchange experience, share best practice or campaign for change.

British citizens, regardless of their attitudes to the EU, are often the most active petitioners and defenders of their European rights.¹ In acts of transnational citizenship, the UK participants, far from being semi-detached like the Government, often play leadership roles through having the lingua franca, organisational skills, a strong voluntary sector, more deeply rooted democratic practices and a leading role in several areas such as research. For example, the former Mayor of London may be campaigning for BREXIT whilst London itself, as the most cosmopolitan city in Europe is a birth place of such initiatives as BEUC the European consumer lobby, the European Public Health Alliance, Culture Action Europe or more recently European Alternatives. Taking just the non-profit charitable sector where I have been working as founder of European Citizen Action Service, I would rate the UK contribution as second to none. This is surprising given the fact that the general culture in the UK is less enthusiastic about Europe than on the “continent”. British civil society organisations have understood, however, that to be strong at home they need to be active in Europe and help build European associations and partners EU-wide and beyond. The UK has been a reference point for reformers in Central and Eastern Europe seeking to build their own civil society with the support of the EU in newly democratic and independent States. With BREXIT, there is no reason why people from the UK should not continue to be active in this cultural, civil and sociological Europe, but to be realistic it cannot exist entirely independently from political Europe. Being outside the EU would make it more difficult to find support both at home and abroad for European initiatives. The UK would lose its leadership role in this other Europe, where its contribution is often seen as making up in some way for a lack of real engagement by successive governments. And there would be a real loss to the rest of Europe.

¹ It is often said that the British are good at complaining. The truth is that they have more IT skills, advice lines and citizens’ advice bureaux than most EU countries.

PART ONE - Union citizenship: state of the art

The emphasis of the referendum campaign in the UK is primarily on whether voters think it is better for the country to stay or leave the UK, a choice which is framed largely in economic terms of risks, costs and benefits. Even so, how is it that an aspect of one's citizenship, which could be either irremediably lost or maintained, could be overlooked? Few issues of the choice on 23 June are quite so clear, since to be a citizen of the Union, you have to be a national of a Member State. One reason could simply be use of language. When the UK Government uses the term "EU citizen" in its publications or in the leaflet sent to every household in April 2016,² it generally refers to citizens from the rest of the EU in the UK, rather than UK citizens. Yet the term "EU citizen" has become part of everyday language in Europe, not just in official statements by the European Union.

Union citizenship was first formally introduced in the EU Treaties at Maastricht in 1993, and is described in Articles 18-25 of the Treaty on the Functioning of the European Union. It is summarised in the box below.

European citizens' rights attached to Union Citizenship:

- Right to travel and live freely within the EU
- Not to be discriminated against on the grounds of nationality
- Right to vote and stand as a candidates in municipal and European Parliament elections wherever they live in the EU
- if their own country is not represented, right to be assisted by another EU country's embassy or consulate outside the EU, under the same conditions as a citizen of that country
- right to petition the European Parliament, apply to the European Ombudsman and address the EU institutions (in any official EU language)
- right to organise or support, together with other EU citizens, a citizens' initiative to call for new EU legislation

This status is not formally linked to any particular policy. These articles place emphasis though on free movement within the EU – the first right of the European citizen. The Treaties place emphasis on European rights which are necessary to move freely around the Union. These rights are backed up by secondary legislation to remove the barriers to

² "Why the Government believes that voting to remain in the European Union is the best decision for the UK" (eureferendum.gov.uk)

residence of EU citizens and their family members, access to healthcare and other social security entitlements and recognition of their professional qualifications. Free movement is in turn closely linked to non-discrimination on the basis of nationality and indeed the fight against racism and all forms of discrimination. Without a guarantee (which as we shall see later is being eroded in the settlement with the UK) of equal treatment with citizens of the host country, the European citizen is handicapped in claiming his or her rights. The Maastricht Treaty confirmed earlier historical rights to free movement of workers and other categories of the population but added a political dimension: the right to vote and stand in European and local elections for European citizens resident in another Member State as well as a right to consular protection outside the EU. The rights are not limited to free movement: this chapter on citizenship and non-discrimination also mentions the European Citizens' Initiative (ECI) whereby over 1 million citizens from at least 7 of the 28 Member States can request the Commission to introduce a new European law.³

The Treaty of Maastricht in 1993 also introduced the idea that European citizens should have rights of access, participation and redress in relation to the EU Institutions. The post of European Ombudsman and the right to petition the European Parliament were created. The right of access to documents was added by the Treaty of Amsterdam in 1997. In the Treaty of Lisbon in 2009 European citizenship became linked to elections to the European Parliament and a commitment to participatory democracy (Article 11 of the Treaty on the European Union). Finally, European citizenship has now been placed in the broader context of the Charter of Fundamental Rights which became legally binding with the entry into force of the Lisbon Treaty ; citizenship is just one of 6 chapters, the others being dignity, freedom, equality, solidarity and justice. Although the UK obtained an exemption to the Charter affecting domestic law, it remains a reason to stay in the EU. The Charter is the only wide-ranging agreed European statement of common values with its catalogue of both traditional fundamental rights and more modern ones-for example in seeking to ban trafficking in persons as a new version of slavery.

What would be the sense of giving up an EU citizenship, which is more popular than the EU itself? This is borne out by Eurobarometer opinion polls (no. 84 of Autumn 2015 for example) which shows that more than two thirds of a representative sample of the population across EU-28, or 64%, feel that they are citizens of the European Union whilst this figure is 52% for the UK. On average in the EU, 38% define themselves entirely in terms of their national citizenship, 52% as both national and European citizens, with 6% as Europeans primarily. For the UK, the figures are almost the other way round: 64%, 31% and 3% respectively. This reflects euro-scepticism, but also self-sufficiency and less exposure to the continental sense of the need for people to share the diversity of different languages and

³ For more information about ECIs, see the [Europa website](#) and the paper by Peter Teglas on [the ECIT website](#).

cultures especially in the smaller countries with open land borders. Within countries too there are differences depending on income, qualifications and between generations with the vast majority of young people feeling that they are European, including in the UK. The total of two thirds of the population seeing themselves as in some way European citizens is counter-intuitive at a time of growing euro-scepticism. Could UK citizens simply be left behind?

Whilst European citizenship is one of the clearest choices to be made in the referendum, it is too scattered across the EU Institutions to attract popular attention, so its absence from the referendum campaign is not only to be blamed on Euro-scepticism and nationalism. Moreover, there is no clear answer to the question “what is European citizenship?”, so it is not taught as part of citizenship education in schools. One reason for this is that across the EU Institutions it is everyone’s and no-one’s responsibility with different aspects of European rights dealt with by separate units, specialised committees in the European Parliament or government experts. EU administrative culture caters for stakeholders and different categories of the population rather than citizens as such. The scattered approach is to an extent exported to civil society where different communities of interest relate to specific aspects of this citizenship: free movement rights, democratic participation or creating a European public sphere, rather than European citizenship as such. Within the research community also, there are marked differences of emphasis among lawyers, political scientists, sociologists or philosophers.⁴ Meaning different things to different circles of interest, European citizenship can appear an abstraction. Yet, when its scattered elements are put together, it starts to emerge as more than the sum of its parts. ECIT is attempting to address this problem and has put together in the guidelines to be found on its website (<http://ecit-foundation.eu/>), the scattered elements of rights, involvement and trust or belonging which characterise any citizenship.

The scattered approach to European citizenship is matched by a deliberately low-key presentation of its symbols by the EU and national governments. The Treaties make it clear that “citizenship of the Union shall be additional to and not replace national citizenship” (Article 20 TFEU). In Articles 3-6 of the Treaty on the European Union (TEU), the limits of EU competence are made clear. Social security, education, health entitlements or culture remain preserves of each Member State’s citizenship. The Treaty therefore provides safeguards against EU citizenship encroaching on the core entitlements and rights of our primary citizenship, the national one. EU citizenship as the first transnational citizenship of the modern era in no way threatens national citizenship but makes it possible for rights to be exported to other Member States or the EU level. Voting to remain in the EU is no threat to national citizenship; the vote to come out is a threat by stripping it of its extension

⁴ An important source on citizenship in general is EUODO. See also [bEUcitizen](#), a European Commission funded research project on barriers to EU citizenship.

beyond the borders. When rights are exported to another Member State, they are often difficult to apply and this creates barriers to free movement. This is because equal treatment is the right to be treated equally to nationals of the host countries not the right to be treated in another Member State as you are in your own country (on the principle “when in Rome do as the Romans”). In order to eliminate barriers to free movement, the EU does not attempt to harmonize national regulations but encourages mutual recognition or introduces systems to coordinate the way they work for people on the move, for example in the area of social security. There is deference to national citizenship and resistance to giving too much prominence to the symbols of the European flag and anthem. National and European identities are reverse sides of the same coin, quite literally in the case of Euro coins and the standardised burgundy-coloured European passport. European and national flags fly together when they do fly, which is quite rare in the UK. On products and services we use, there are familiar references to a European standard quality assurance, the CE mark, a charter of European travellers rights displayed at airports, standard guarantee terms, the same labels on food. This information is presented in such a way that it is taken for granted as part of an internal market. Many people would like to see more assertive symbols of European citizenship, but in this area all governments guard their sovereignty jealously.

Is EU citizenship really a factor to be considered and worth defending in the referendum?

The answer is that it should be because appearances can be deceptive and this citizenship has more legal substance, deeper historical roots and is more popular and widely practiced than generally thought:

Legal substance

When Union citizenship was first added to the EU in the Maastricht Treaty in 1993, opinion among academics was divided, some seeing this merely as a public relations exercise confirming existing rights to free movement, others as the beginnings of a transformation of citizenship itself. The Court of Justice of the European Union (CJEU) has settled the argument somewhere between these two extremes, emphasising in a series of landmark judgements that “Union citizenship is destined to be the fundamental status of nationals of Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for”. The CJEU case law from *Martinez Sala* (Case 85/96) to *Ruiz Zambrano* (Case 34/09) has established that any European citizen can invoke the citizenship status in a court and the associated right to equal treatment with nationals of Member States. In more recent judgments, the Court has emphasised the exceptions rather than the citizenship rights to take into account the concerns expressed by the UK and other Member States about ‘benefit tourism’. It should be pointed out, however, that the case law of the court which receives

most attention relates to non-active European citizenship. The main motive for free movement is to work. The importance of the case law in giving legal substance to Union citizenship should not be underestimated. It is a challenge to the way the all-powerful monopoly of national citizenship entitlements can be exclusionary or discriminatory towards neighbouring countries' nationals. It does this by putting forward a European citizenship right to free movement in relation to access to social benefits, student grants and loans, training schemes for job seekers, and even the threat to the loss of citizenship itself.

Historical roots

The post-Maastricht case law on Union citizenship is a logical consequence of the earliest interpretation by the European Court of the Treaty of Rome which established that it "is more than an agreement which merely creates obligations between the Member States" but also effects their citizens (Case 26/62). The EU is a union not just of states but also citizens even though there is a long way to go before that dream can be realised in practice. Union citizenship was not invented just a generation ago by the Treaty of Maastricht, but has deeper roots. This is the first legally established transnational citizenship of the modern era since the Greek and Roman citizenships of classical times. A thin red line can be traced from one to the other through founding acts such as Magna Carta, Habeas Corpus, or the Declaration of Human Rights and the citizen of the French Revolution. In turn, these are the inspirations for UN declarations and conventions, as well as the Council of Europe's Convention on Human Rights with its strong emphasis on post-war reconciliation and "never again" followed by the EU Charter of Fundamental Rights. Just as St. Paul could claim a right as a Roman citizen to be tried in Rome, so a European citizen can challenge a Member State for a violation of European law in a national court. That court can refer the case to the European Court in Luxembourg, not only in the area of free movement but in any area where a violation of European law affects his or her rights. This tradition of the fight for democracy and human rights may explain the popularity of European citizenship, which has been given legal recognition by the EU but which reflects much deeper ideas of Europe. Of course one can argue that the EU should do more to live up to this ideal.

Against this background, European citizenship came about within the EU through parallel developments:

- **The increasing reach of European legislation.** At the start, the common market established free movement for workers, in the coal and steel industries, and then for workers more generally. It is a reflection of the diversification of the economy that legislation was required next to remove barriers to the free movement of professionals and the self-employed. It then became clear that people do not move just for work and that legislation should be extended to the free movement of students and retired people. It was logical therefore to introduce Union citizenship

and also merge piecemeal legislation for different categories of the population in more cross-cutting general laws on free movement and residence for European citizens and their family members, the coordination of social security arrangements and the recognition of professional qualifications.

- **The initiatives for a peoples' Europe.** From the early period of success in progress towards European integration to periods of crisis, governments and the EU Institutions showed concern (which they would do well to revive today) about leaving citizens behind or out of the process. The result was a series of working parties examining proposals for eliminating border controls, introducing European passports and cultural, youth and educational exchanges, and which led to the current symbols of Europe, the Schengen border-free zone and Erasmus. Direct elections to the European Parliament from 1979 gave impetus to policies for a citizens' Europe. In 1993 when European citizenship was added to the Maastricht Treaty, it was often UK charities which took the lead in pushing for the new related policies added to the Treaty at the same time: consumer protection, development, environment and public health.

[A citizenship which is more popular and widely practiced than generally thought](#)

In the same way that popular support for European citizenship has grown, so 49% of people are aware of their European rights and 55% of people according to Eurobarometer polls see free movement as the most important of the EU's achievements, even ahead of peace (no. 84 of Autumn 2015). Official statistics show that out of a population of 507 million, only 14.3 million are permanently resident in another Member State (Eurostat January 2014). But this is an underestimation, since short-term mobility, cross-border commuters resident in two countries or job-seekers go unrecorded and are unofficially resident or semi-resident. For the younger generation, it is a positive legacy of the European Union and its enlargement that you can now travel thanks to the liberalisation of air transport and other lower costs such as roaming charges from Edinburgh to Riga, Stockholm to Lisbon with an ease not possible for previous post-war generations. Not enough has been done to back these opportunities by offering decent job opportunities and a European labour market, which economic studies show can be of advantage both to countries of origin, countries of destination and EU migrants themselves. At a time when some countries have reinstated border controls and the Schengen system appears vulnerable, BREXIT would encourage calls for further restrictions. The advantages of free movement still reach only a minority of the population, even though interaction in all its forms with other EU citizens is far more widespread than generally thought. Mobility both virtual and physical, permanent or

temporary, both individual or more collective through networks or exchange schemes, touches the lives of an increasingly heterogeneous population of workers, entrepreneurs, students/researchers, cross border lovers and sun-seekers. In relation to BREXIT, the impact would be wider than 3 million EU citizens in the UK or 2 million UK citizens in the EU.

At the same time, free movement within the EU has become increasingly contested and associated in the public mind with the widely perceived failure to meet the challenge of increased numbers of migrants and asylum seekers, even though the two are legally distinct. Alternative measures to restrictions on freedom of movement are possible. General restrictions miss their target, since patterns of free movement are so uneven that negative effects such as migration failure, strains on local services and tension with the local population are concentrated in specific territories. Local problems require more local action. This is the reasoning behind using, instead of instruments such as the emergency brake, EU social and regional funds as recommended for example in the ECIT guidelines. These funds could provide a framework and resources to create a European free movement solidarity fund to which there would be contributions from the country of origin, the host country and the EU budget. Such proposals should be considered when the negotiations on the future of EU cohesion funds begin for the period after 2020. Similarly, demands are often made to strengthen border controls and restrict free movement rights in the fight against terrorism and organised crime. Here again, the policy should be not to restrict free movement but strengthen European cooperation among police and security services.

PART TWO – Implications of the choice for free movement of persons within Europe

1. If the United Kingdom decides to remain in the EU

A period of delay and uncertainty

In the case of a vote to remain in the EU, the decisions by the European Council of 18-19 February 2016 and the related Commission declaration of free movement will be translated into formal legislative proposals. These concern the emergency brake, and other measures – the payment of child benefits, alleged abuses of rights and restrictions on family reunion with third country nationals. What will be the impact of the settlement with the UK in actual practice? It could be limited to European citizens moving to the UK, but there could be wider implications. Whilst an earlier proposal for the agreement referred only to the UK, the final text refers to “Member States”.⁵ There is risk of contagion and that other governments may use the UK precedent to demand restrictions of their own, an opportunity which will certainly be considered with interest by parties of the extreme euro-sceptical right. Nothing however will be clear until after an initial period of uncertainty. Since there is a unanimous decision by the European Council on the settlement with the UK, with every indication that it should be put into force quickly, implementation is a given. It will have to go through the legislative process, which may take one to two years with a further period given to national administrations to put the legislative changes into effect. Some aspects of the settlement could also be open to challenge in national parliaments.

Over this period, European citizens already in the UK or considering to move there will be uncertain as to where they stand. Even when implementing legislation is agreed by the EU that is not all, since much will depend on the detail of the application measures in the UK. When Directive 2004/38 on free movement and residence of European citizens and their family members was adopted, implementation was delayed in several Member States leading to uncertainty. When the new regulation on the coordination of social security arrangements (Regulation 883/2004) was adopted it did not come into force immediately: there was a delay whilst an implementing regulation had to be agreed (Regulation 987/2009). The settlement in case of a vote to remain is by far the lesser of two evils, and should affect far fewer people and narrowly defined aspects of their European rights to equal treatment rather than their rights as a whole and status as European citizens.

The emergency brake

The European Council conclusions of February 2016 make a clear distinction between free movement of workers which is a direct result of different levels of remuneration and the freedom of the market and differences in social security systems which the EU does not

⁵ Letter by President Donald Tusk to the members of the European Council on his proposal for a new settlement for the United Kingdom within the European Union (press release 23/16 of 2.02.2016). European Council(18-19 February 2016) Conclusions EUCLLO 1/16.

harmonise and which it is now found could operate as a pull factor. The conclusions state that “It is legitimate to take this situation into account and to provide both at Union and at national level and without creating unjustified direct or indirect discrimination, for measures limiting flows of workers of such a scale that may have negative effects both for Member States of origin and for the Member States of destination.” In support of this, the Commission declared that on the basis of the information provided by the United Kingdom, “the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists today.” This declaration flies in the face of all previously published statements by the Commission that there is no evidence of such a pull factor and that EU workers contribute more in taxes than they receive in benefits, at least on aggregate.⁶ The Commission’s new claim and U-turn based on data from the UK which has not been made public will no doubt be scrutinised by the European Parliament which may demand further evidence. Otherwise there would be little burden of proof on a Member State applying for the emergency brake.

What could be the impact of this measure? It does not go as far as the original demands of David Cameron for a settlement in his speech of 26 November 2014 to impose a permanent four-year period before EU migrants can access any in-work benefits such as tax credits and housing benefits. Firstly, like the transnational arrangements linked to enlargement of the EU, the emergency brake is limited to a period of 7 years and is therefore a temporary safeguard measure rather than a permanent one. Instead of a total ban on access to benefits for four years, “the limitation should be graduated, from an initial complete exclusion but gradually increasing access to such benefits to take account of the growing connection of the worker with the labour market of the host Member State”. The Member States of Central and Eastern Europe concerned to protect the rights of their nationals seeking work in the United Kingdom have brought about a weaker brake. This resembles more a measure of dissuasion and political rhetoric than a real barrier. The measure may be open to challenge in national courts and presumably in the CJEU, if a court asks whether a measure is legal which directly discriminates against workers of other Member States denied access to benefits given to domestic workers. As we have seen the Treaties expressly prohibit discrimination against EU citizens on grounds of nationality (Article 18 TFEU), a requirement which is reinforced by other Treaty articles and legislation on free movement of workers, which applies equal treatment from the first day in work. The governments have taken CJEU case law related to non-active and unemployed citizens who do need to show a degree of integration and length of residence before being able to access benefits, and carried it across to active and employed citizens, thus diluting free movement of workers. This should not be

⁶ For a summary of studies on the impact of free movement on social benefits the Commission communication “Free movement of the EU citizens and their families: Five actions to make a difference.” (COM (2013) 837 of 25.11.2013).

allowed to set a precedent, since there are dangers here of weakening the European labour market.

The other measures

At first sight, the other three measures appear less damaging to free movement of persons and are less discriminatory against citizens from other Member States:

- **Child benefits.** The Commission is to make a proposal to amend Regulation (EC) no. 883/2004 on the coordination of social security systems in order to give Member States the option of indexing such benefits to the conditions of the country where the child resides. To begin with, this measure will apply only to new claims, but from 1 January 2020 “all Member States may extend indexation to existing claims to child benefits already exported by EU workers”. This will worry all EU parents especially single mothers or fathers with responsibility for children left behind in their country of origin. In the current period of cuts in public expenditure it will be difficult to persuade governments to overlook an opportunity to make savings in the payment of benefits. This measure is a blow to social Europe.
- **Abuse of rights or fraud.** The settlement highlights demands already made by Member States to address cases of fraud and other criminal activity and makes it easier to deport individuals “whose personal conduct is likely to represent a genuine and serious threat to public policy or security”. Rather than being able to take action against an EU citizen only if he or she presents an imminent threat, Member States may now take past conduct into account and take measures even in the absence of previous criminal conviction. The widening of the scope of reasons for expulsion increases the discretionary power of national authorities to decide who should or should not be on their territory, thus weakening EU citizenship. It is a reminder of citizenship in the 19th century when it was still possible for criminals and “undesirables” to be shipped to Australia or Ile de la Réunion.
- **Family reunion and third country nationals.** This tightening up of free movement is reinforced by the call to address cases of making use of free movement as a route for bypassing national immigration rules applying to third country nationals. European citizens should be aware that falling in love with a third country national might be challenged by the authorities as a marriage of convenience. That such abuses exist, there is no doubt, but do authorities really lack the powers to deal with them? In addition, the European Commission will propose new secondary legislation in order to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen or who

marry a Union citizen only after the Union citizen has established residence in the host Member State. The settlement with the UK amounts to a reversal by governments of an earlier judgement by the Court of Justice of the European Union, which did not accept such restrictions on family reunions between EU citizens and third country nationals (Metok Case – 127/08). Over time free movement of people has become less strictly intra-European and more linked to global migration, a trend government would like to resist, but cannot.

The language of the European Council conclusions of 18-19 February is negative, failing to highlight the benefits of free movement. The statement places exaggerated emphasis on the means by which Member States may protect themselves against the abuse of European rights. The “exceptions” accepted by the CJEU are highlighted and presented as if fraudulent behaviour by EU citizens was almost a standard practice. As already noted the CJEU has become more restrictive in applying the equal treatment principle by giving more scope to Member States to contest the right of residence in first place when inactive citizens are concerned. In the settlement with the UK, EU governments are highlighting their own possibilities for controlling free movement. Could this result in further restrictions on free movement? The measures fall disproportionately on low-paid workers, hard-up families and third country national family members, precisely the groups which already face the most restrictions on their free movement rights, and this is not only the case in the UK. The effect on overall numbers of EU citizens taking up employment in the United Kingdom is unlikely to be as significant as the quotas or work permits associated with the transitional arrangements for workers coming from new Member States after enlargement of the EU. It should be recalled that it was entirely on its own responsibility that in 2004 the UK along with Sweden and Ireland did not take up the option of imposing transitional restrictions on access to work for Polish and other citizens from new Member states. In other Member States such as Germany which did impose transitional arrangements numbers were not necessarily less than in the UK. Even then, ways were found round restrictions for example with workers becoming self-employed rather than employees. It is also difficult to explain and administer complex measures for progressively phasing in work benefits or indexing child benefits. On the other hand, the waste of time, disruption and cost to the administration and the exercise of European rights are a small price to pay by comparison with BREXIT. The main objective for all those concerned with the preservation of free movement across Europe should be to ensure that the decisions of the Council of 18-19 February are limited to the UK and that alternative more progressive policies to the emergency brake, such as the creation of a European free movement solidarity fund outlined above, are developed.

2. If the United Kingdom decides to leave the EU

A prolonged period of major uncertainty and chaos

In case of a vote to leave the EU, UK citizens lose their European citizenship and the Council settlement of February 2016 becomes irrelevant. In the paper *The Process for Withdrawing from the European Union* (HM 916 of February 2016), the UK Government explains that the only possible route for exit is through applying Article 50 of the Treaty on the European Union.

Article 50 TEU

1. Any Member State may decide to withdraw from the (European) Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the Council of its intentions. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Nation State concerned unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Article 50 has never been used, so this is entirely unknown territory towards an unknown destination. The process described is weighted in favour of the existing Member States which first draw up guidelines among themselves before opening talk with the UK. Two

separate issues have to be dealt with at the same time or consecutively: the arrangements for withdrawal and the future relationship with the Union. Nor is it clear to what extent negotiations are led by the European Council or the Commission. The article provides that if there is no agreement within two years, which appears highly likely, the deadline can be extended for a further two years. This however has to be decided unanimously by EU-27 which is likely to lead to blocking Member States extracting further concessions from the UK. After the negotiations, the European Parliament accepts or rejects the results which are then agreed by the Council of the European Union before being ratified by national parliaments.

The UK government paper draws attention not only to the uncertainties of the procedure but also to the breadth of issues which have to be negotiated after 40 years of membership. How to ensure that European citizens' rights are given priority when there will be so much at stake economically? Could they be settled quickly? This appears desirable but unlikely with so much lobbying for interests across the spectrum of manufacturing and service industries. For the much more limited negotiations which led to the settlement of February 2016, free movement of persons was the most difficult and the last piece of the package to be put in place. In order to settle its new trade relations with the EU and the rest of the world, the UK estimates that the whole process could take 10 years. It could take longer to decide and implement the issues of free movement of persons, which are both contentious and seen as a lesser priority. This could leave an estimated 2 million British citizens resident in the EU and over 3 million EU citizens resident in the UK in an impossible situation of uncertainty for far too long a period, even if for the first two years and a possible extension for a further two, their previously acquired EU rights would remain in force. And there would be a knock-on effect for a much larger number of people working or living less permanently across borders between the UK and the rest of the EU. By no means all cross border activity is recorded in the official statistics; nor is there much clarity about contractual agreements linked to EU membership.

The total of 5 million permanently resident EU citizens involved in or from the UK amounts to over one third of the total established by Eurostat of free movement of people for EU 28 . Uncertainty as to their personal situation is likely to be compounded by economic uncertainty with the pound fluctuating in relation to the Euro and other national currencies. Whilst rights, entitlements and citizenship may well be taken for granted in normal circumstances, threats to them brings home how they affect life choices. For many the period of waiting and uncertainty will make it difficult to plan their own future or that of their children. The possibility of losing EU citizenship status has already led some UK citizens with a parent or grandparent born in Ireland to seek Irish citizenship. Other UK citizens may opt for dual citizenship of their country of origin and their country of residence as a better way to safeguard their interests before waiting for future solutions at government or EU level. EU citizens permanently resident in a United Kingdom which will become a non-EU

country could well apply for British citizenship.⁷ Just as the likely impact of new countries joining the EU led to all kinds of different predictions so a country leaving will create even more uncertainty, especially one which occupies such a pivotal role in Northern intra-EU mobility. Without the close cooperation within the EU, there are likely to be problems at borders such as Calais, the UK ports, or the border between Gibraltar and Spain, and Northern Ireland and the Republic. Without the protection of European citizenship and equal treatment there is likely to be more discrimination against British passport holders from minority groups. The situation of uncertainty and delay will also cause problems for the administration whether at local level in the town hall for delivering residence permits, or at regional or national levels when it comes to answering questions about social benefits, social security, health or the recognition of professional qualifications-both in the UK and throughout Europe. British pensioners on the Costa del Sol and elsewhere in the EU are particularly concerned. In the absence of official EU responses until agreement with the UK is reached, there are likely to be a variety of different often contradictory national responses, creating further barriers to free movement of persons. The hidden costs involved will not be recoverable. The calculation of pensions by totalizing work periods from different EU Member States in case of Brexit will be a major concern for UK citizens who have retired in the EU, those who have worked in the EU and retired in the UK and European citizens who have worked in the UK.

European rights and the internal market

The last page of the UK government document on the process for withdrawing from the European Union contains a commitment to uphold acquired rights:

How these negotiations might affect UK citizens.

UK citizens get a range of rights from our membership of the EU. If the UK were to leave the EU, all of these rights would have to be covered in a successor arrangement. If we left the EU without agreeing what would happen to these rights, it would at the least bring them into serious question, creating difficulty for UK citizens who relied on them.

A selection of these rights includes:

- the right to live, work and own property in all 28 countries of the EU;
- the ability to retire to another EU country;

⁷ Naturalisation in the UK and Ireland on the rise due to fears of BREXIT (eudo-citizenship.eu). Sales of the textbooks used for the preparation of the citizenship exam in the UK have quadrupled. “Meanwhile UK citizens use their family ties with Ireland to secure EU citizenship”. It should be noted however that having or obtaining dual citizenship does not solve all cross-border problems. A dual UK-French citizen for example will only be considered as British in the UK and as French in France. So, a dual national would not be able to invoke French nationality to claim family rights in the UK and vice-versa.

- the right to receive healthcare that is free at the point of use and paid for by the NHS, using the European Health Insurance Card;
- the right to vote in local elections in other EU countries;
- mutual recognition of child custody decisions across the EU;
- the use of the European Small Claims Procedure to reclaim up to €2,000 from individuals in other EU countries; and
- the right to use public services in other EU countries.

The document states “there would be no requirement under EU law for these rights to be maintained if the UK left the EU”. Should an agreement be reached to maintain these rights, the expectation must be that this would be reciprocated for EU citizens in the UK. The assumption made by the government is that such an agreement might be reached in the context of the UK joining the European Economic Area (EEA) with a similar status to that of Norway requiring that in exchange for access to the internal market, free movement of persons to and from the UK would be maintained. But this will never be easily accepted by many in the ‘leave’ campaign. The argument on the EU side, and one which has been made for example following the referendum on 9 February 2014 in Switzerland in favour of immigration quotas, is that the internal market is not like a Swiss cheese with holes in it and that the four modern commercial freedoms of people, goods, services and capital are indissoluble. In turn, however, the UK Government will have a mandate to negotiate tougher restrictions and emergency brakes on EU citizens than those agreed in February. Even if in the most optimistic scenario the core of the European rights might well be preserved, although with additional restrictions, their enforcement will be an uphill struggle. This is especially so since EU governments and Institutions consider that in the February 2016 agreement they gave the UK an opportunity to accept a generous concession which would have been rejected. There is no guarantee however that this will happen and that the UK will stay part of the internal market. In which case the rights or some of them listed in the government document will disappear and the rest of this description of a possible BREXIT scenario becomes irrelevant.

The main issue in the area of free movement of persons is the gap between the fine principles of European law and the way European rights face numerous obstacles and red tape on the ground. If in the case of BREXIT, the UK remains part of the internal market, its citizens will still be able to use EU assistance services for citizens and businesses such as Europe Direct, Your Europe Advice and Solvit. For more serious complaints it would be possible to go to a ‘surveillance authority’ or have the case referred from a national court to a special EFTA-EEA Court which exists alongside the CJEU in Luxembourg. However, whilst support outside the EU from the UK government would become more important, the latter

would not be party to legislative decisions which affect internal market rules and European rights – it is a question of “co-shaping” not “co-deciding”. A number of joint expert, ministerial and parliamentary committees bring together EU decision-makers and the representatives of neighbouring states which are part of the internal market, but these are not effective forums for raising and solving citizens’ concerns. The government would be part of the internal market, subject to EU decisions but without participating in decision-making in the EU Institutions. The position of UK citizens would mirror that of the government being part of the internal market but without the European arm of their citizenship. To an increasing extent European rights in the internal market beyond the EU are shaped by the European court’s case law based on the citizenship articles which can only be invoked by EU citizens.

There is no reason why people in the UK, like many people in Switzerland or Norway, should not feel just as much European citizens as those in the EU, even without the formal status of EU citizen. The loss of Union citizenship may not result in the loss of all the rights associated with that status, but it will make access to the appeal mechanisms which are responsible for their enforcement much more difficult. There is no reason why UK citizens should not petition the European Parliament, but the extent to which the Petitions Committee takes up a petition and hears its representatives depends on its substance and political importance. A petition from those who do not vote in European elections is inevitably a second order petition. Using other channels to appeal or defend European rights with the EU Institutions is even more difficult. The European Ombudsman deals with complaints from EU citizens or organisations with a registered office in Member States. Using the EU’s freedom of information or access to documents regime⁸ is also subject to citizenship or residence in the EU. Only EU citizens over the age of 18 can sign a European Citizens’ Initiative (ECI), whereby a minimum of 1 million people demand that the Commission presents a new law.⁹ Anyone examining the annual reports relating to these mechanisms for access and appeal or looking through the register of ECIs will understand that they are in their infancy. As awareness of European rights increases and possibilities expand through social media for collecting signatures across national borders, the importance of direct channels of communication between citizens and the EU Institutions will increase. The fact that they will be beyond the reach of British citizens in the case of BREXIT will be problematic not only for the defence of European rights, but also when internal market rules more generally apply to the UK. BREXIT would also be a setback for all reformers pushing for a more transparent, accountable and democratic EU - they would lose support from an important part of the EU’s active citizens.

⁸ Regulation (EC) no. 1049/2001 regarding public access to documents of 30 May 2001.

⁹ Regulation (EU) on the citizens’ initiative no. 211/2011 of 16 February 2011.

CONCLUSIONS

As pointed out at the beginning of this paper, the extent to which keeping or losing EU citizenship could be a factor in the choice of UK voters on 23 June depends on assessing the importance or otherwise to them of the European rights attached to this status. A case has been made out in this paper that European citizenship has deeper historical roots, has been given more legal substance and is more widely practiced than generally thought. There is a tendency to underestimate this first transnational citizenship of the modern era because its pieces are scattered and its symbols deliberately underplayed out of deference to national citizenship. When put together as ECIT has done in its guidelines, the sum appears more than in its parts. Moreover, European citizenship is popular and now even the most sceptical observers accept that it exists and not just as a rhetorical device.

The real question for voters is what European citizenship might become for their children or grandchildren. In turn its future depends very much on their vote, since this question is entirely open and there is no road map for the development of European citizenship. The practice of free movement rights, transnational citizen action towards the EU or across Europe is bound to increase through growing interdependence and the digital economy. As practice increases so its opportunities to be a European citizen should be enjoyed by more people, even though there is a long way to go before it becomes a status of equality enjoyed by all.

Currently, the future of EU citizenship faces the major political paradox of being at the same time the potential basis for solving many of the crises facing the EU, whilst being also under threat from them. The EURO crisis has tested the limits of European solidarity depending on whether you are a citizen of a country providing bailouts, on the receiving end with unacceptable conditions attached or on the outside like the UK but nevertheless affected. The capacity of governments to find solutions is constrained by the need to refer back only to their own citizens and national parliaments. Our approaches to citizenship are however very different between and within countries to the extent that it could be said that there is something of a crisis of citizenship. This has been revealed by the divergent reactions to terrorist attacks beginning with London, Madrid and then Charlie Hebdo and more recently in Paris and Brussels. For some this implies more European cooperation on security to others a retreat behind national borders. To an even greater extent the reactions across Europe to the migration and asylum crisis have shown not only how divided governments are but also citizens in terms of any real sharing of European values when put to the test. What else could hold the EU together except for a stronger sense of shared citizenship?

In turn this can only come about through processes of education, debate and political choice over at least a generation, even if it is urgent to assert European citizenship now and before

it is too late. The foundations exist but creating a full-scale European citizenship means considering a range of further questions both practical and conceptual:

- How to make European citizenship work properly and close the gap between the fine principles of EU Treaties and the Charter of fundamental rights and how people are treated? What reforms are necessary to enforce European rights and resist the erosion of freedom of movement?
- How well does the concept of European citizenship fit with the EU's different decision-making processes, sometimes more federal sometimes more intergovernmental? Can citizens really have a voice through existing channels dominated by lobbies and experts?
- How to turn European citizenship into a status of real equality so that its advantages are enjoyed not just by a relatively privileged, mobile and linguistically competent few, but by everyone resident in Europe?
- Could a broader European continent-wide citizenship be conceived based neither on a fixed territory nor any type of European super state, but shared values and sufficient popular support to counterbalance the centrifugal forces of extreme nationalism?

A debate on what it means to be a citizen of Europe is long overdue in an EU facing multiple crises of debt, unemployment, migration and threats to security. It is a debate in which UK citizens should take the lead provided a majority votes to bury BREXIT on 23 June. A reason to do that is to keep rather than lose the status of EU citizenship not just for what it brings now but for what it could and must become. What else can hold the EU together?