

THE LEGAL IMPLICATIONS OF BREXIT

Proceedings of the conference
in the context of the 2018 General Assembly
of the UAE – European Lawyers' Union

LISBON, 30 NOVEMBER 2018

EDITED BY
Pedro de Gouveia e Melo



Union des Avocats Européens
European Lawyers' Union

THE LEGAL IMPLICATIONS OF BREXIT

Proceedings of the conference
in the context of the 2018 General Assembly
of the UAE – European Lawyers' Union

LISBON, 30 NOVEMBER 2018

EDITED BY
Pedro de Gouveia e Melo



THE LEGAL IMPLICATIONS OF BREXIT

Proceedings of the conference in the context of the 2018 General Assembly of the UAE – European Lawyers' Union

Lisbon, 30 November 2018

EDITED BY

Pedro de Gouveia e Melo

PREPARED AND DESIGNED BY

**Morais Leitão, Galvão Teles, Soares da Silva
& Associados**

Co-organisers:



 **CÍRCULO DOS ADVOGADOS PORTUGUESES
DO DIREITO DA CONCORRÊNCIA**

With the support of:



M
L **MORAIS LEITÃO**
GALVÃO TELES, SOARES DA SILVA
& ASSOCIADOS

FIRST PANEL – BREXIT: WITHDRAWAL AND TRANSITION

Opening Words from the Moderator	6
José Luís da Cruz Vilaça	
Outline of the Brexit negotiations: players, roles and state of play	12
Joana Cruz-Schilling	
Can Brexit be Stopped? The <i>Miller</i> case	19
Fergus Randolph QC	
Brexit and Ireland	27
Florence Loric	
Soft, Hard or no Deal Brexit: The EU and the Atlantic Dimension of Brexit	37
Bernardo Ivo Cruz	

SECOND PANEL – BREXIT AND THE LAW

Opening Remarks from the Moderator	46
Pedro de Gouveia e Melo	
The Impact of Brexit on Judicial Cooperation	49
Rita Giannini	
Brexit and the Practice of Law	55
Nicole Hirst	
Free Movement after Brexit	61
Inês Quadros	

FREE MOVEMENT AFTER BREXIT

Inês Quadros

First of all I would like to thank the organizers of the conference for the opportunity to take part in it. Although I have practiced law for some years, I am currently mostly an academic, and therefore I would highly appreciate your insight on the practical consequences of Brexit.

The subject that was proposed to me relates to free movement rights after Brexit. Although the subject lacks some stability now, because we don't know the results of the votes on the transition agreement yet, nor the effect or the result of the political declaration, I will base my presentation on what we have so far, and I have tried to systematize the topic by outlining three problems that I consider to underpin the future relationship between the UK and the EU on free movement.

The first topic relates to rights of free movement and residence within the transition period, and I've entitled this topic in the line of "You can't always get what you want". The second problem deals with the future relationship and economic freedoms, and I've entitled it "Same, same, but different". The third topic deals with the remedies available to individuals, and is entitled "You should have known better".

So, let's start by the first topic – "you can't always get what you want", and I would add "or at least when you want it to happen". The agreement for the transition period, to which by now you are probably acquainted,

accounts for the maintenance of several rights of EU citizens in the UK and rights of UK nationals in EU Member States. In Part II of the agreement, article 9 and the following guarantee that the rights of residence for citizens and rights of family members as stated in the directive of 2004 will be entirely applicable until the end of the transition period. Theresa May wanted it differently, to safeguard only the rights of EU citizens that entered the UK until March 2019, but she eventually accepted to extend those rights to all those arriving to live in the UK at any point until the end of 2020, or even later, if the transition period is extended. So, as we have heard earlier today, this is somehow puzzling for the UK since the subject goes to the heart of the argument in favour of Brexit. The United Kingdom wanted to take back control of the borders – that is to decide on rights of free movement of non-economic actors –, and it wanted to regain control on decision making, which basically meant that it didn't want to remain subject to the Court of Justice's creativity. Well, in both cases the UK didn't take back the control, since it had, first, to postpone the borders control, and, second, to continue to abide by the Court of Justice during the transition period.

As you know, rights of free movement have in the Treaty, and in the directives, only their point of departure. Their depth and significance were mostly the result of extensive case law of the Court of Justice that upgraded them to the nature of fundamental rights of EU citizens. Because they were considered fundamental rights, they were always broadly interpreted by the Court, and recognized as having a radiant effect towards all legal order. We can find multiple examples for that in an ever-expanding case law that, while reinforcing rights of free movement, actually challenged national laws on immigration (we can name several very known cases, like *Carpenter*,¹ *Chen*,² *Metock*,³ all in which the Court

¹ [C-60/00, judgment of 11.07.2002.](#)

² [C-200/02, judgment of 19.10.2004.](#)

³ [C-127/08, judgment of 25.07.2008.](#)

had to deal with national rules on immigration in order to guarantee rights of free movement to European citizens), on social benefits, as in *Brey*⁴ (which was also a pretext for Brexit – you probably remember that the agreement achieved by Cameron with the EU prior to the referendum related mostly to rights conferred to family members of citizens that did not reside in the UK), and on, let’s say, civil identification (like in *García Avello*⁵ and *Sayn-Wittgenstein*,⁶ for instance). By lifting residence rights and rights of free movement to the nature of fundamental rights, and hence by seeking their maximum protection, the Court brought to the scope of EU Law many areas which were not competence of the Union.

According to the transition agreement, the situation will not be altered when the UK leaves the EU next March, at least during that period (it may be different for the future relationship, of course). The agreement expressly reads in article 4 that “the provisions of the agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice handed down before the end of the transition period. The same article clarifies that “concepts and provisions of Union law shall be interpreted and applied in accordance with the methods and general principles of Union law”.

The second problem, which I have entitled “Same, same, but different”, deals with the future relationship between the UK and the EU, after the end of the transition period, when supposedly the EU provisions on rights of free movement and residence will cease to apply. Those rights will probably depend on mobility arrangements based on non-discrimination and full reciprocity, and not anymore on citizenship. So, time will then come for building a relationship much more to the like of the UK: an

⁴ [C-140/12, judgment of 19.09.2013.](#)

⁵ [C-148/02, judgment of 2.10.2003.](#)

⁶ [C-208/09, judgment of 22.12.2010.](#)

economic agreement without any trace of federalism, whichever form that takes. From that you can reasonably expect that economic rights and rights of movement and residence associated with the exercise of an economic activity will still be guaranteed. But I argue that even these rights will most probably be “same, same, but different” than what they are now. I mean, even if the final agreement on the future relationship grants to economic actors every right they have so far – free movement, residence, free exercise of an economic activity, that is the sum of all already existing rights connected to the exercise of the economic activity –, it will still make a difference that these rights no longer come in the package of citizenship.

I’ve selected two cases, that help me prove my point.

The first case is *Ziebell*,⁷ and it concerned a Turkish national that was born in Germany and lived there ever since. Although he had an unlimited residence permit in Germany, he couldn’t apply for the German nationality due to several infractions, mostly concerning drug possession, and several periods of imprisonment. Eventually in 2007 an order of expulsion was issued on the grounds that Mr. Ziebell’s conduct considered a serious disturbance to social order, and there was a high risk that he would engage in serious re-offending. It happens that in previous years he had found work and was employed, had gotten married, had a child, and for those reasons he challenged the order of expulsion, arguing that the provisions providing for protection against expulsion laid down in article 28 of the directive of 2004 should be applied by analogy to a situation coming under the bilateral agreement between Turkey and the EU. The Court of Justice didn’t agree. It argued that the different purposes of the EU treaties, and the EU-Turkey association agreement called for different solutions. In the view of the Court, the EEC-Turkey Association pursued a “solely economic purpose”, whereas the 2004 directive, far from that, aims

⁷ [C-371/08, judgment of 8.12.2011.](#)

to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty, and it aims in particular to strengthen that right.

Of course you could always argue that the future UK-EU agreement cannot be compared to the EU-Turkey agreement, in view of the very different relations and history that EU has with Turkey and the UK. Relations with Turkey have not been, and still aren't, always easy, there have been many ups and downs in the process of accession to the EU. Further, you could argue that, should EU laws be applicable by analogy to EU-Turkey agreement, you could face the ghost of massive immigration coming from Turkey.

But it actually happens that similar considerations were made by the Court regarding a very recent case concerning the EU-Switzerland agreement. And of course, it's hard to believe that the Court is considering massive immigration to or from Switzerland, so we are forced to take this judicial trend seriously.

This second case is *Picart*⁸ and was decided by the Court in March 2018. It deals with the agreement between the EU and Switzerland on the free movement of persons. It concerned a French national that had moved to Switzerland while maintaining substantial shares in several companies in France. To cut it short, some years later he wanted to challenge a French legal mechanism of exit taxation on unrealized capital gains that he had obtained. The Conseil d'Etat was unsure whether the right of establishment as a self-employed person within the meaning of the bilateral agreement had the same scope as the freedom of establishment, which article 49 of the TFEU Treaty guarantees to nationals of Member States. In its ruling, the Court recalled that, and I quote, "as the Swiss

⁸ [C-355/16, judgment of 15.03.2018.](#)

Confederation has not joined the internal market of the European Union, the interpretation given to the provisions of EU law concerning that market cannot automatically be applied by analogy to the interpretations of the Swiss agreement unless there are express provisions to that effect laid down by that agreement itself”. In practical terms, in this particular case it meant that Mr. Picard could not be considered a self-employed person, and thus rely on the right of establishment granted in the agreement, because while having changed its residence to Switzerland he maintained his economic activity in France. Therefore, he could not be considered either a frontier-worker (since he didn’t return to his place of residence as a rule every day, or at least once a week), nor he pursued an activity in Switzerland.

This decision differs from the case law of the Court of Justice on the right of establishment within the European Union. There are several cases in which the exact same situations were considered in relation to Member States’ nationals and the outcome was very different. In *N* case,⁹ for instance, a situation very close to the Picard case was dealt by the Court in relation to a Netherlands national that transferred his residence to the UK while performing the economic activity in his home State. In this case, the Court had decided that the individual could rely on the right of establishment by simply recalling the well-established case law according to which national measures which are liable to hinder the exercise of fundamental freedoms or make them less attractive are contrary to the Treaty.

So, both of those cases – *Ziebell* and *Picart* – are of huge relevance to the future relationship between the UK and EU. Of course we cannot be sure that the rationale the Court applied to the interpretation of the bilateral agreements with Turkey and Switzerland will be applicable to the future agreement between the EU and the UK, because, of course,

⁹ [C-470/04, judgment of 7.09.2006.](#)

again, the situations are very different: in the cases of bilateral agreements with Switzerland and Turkey, it was a matter of expanding the rights that individuals previously had, whereas in the case of the relationship between the UK and the EU, the case is of stepping back. That is why the political agreement actually takes this into account, when it states that “the period of the United Kingdom’s membership of the Union has resulted in a high level of integration between the Union’s and United Kingdom’s economies, and an interwoven past and future of the Union’s and United Kingdom’s people and priorities. The future relationship will inevitably need to take account of these unique context”.

But the problem is how to give practical effect to this wishful thinking. What we can affirm with a certain degree of certainty is that, without the citizenship package, economic rights tend to be differently understood. While EU citizens will no longer be considered as such by the UK, nor the other way around, there is the risk that free movement rights, whether connected to economic freedoms or not, will no longer be interpreted as fundamental rights, but probably merely as ancillary to an economic agreement between States.

And now to the final topic, that I’ve entitled “You should have known better”, which relates to other intriguing issue – the available remedies in cases that affect rights of individuals.

As you know, free movement rights have been recognized thanks to the development of principles of direct effect and supremacy, which were crucial to the judicial protection of individuals. It’s not clear how this protection will be guaranteed after the transition period, and in particular who will be responsible for the enforcement of rights. Further, the political declaration states that the UK ceases to be bound by the Charter of Fundamental Rights, and is now exclusively bound to the European Convention of Human Rights. Paragraph 7 of the political declaration states that “the future relationship should incorporate United Kingdom’s

continued commitment to respect European Convention of Human Rights while the Union and its Member States will remain bound by the Charter of Fundamental Rights, which reaffirms the rights as they result in particular from the European Convention of Human Rights". So, it seems that the protection of individuals has a point of connection through the European Convention on Human Rights.

But two problems actually arise from here. One is the different remedies that the Charter and the European Convention provide in the UK. While the Charter as EU law is directly effective, European Convention of Human Rights is applicable through the Human Rights Act, and hence judges cannot not override legislation incompatible with the Convention. The other problem is that the Charter and the European Convention, while pursuing, of course, the same purpose, don't always produce the same outcome, as should be known by legal actors and political negotiators. The differences were brought to light in the Court's opinion on accession to European Convention on Human Rights, and further, throughout the years, several literature provides for examples in which the two Courts have decided differently, or at least according to different methodologies. For instance, the importance of the general principle of mutual trust in EU law, demanding for a cautious approach in the case of interstate litigation, and the way in which the Court of Justice interprets article 52 of the Charter, as not precluding the primacy of EU law, are amongst the most notable examples that show a different understanding of rights enshrined both in the Charter and in the European Convention on Human Rights. So, it may happen in the future that similar situations be treated differently by each part. That whereas a British citizen residing in a different Member State claiming that the latter did not fulfil obligations arising from the bilateral agreement can invoke both the Charter and the Convention, the same could not be possible for a EU citizen residing in the UK.

So, in short, I would say “it’s a long and winding road”. It’s difficult to jump into conclusions so far, and to be anything else than problematic for now. On the other way around I’m an optimistic, and we are facing the opportunity of an unprecedented intellectual challenge. The complex net of relations in which the UK and the EU are gathered is surely a lot of food for thought for us, legal actors and academics.