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THE FEASIBILITY OF ASSOCIATE EU CITIZENSHIP FOR UK CITIZENS POST-BREXIT

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Executive summary

This report has five principal findings on the protection of the status of Union citizenship and the related rights post-Brexit. **First**, the key question as to providing this protection is whether Union Citizenship continues post-Brexit, or whether Brexit extinguishes Citizenship. The report considers that continuity (“Continuity”) is the more convincing interpretation of European Union law and international law as it stands, but it also considers the alternative of creating the new status of Associate Citizenship of the Union for British nationals (“Associate Citizenship”) with related rights. **Second**, the report identifies two possible means of realising these models: i) legislation by the Union to clarify Continuity and ii) the Withdrawal Agreement between the EU and the UK enshrining Associate Citizenship or Continuity. **Third**, it is established that no revision of the Founding Treaties is needed, irrespective of the model followed. **Fourth**, UK citizenship law is highly flexible in line with the principle that individuals ought not to be stripped of citizenship against their will. **Fifth**, devolution in the UK entails that Wales may have a considerable responsibility to protect Union Citizenship rights post-Brexit.

I. The options: Continuing Union Citizenship or creating the new status of Associate Union Citizenship

The first option the report proposes can be called “Continuity Union Citizenship”. This continuity reflects the state of European Union law post the Treaty of Lisbon, whereby Union citizenship is the fundamental status of individuals that cannot be taken away. However, the rights themselves contained within citizenship can change over time.

Thus, nothing in the status quo would change as the result of Brexit, neither for the Union of citizens of British nationality on the territory of the Union nor for the Union citizens of EU27 nationality in the UK. EU and UK action would clarify the existing legal situation, even if not strictly necessary. This continuity relates to Citizenship free movement rights that have been exercised or will have been exercised at the time the UK withdrawal becomes effective. The dormant rights of those residing in their own Member State of withdrawal are different in that no legal situation has been created yet to continue.

Continuity also reflects the state of international law. The 1969 Vienna Convention on the Law of Treaties (VCLT) will be binding on all remaining Member States, the UK, and the EU itself post Brexit. It ensures that the status and rights of those EU citizens resident in the territory of the Union and those resident in the UK will continue. Art. 70(1)(b) of that Convention provides that 'legal situations' created during the currency of the Treaties continue after the withdrawal. That covers the situation of nationals of Member States that have been admitted to and reside in another member pursuant to the Treaties. These go on after withdrawal unchanged. Art. 70(1)(b) of the Vienna Convention also continues 'rights' of individuals derived from treaty. As the fundamental Case 26/62 *van Gend en Loos* makes clear, the Founding Treaties of the EU grant rights directly to individuals. This interpretation of the Convention that *ongoing* situations and rights continue is supported by the overriding objective to ensure legal certainty and to prevent withdrawals from treaty having any retroactive effect. It is also supported by state practice.

There is, however, a reading of European Union law and Art. 70(1)(b) of the Convention that the exit of a Member State pursuant to Art. 50 TEU extinguishes all rights of individuals created by the Founding Treaties. If one were to adopt that reading, then European Union law and international law would at least demand that a treaty be negotiated on Associate Union Citizenship, which the report discusses as an alternative model. In this second case, the status that emerges as Associate Citizenship and the bundle of rights that go with it will have to be defined. EU action would have constitutive effect. Whether there should be any distance from the bundle of rights that come with full Citizenship is a political question.

A third option is an individual opt-in for British nationals, conferring an exclusively personal status. This option is the furthest from the law as it stands and will therefore not be explored in this report.

II. Legislation to enshrine Continuity Citizenship

The Union could legislate on Citizenship post-Brexit. The available competences, set forth in Art. 21-24 TFEU, empower the Union to legislate to that effect.

Such legislation will only have a clarificatory role in the case of Continuity as a matter of logic. This legislation to continue citizenship would essentially extend the law as laid down in Directive 2004/38 and Regulation 492/2011, and would also codify the rights that are recognised in the case law of the Court of Justice of the European Union. It would protect the rights of permanent residents and the legitimate expectation of others to obtain that status for a defined period of time. It could also protect dormant rights.

The legislation would protect British nationals in the EU. It would not, however, have any binding effect in the UK post-Brexit. While Continuity does not change anything, the best way to protect and make those rights of EU27 nationals enforceable is to include them in the Withdrawal Agreement even though it is not technically necessary.

III. The Withdrawal Agreement as a means to achieve either Continuity or Associate Citizenship

The alternative means is a treaty between the EU and the UK, the so-called Withdrawal Agreement. That treaty will be binding on the EU and the UK as international law post-Brexit. Two new statuses could be created in the treaty. Associate Union Citizenship for British nationals could be matched by an Associate British Citizenship for Union citizens from the remaining Member States.

This agreement should be based on reciprocal protection of *exercised* citizenship rights of British nationals in the EU and for EU27 nationals in the UK. *Dormant* rights to free movement could be protected in the agreement for a defined period of time after the entry into force of the Withdrawal Agreement. The political rights would be part of the whole package of rights included in the agreement. Thus, a resident on the territory of the Union would be allowed to vote and stand for the EP in their host Member States, represented by the members of parliament allotted to that Member State. Union citizens resident in the UK would vote in the Member State of their last residence.

The agreement will have to have two pillars. The first pillar comprises the rules that concern British nationals in the Union territory. These rules will automatically become part of Union law and as such be directly applicable before the courts of the remaining Member States. Directives and regulations to implement it might still be needed, though, given the limitations of direct effect and the need for certainty and clarity. The second pillar comprises the rules concerning EU27 nationals in the UK. Under UK constitutional law, these international rules will have to be transformed into national legislation to become internally applicable.

UK citizenship law is highly flexible. It has created differentiated statuses with related rights. An important principle underlying that flexibility is that individuals may not be stripped of their citizenship as result of territorial changes. That principle should apply to the protection of Union citizenship.

Judicial protection of these treaty-based rights would also be organised along this two-pillared structure. The national courts of the EU27 would adjudicate the rules applying in the Union territory. They would be able to refer questions to the European Court of Justice under Art. 267 TFEU. British courts would adjudicate the rules applying in the UK. They would no longer be able to seize the European Court.

That has to be reinforced by a mechanism to settle disputes that may arise between the EU and the UK relating to the agreement. Two such mechanisms are conceivable. An international court of arbitral tribunal may be created. The agreement would then have to include provision to protect the exclusive jurisdiction of the ECJ for the interpretation of EU law. Alternatively, the agreement could confer jurisdiction of the European Court of Justice.

IV. No need for revising the Founding Treaties

This report furthermore concludes that neither continuity citizenship nor associate citizenship require any revision of the Founding Treaties. The provisions on Union citizenship, Art. 20-25 of the Treaty on the Functioning of the European Union, are to be interpreted as not standing in the way of protecting citizenship status and rights post-withdrawal. That protection will concern persons that are nationals of a former if not current Member State, and not interfere with the exclusive competence of the Member States over who obtains their nationality and thereby Union citizenship. However, it is conceivable to include in the Withdrawal Agreement provision to amend the Founding Treaties. That would make it a so-called mixed agreement that needs to be ratified by all remaining Member States.

V. UK citizenship law and devolution

The report also finds that Wales, as other parts of the UK, has considerable devolved powers to realise a non-discriminatory protection of the rights of EU27 nationals, basing its rules on public services on residence rather than nationality. The UK government does currently retain the powers over immigration, though.