

The Brexit Papers



Acquired Rights

Paper 15



Bar Council Brexit
Working Group
June 2017

**THIRD
EDITION**



Brexit Paper 15: Acquired Rights

Summary

Millions of UK citizens have established their home, family and working life in the EU27 countries, and vice versa, pursuant to rights granted by the EU Treaties. Article 50 TEU provides that in the absence of a withdrawal agreement, the Treaties “cease to apply” to the departing State two years after notification of withdrawal. On ordinary principles of EU and international law, supplemented by the ECHR, citizens would probably keep the benefit of some rights acquired during the UK’s membership of the EU. But there is no certainty or consensus about the scope of those rights, who would benefit, and for how long.

It is critically important that the UK and EU reach agreement, before the 2-year period expires, providing certainty about the post-Brexit status of those who have exercised Treaty rights. Enforceable protection for acquired rights should be enshrined in the Article 50 withdrawal agreement. This is already identified as a priority in the European Council’s negotiating directives for Brexit.

If progress towards a withdrawal agreement falters, the UK and EU should at a minimum agree such protection in a separate transitional arrangement. There is a case for the UK Government making unilateral legislative provision to ensure continuation of EU27 persons’ rights within the UK while negotiations proceed. But that is no substitute for reaching swift and effective reciprocal agreement at UK/EU level.

The issue: which EU rights will people keep when the Treaties no longer apply?

1. Since pre-referendum campaigning began, commentators posed the question: what would be the impact of Brexit on the legal status of EU citizens who, in exercise of their free movement rights, have taken up residence on either side of the Channel, and have established their working life there – and have perhaps founded a family, or gone on to retire there?

2. The Bar Council's 'Referendum Papers' posed the question how far a doctrine of "Acquired Rights" might protect these individuals. The Bar Council commented that the position lacked certainty, and urged the UK Government, in the event of a 'Leave' vote, to resolve the position by prioritising this topic in a withdrawal agreement. Others made similar observations.

3. Since the service of notice of withdrawal under Article 50, it has become clear that it may not be possible to conclude the withdrawal negotiations within the 2-year timeframe. So, it remains important to try to identify the default, "no agreement" position. That also forms a useful starting point for the negotiated content of a withdrawal agreement.

4. The rights that natural and legal persons have acquired as a result of the UK's membership of the EU are many and varied. For example, the key rights of EU citizenship include the right of exit, right of entry, right of unconditional residence for up to 3 months (including non-EU family members), right of long-term residence for EU citizens (and non-EU family members) subject to economic activity/no economic burden conditions, right of permanent residence after 5 years' exercise of Treaty rights, right to equal treatment, and a State right to expel on non-economic grounds.¹ There is also the question of rights accruing after withdrawal, such as rights of permanent residence where the 5-year period started before the withdrawal date.

5. There are also potential accrued entitlements such as pension rights and economic interests, including vested rights under existing contracts which take advantage of EU rights (such as free movement of goods or services) where future performance would be made impossible, or unduly onerous, if the EU right were to disappear on withdrawal.

6. As a matter of law, the Article 50 TEU proposition that the Treaties "cease to apply" does not mean that they are treated as never having applied. But there are few precedents for the present situation, making it hard to ascertain exactly how far the distinction applies post-withdrawal. Many of the rights potentially in play do not

¹ The House of Lords EU Committee, in its report 'Brexit: Acquired Rights' (10th Report of 2016-17), described these rights as "some of the most fundamental" in EU law.

concern a simple entitlement that has “vested” in the past, but relate to continuing or future activity. That is particularly true in relation to economic rights: the real value, for example, of establishing a business in another Member State lies in the possibility of continuing to trade for profit in the future.

7. Three areas of law potentially govern the impact of withdrawal on the status of persons who have exercised Treaty rights:

- International law, including the general law of treaties
- EU law itself, and
- The European Convention on Human Rights (ECHR), to which all EU Member States are parties.

International law

8. The Bar Council agrees with the conclusion of the House of Lords EU Committee in its ‘Brexit: acquired rights’ report that the Vienna Convention on the Law of Treaties is unlikely to protect the type of rights which Brexit has brought into focus. This is because the provision usually cited² focuses on the vested rights and obligations of the parties to the Treaty (being sovereign States), not to individuals who are nationals of a party, nor to companies incorporated under a party’s laws.³

9. The Permanent Court of International Justice stated in 1926, “...the principle of respect for vested rights ... forms part of generally accepted international law.”⁴ International law has, however, historically only protected rights of a “patrimonial nature”, being property, ownership, contractual and concessionary rights. There is no precedent in international law for the protection of the wide array of acquired rights that is currently being discussed, notably the rights said to arise by virtue of EU citizenship and economic interests.

10. Even if nationals could benefit from these provisions, they might find it impossible to enforce their rights in practice. In international law, generally speaking only States have standing to bring proceedings in international tribunals such as the International Court of Justice. Unless a particular treaty confers a remedy on individuals (as in the case of the ECHR), they cannot bring proceedings. In some

² Article 70(1)(b) deals with the question of acquired rights by stipulating that unless the treaty provides, or the parties to the treaty agree otherwise, the termination of a treaty “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.”

³ The Bar Council made this point in its Referendum Paper I, ‘New settlement or Brexit?’, at paras. 104-108: http://www.barcouncil.org.uk/media/472106/paper_i_bar_council_eu_referendum_final.pdf

⁴ ‘Certain German Interests in Polish Upper Silesia’ <http://www.icj-cij.org/pcij/series-c.php?p1=9&p2=4>

continental legal systems, national courts can enforce rights under international treaties, but that does not apply in the UK's 'dualist' system.

EU law

11. The Treaties operate between the EU's Member States, but they nevertheless appear capable of conferring rights on individuals. The CJEU has held that EU law confers rights on individuals that "become part of their legal heritage".⁵ The UK Supreme Court in *Miller* also recognised a category of domestic rights acquired through EU law – though like the Divisional Court, it proceeded on the assumption that they would be abrogated by withdrawal from the EU Treaties.

12. There is EU precedent to suggest that some rights acquired by individuals during the life of a treaty can, in principle, survive its termination. The 1984 'Protocol on special arrangements for Greenland' (necessitated after Greenland obtained home rule from Denmark and subsequently voted to leave the EEC) recognised "rights acquired by natural or legal persons during the period when Greenland was part of the Community" and provided for an Act of Council to maintain those rights. The CJEU also recognised the pension entitlement acquired by German workers during periods of employment in Algeria while it was part of the EEC, before gaining independence from France.⁶

13. But in the context of Brexit, it is far from certain what, if any rights, the remaining 27 Member States and the EU institutions would be prepared to recognise as "acquired" absent specific agreement.

14. Another difficulty, in the absence of agreement, is a method of enforcing acquired rights. Causes of action before the CJEU, for example, are limited, and the right of individuals to issue proceedings is heavily circumscribed. It is also unclear what jurisdiction, if any, the CJEU could exercise post-Brexit in respect of claims by UK nationals against EU27 States or by EU27 nationals against the UK. Within the UK, domestic proceedings are likely to prove a better route to enforcement. The 'Great Repeal Bill' will be designed to 'freeze' directly effective EU rights and obligations into domestic law when Brexit takes place. So, even if the UK courts can then no longer refer questions to the CJEU, they will probably have jurisdiction to determine questions about the existence and extent of rights originally derived from the Treaties.

⁵ *Van Gend en Loos*

⁶ *Ulrich Horst v Bundesknappschaft*

ECHR

15. The ECHR (notably Article 8 and Article 1 Protocol 1) has traditionally protected a variety of rights acquired by individuals over time. Article 1 Protocol 1 can potentially protect property rights akin to, and probably wider than, those protected under other international law: for example, intellectual property, contracts, judgments, licences and certain kinds of legitimate expectations. Article 8, which protects rights to private and family life, also has a wider application than customary international law.

16. For the time being, proceedings relying on ECHR rights could be brought in the UK under the Human Rights Act 1998. But the ECHR does not come close to protecting the full range of rights that EU citizens enjoy as a result of their State's membership of the Union.

Conclusions

17. The rule of law requires that citizens understand their legal situation with adequate certainty, so that they can plan and order their affairs. Whatever the precise range of rights under discussion in the context of Brexit, at stake are some of the most important aspects of day-to-day life for EU citizens who have made their home or working life in Member States of which they are non-nationals.

18. While the three bodies of law considered above may, together, provide some degree of protection for certain rights acquired by individuals as a result of the UK's membership of the EU, they each have significant shortcomings. There is a conspicuous lack of certainty or consensus about which EU-related rights are "acquired" and survive Brexit; if so, by whom and for how long; and how they might be enforced. There is no precedent in either legal principle or political agreement for the protection of the wide array of rights which are in doubt as a result of Brexit.

19. The Bar Council therefore strongly echoes the recommendation of the House of Lords EU Committee that express provision for specific acquired rights be a priority in the negotiations between the UK and the EU. The importance of this is also highlighted in the European Council negotiating directives for Brexit, which set out a series of minimum rights which any agreement should address. It is also important to reach agreement on how such rights can be enforced by the individuals concerned.⁷

20. At an early stage in negotiations, both sides should work to identify the rights requiring protection and to prioritise areas of particular significance for the individuals concerned: for example, the right of EU/UK nationals already settled in

⁷ See further the Bar Council Brexit Paper, 'Dispute Resolution and Enforcement Mechanisms Post-Brexit'.

UK/EU to continue to reside and lead a family life in their adopted country, and rights of economic significance such as access to the labour market (including self-employment), pensions and social security.

21. The uncertain 'default' position makes especially alarming the prospect that the UK might leave the EU on expiry of the two-year Article 50 period without a withdrawal agreement. In the Bar Council's view, even if nothing else is capable of political agreement within that time, there must at least be a transitional arrangement under which the status of expatriate UK and EU27 nationals is preserved, or adequately defined pending further agreement. As noted above, there is at least some precedent (Greenland) for the rights of individuals to be given special consideration on withdrawal of a territory from the Union.

19. For economic reasons, there is also a case for considering the position of legal persons currently doing business cross-border who may have entered into contracts and other arrangements, where performance might be jeopardised by a 'no agreement' withdrawal from the EU.

20. If negotiations for a withdrawal agreement appear to be stalling, we would recommend that the UK government should legislate to secure, unilaterally, the post-Brexit position of EU27 nationals within the UK.⁸ That may well ease the achievement of a reciprocal transitional arrangement to come into effect on expiry of the two-year period.

21. Assuming a withdrawal agreement or transitional arrangement is reached, the Bar Council recognises that it cannot address all possible acquired rights. It should therefore include provision to set minimum standards that should be respected where there is no specific provision in the agreement.

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⁸ It might be necessary to incorporate measures to meet concerns expressed by some in the business community that this should not create an uneven playing field by giving EEA firms the right to continue cross-border business in the UK when UK firms have lost that right in the rest of the EEA.

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