STUDY

For the JURI committee

European Parliament

The impact of Brexit on the legal status of European Union officials and other servants of British nationality

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

The impact of Brexit on the legal status of European Union officials and other servants of British nationality

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, focuses on the legal status of EU active and retired officials and other servants of British nationality in the context of the UK leaving the EU under Article 50 TEU. It examines the legal position of EU officials and other servants of British nationality with their rights and possible remedies. It further explores avenues towards solutions for open legal questions.

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RESPONSIBLE RESEARCH ADMINISTRATOR

Roberta PANIZZA
Policy Department for Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

AUTHOR

Herwig C.H. HOFMANN, Professor of European and Transnational Public Law, University of Luxembourg

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LIST OF ABBREVIATIONS

CEOS	Conditions of Employment of other servants of the European Union
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union (which contains the Court of Justice, CJ, and the General Court, GC)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.11.1950)
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
GC	General Court (CJEU)
Staff Regulations	Regulation No 31 (EEC), 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ 45, 14.6.1962, p. 1385) with amendments (consolidated version 1962R0031-EN-01.05.2014-012.003-1)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland

EXECUTIVE SUMMARY

Background

In view of the host of novel and so far un-encountered legal questions arising from Brexit, the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee has commissioned this study on the *legal* framework governing the status of EU officials and other servants of British nationality[1].

Aims

- Analyse the legal position of active and retired EU officials and other agents of British nationality.
- Identify problems and open questions to be addressed in the context of Brexit negotiations under Article 50 TEU.
- Contribute to finding solutions for open legal questions.

KEY FINDINGS

- EU citizenship is a pre-condition for employment of EU staff members. This rule is set out in the Staff Regulations and CEOS.
- The employment of EU *officials* of UK nationality may be terminated under the rules of the Staff Regulations in the event of Brexit. The employment contracts of EU *agents* of UK nationality automatically end in the case of Brexit-induced loss of EU citizenship under the rules of the CEOS.
- An official or agent cannot enjoy any protected legitimate expectation of continuous employment with the Union in the case of loss – for whichever reason – of citizenship of the Union since EU legislation in force has since its introduction explicitly allowed for the termination of employment with loss of the nationality of one of the Member States of the Union.
- Both EU officials and agents of UK nationality have a right to request a decision for an exception to the requirement of holding the nationality of a Member State of the EU from their appointing authorities. The appointing authority of an official or agent enjoys discretion whether to grant such exceptions under Article 28(a) of the Staff Regulations and the equivalent rules in the CEOS.
- The discretion of the appointing authority to grant an exception to the nationality requirement is limited by EU general principles of law, including the principle of good administration and the *devoir de sollicitude* (duty of solicitude). Compliance can be reviewed by the CJEU.

[1] For the purposes of this study, the terms "British nationality" and "UK nationality" are interchangeable.

- Article 50 of the Staff Regulations referring to the "interests of the service" allows for EU senior officials with UK nationality to be retired under this Article before or after Brexit irrespective of the mode of hiring. Therefore, it appears to be within the discretion of the appointing authority to assess whether it is in the interests of the service to prioritise the requests for retirement of senior officials appointed on the basis of a procedure other than the competition procedure as referred to in Article 29(2) of the Staff Regulations.
- Staff members of the EU acquire pension rights against the EU as a legal person. Brexit does not change this.
- Protocol No 7 to the TEU and TFEU on the Privileges and Immunities of the European Union includes rules on individual rights of residence and on taxation. This Protocol will cease to be applicable post-Brexit within the UK as a result. Irrespective of their nationality, only EU officials and other servants with residence within the EU will benefit from the protection of Protocol No 7.

1. BREXIT AND THE STATUS OF EU OFFICIALS AND OTHER SERVANTS OF BRITISH NATIONALITY

1.1. Background and objective of the study

On 29 March 2017, the UK government notified the European Council of its intention to withdraw from the European Union (EU) and Euratom. Negotiations, as foreseen in Article 50 of the Treaty on European Union (TEU), have since begun. Among the many complex legal issues that arise in the process of disentanglement from the EU legal order is the question of the legal status of active and retired British staff of the EU institutions, bodies, offices and agencies.

In view of the host of novel and so far un-encountered legal questions arising from Brexit, the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee has commissioned this study on the *legal* framework governing the status of EU officials and other servants of British nationality[2]. This study looks at the legal position of active and retired EU officials and civil servants as well as provides a number of policy recommendations for problems identified in the study.

1.2. The legal framework for the EU's civil service

The rights and obligations of all officials and agents of the EU are governed by primary law including Treaty provisions (e.g. Articles 336, 298 TFEU), the Charter of Fundamental Rights of the EU (CFR,[3] Article 6(1) TEU), Protocols (Article 51 TEU) especially Protocol No 7 to the TEU and TFEU on the Privileges and Immunities of the European Union. Equally protected on the level of primary law are fundamental rights as they arise from General Principles of EU law (Article 6(3) TEU) as well as other General Principles of EU law such as the protection of legitimate expectations and the principle of proportionality.

Further specific rules on the rights and obligations of EU staff members arise from Union legislation including most importantly the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Union.[4] The Staff Regulations establish a set of mutually applicable rights and obligations between the

[2] The EU institutions expressed their firm commitment to ensuring legal certainty to EU citizens, including to their officials and civil servants. According to the European Council guidelines, following the United Kingdom's notification under Article 50 TEU (http://www.consilium.europa.eu/press-releases-pdf/2017/4/47244658130_en.pdf), one of the priorities of the first phase of the negotiations is indeed to 'provide as much clarity and legal certainty as possible to citizens ... on the immediate effects of the United Kingdom's withdrawal from the Union'. The call for legal certainty and stability has recently been reiterated by the European Parliament in its resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P8-RC-2017-0237&language=EN). See also EP Resolution of 3/10/2017 (2017/2847(RSP)).

[3] The Charter is applicable in the relation between the EU and its officials and other agents (Article 51 CFR declares it *inter alia* applicable "to the institutions, bodies offices and agencies of the Union").

[4] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment for Other Servants of the European Economic Community and the European Atomic Energy Community, (OJ 1962 45/1385) with amendments. A consolidated version is published as 1962R0031-EN-01.06.2014-012.003-1.

Union and its officials and agents. These include compliance with the principles of loyalty to the Union, carrying out the duties assigned with objectivity and impartiality and acting "solely with the interests of the Union in mind" (Article 11 Staff Regulations). The EU is in turn obliged to act vis-à-vis its officials and agents with solicitude taking into account the principle of care. These obligations are the counterparts but also the interpretative framework for understanding the relations between officials and other servants of the Union, on the one hand, and the Union as a legal person, on the other.

Under the Staff Regulations, officials and other agents of the EU are appointed either to the EU as a legal person under Article 47 TEU (or to one of the legal persons under EU law such as EU agencies) or have entered an employment contract with the EU as a legal person or with one of its bodies or agencies with independent legal personality under EU law.

The Staff Regulations split the European civil service into two distinct groups. One consists of EU officials appointed by unilateral administrative 'decision' by the hiring authority as an 'official of the Union' (Article 1a(1) Staff Regulations). Their rights and obligations are therefore governed only by EU legislation and "may be altered at any time by the legislature."[5]

"Other agents" of the Union (or of a legal person under EU law) are employed under an employment contract, which is generally a contract under EU law. The Conditions of Employment of Other Servants of the European Union (CEOS) distinguish "temporary staff" with a determinate or indeterminate contract (Title II) from "contract staff" (Title IV), "local staff" (Title V), "special advisors" (Title VI) and "parliamentary assistants" (Title VII).

Agents of the European Investment Bank (EIB) and of the European Central Bank (ECB) are employed under specific rules and are not governed by the general EU Staff Regulations. However, Protocol (No 7) to the TEU and TFEU is explicitly applicable to them. The Civil Service Tribunal[6] has held that the performance by members of the ECB of duties in the European public interest means that their status is similar to that of EU officials.[7]

[5] Case C-443/07 P *Centeno Mediavilla v Commission* of 22 December 2008, ECLI:EU:C:2008:767, para 60.
[6] The Civil Service Tribunal, established in 2004, ceased to operate on 1 September 2016 after its jurisdiction was transferred to the General Court in the context of the reform of the European Union's judicial structure.
[7] Case F-73/13 *AX v ECB* of 17 March 2015, ECLI:EU:F:2015:9, para 147 et seq.

2. THE STATUS OF EU STAFF OF BRITISH NATIONALITY POST-BREXIT

With EU Citizenship being granted to "any person holding the nationality of a Member State" (Article 20(1) TFEU), UK citizens will lose their EU citizenship when the UK ceases to be a Member State under the conditions of Article 50 TEU in the context of Brexit.

Although the Staff Regulations do not specifically foresee the case of a Member State's withdrawal from the EU and the consequences thereof for EU staff, they cover the situation where a staff member loses the nationality of one of the Member States of the EU. Article 28(a) of the Staff Regulations lays down the requirement of EU citizenship as a condition for appointment. Pursuant to Article 49 of the Staff Regulations, an official who ceases to fulfil the conditions laid down in Article 28(a) may as a result be required to resign. Equally, Article 47 CEOS allows for the termination of employment in the context of a loss of EU citizenship since EU citizenship is also a pre-condition for hiring an agent (Articles 12(2)(a), 82(3)(a) and 128(2)(a) CEOS).

Much discussed in public is whether Brexit allows for termination of the status of EU officials with UK nationality under Article 49 of the Staff Regulations and of other agents under Article 47 CEOS. Since the formulations of Article 49 of the Staff Regulations and Article 47 CEOS differ, they will be examined separately. Following this, other forms of changing the status of officials and agents will be discussed.

2.1. Article 49 of the Staff Regulations – Compulsory Resignation?

By referring to the nationality condition in Article 28(a) of the Staff Regulations, Article 49 of the Staff Regulations (the sole article under the heading of Section 2 "Compulsory Resignation") identifies the loss of an official's EU citizenship during his or her tenure as one of the possible reasons for requesting resignation. However, although the notion of "compulsory resignation" has been subject to the case law of the Court of Justice of the European Union (CJEU), [8] the situation of loss of citizenship under Article 28(a) of the Staff Regulation has thus far not been subject to its case law.

Articles 49 and 28(a) of the Staff Regulations treat the possession or loss of EU citizenship as objective condition.[9] Loss of citizenship might occur because an EU

[8] See already C-7/56 *Algera and others v Common Assembly* of 12 July 1957, ECLI:EU:C:1957:7.

[9] Article 49 of the Staff Regulations refers to reasons for resignation both which are within the official's possibilities of influence as well as beyond. An element of subjective wrongdoing is therefore not required in all cases. Loss of citizenship can be self-induced but can also happen without any individual fault or contribution, as the case of Brexit shows. Other forms of 'objective' criteria are mentioned in Article 41(4) which authorises a request for resignation "at the end of the period of entitlement to the allowance" in the case of non-active status. This differs from cases such as formulated in Article 40(4)(d) of the Staff Regulations (when an official refuses offers to be reintegrated into the service after the end of a period of leave on personal grounds). In addition, see Article 41 (5) of the Staff Regulations (when an official who was placed in the 'non-active status' due to supernumeracy refuses to be re-integrated) as well as Article 39(f) of the Staff Regulations (refusal of reintegration after secondment).

official actively denounces citizenship, but also may be the result of a withdrawal of a naturalisation decision by a Member State.[10] Articles 49 and 28(a) of the Staff Regulations do not distinguish for which reason an official loses EU citizenship – whether it was with or without an individual official's fault or whether he or she could have influenced the situation. Therefore, Brexit-induced loss of EU citizenship, which is beyond the possibility of influence of individual officials, falls within the scope of Articles 49 and 28(a) of the Staff Regulations.

Article 28(a) of the Staff Regulations does provide for the possibility of granting exceptions to the nationality rule (see below section 3.6.) and such exceptions have been granted in the past.

Under these conditions, according to Article 49 of the Staff Regulations an "official *may* be required to resign" where the conditions of Article 28(a) are no longer fulfilled. This wording grants the hiring authority a discretion whether or not to require resignation from an official. Such discretion may be exercised after hearing the Joint Committee and the official concerned, and must be documented in a reasoned decision of the appointing authority. The English language version of Article 49 of the Staff Regulations implies by stating that an "official may be required to resign" that the official could choose to refuse to resign. This interpretation, however, would not be compatible with other language versions, which indicate clearly that the appointing authority has the unilateral power to terminate the employment relation under the conditions of Article 49 of the Staff Regulations. For example, the French language version states that the official "*peut être démis*" and the German clarifies that unilateral nature by declaring "*kann …entlassen werden*", where the conditions of Article 28(a) are no longer fulfilled.

When taking the decision as to whether granting an exception is in the discretion of the appointing authority. Amongst the factors, which may be taken into account, is also the method of recruitment. Officials, who have entered the EU's services through a procedure other than the open competition procedure, especially as senior officials, might be differentiated from the officials who had entered the EU's services following an open competition. This decision will lie within the discretion of the appointing authority.

2.2. Termination of employment of an agent?

Article 47 CEOS holds that "the employment of temporary staff shall cease" under (b) and (c) "where the servant no longer satisfies the conditions laid down in point (a) of Article 12(2)." Loss of citizenship under the formulation of Article 47 CEOS leads to the termination of employment. The same rules apply for contract staff and other categories under CEOS according to Articles 119 and 82(3)(a) as well as Articles 139(1)(e) and 128(2)(a) CEOS.

[10] For such case, see e.g. the situation which gave rise to the CJEU's case C-135/08 *Rottman v Germany* of 2 March 2010, ECLI:EU:C:2010:104 in which German nationality had been obtained by deception of authorities during the application procedure.

Unlike Article 49 of the Staff Regulations, Articles 47, 119 and 139(1)(e) CEOS don't provide for the authority to exercise discretion as to whether it will exercise the decision to terminate. Under Articles 47 (as well as 119 and 139(1)(e) CEOS) "the employment of temporary staff *shall* cease" [emphasis added] either with death of the employee, his or her reaching the pensionable age, the end date stated in the contract but also "where the servant no longer satisfies the conditions" laid down in point (a) of Article 12(2). The link is immediate. Agents are thus only protected by the notice period.

Article 47(b)(iii) and (c)(ii) CEOS, however, does allow for "the possibility of authorising an exception".[11] This exception allows for continuation of the contract. An exception can be granted ex officio or, alternatively, on the basis of an explicit request by an agent.

2.3. Other legal bases

Additional avenues exist under the Staff Regulations to retire individuals or to place them into temporary inaction. Of these, especially Article 50 of the Staff Regulations allowing retirement in the interests of the service appears a possible approach. Other options appear less likely to be used as primary approaches to address the status of British officials and agents of the Union post-Brexit.

2.3.1. Article 50 of the Staff Regulations – Retirement in the interests of the service?

A senior official may, under Article 50 of the Staff Regulations, be retired "in the interests of the service". Senior officials are defined under Article 29(2) of the Staff Regulations as officials on the level of director general and director. Positions on these hierarchy levels exist in all of the institutions and may exist in EU agencies. Officials on these hierarchy levels are generally concerned with policy matters of a certain level of political relevance. For example, Commission officials on this level have direct influence on the formulation of policy choices of the Union formulated by the Commission.

Under Article 29(2) of the Staff Regulations, senior officials may be hired by means other than the open or internal competition procedure. In practice, this is not unusual. Article 50 of the Staff Regulations does not make a formal distinction between staff members recruited on the basis of open or internal competitions and staff members appointed on the basis of a procedure other than the competition procedure as referred to in Article 29(2) of the Staff Regulations. However, this grants the hiring authority a wide discretion in identifying the needs of the service and assessing whether the retirement of a specific official is necessary in order to pursue those needs.

Generally speaking, the notion of "interests of the service" is a wide and open term, which encompasses the public interest in a well-functioning public service. Article

[11] Similarly, such a possibility of exception is also available under Articles 119 and 82(3)(a), Articles 139(1)(e) and 128(2)(a) CEOS as well as for an official under Article 28(a) of the Staff Regulations.

298 (1) TFEU states that the Union institutions are supported by an "open, efficient and independent European administration". Concerns as to ensuring the proper functioning and efficiency of the EU's administration are thus "interests of the service". These interests may be in juxtaposition with private interests of the official of the Union, in which case a balancing may be necessary. Article 50 of the Staff Regulations provides for such balancing as the interests of the service can override the interests of certain categories of officials, irrespective of the method of recruitment.[12]

Within the Staff Regulations, the term "interests of the service" denotes the interest of the appointing authority "as a whole, rather than that of the particular service to which the staff member has been posted."[13] Although there appears to be no specific case law as to Article 50 of the Staff Regulations, there is considerable case law on two elements decisive for the application of that Article, most notably on the notion of the "interests of the service". It has been the position of the CJEU in the case law spanning several decades that "in assessing the interests of the service", the

> "appointing authority possesses a wide discretion, and in that connection the Community Court's review must be confined to the question whether, having regard to the various considerations which have influenced the administration in making its assessment, the latter has remained within reasonable bounds and has not used its power in a manifestly incorrect way. The Community Court cannot therefore substitute its assessment of the qualifications and merits of the candidates for that of the appointing authority."[14]

Limitations to the exercise of the discretion which will be applicable in this context (see to this effect *inter alia* Section 3 of this study) arise from General Principles of EU law. Given compliance with these rules and principles on the exercise of discretion, Article 50 formulated as "interests of the service" does allow for EU senior officials with UK nationality to be retired under this Article before or after Brexit irrespective of the mode of hiring. Therefore, it appears to be within the discretion of the appointing authority to assess whether it is in the interests of their services to prioritise the requests for retirement of senior officials appointed on the basis of a procedure other than the competition procedure as referred to in Article 29(2) of the Staff Regulations.

2.3.2. Articles 41 and 42c of the Staff Regulations – Non-active status and leave in the interests of the service

Under Article 41 of the Staff Regulations, an official may be placed in a "non-active status" where a general decision of 'supernumeracy' has been taken, with the objective to reduce "the number of posts in a particular grade" within an institution.

[12] For a general assessment of the relation between Articles 298, 336 TFEU and the Staff Regulations see K. Bradley, EU Civil Service Law in : Hofmann, Herwig C.H.; Rowe, Gerard ; Türk, Alexander (eds.) Specialised Administrative Law of the EU, OUP (Oxford: forthcoming 2018) manuscript page 3.
[13] K. Bradley, EU Civil Service Law in: Hofmann, Herwig C.H.; Rowe, Gerard ; Türk, Alexander (eds.) Specialised Administrative Law of the EU, OUP (Oxford: forthcoming 2018) manuscript page 5.
[14] Case C-16/07 P *Marguerite Chetcuti v Commission* ECLI:EU:C:2008:549 of 9 October 2008 para 77; Case C-277/01 P *Parliament v Samper* [2003] ECR I-3019, para 35; Case 324/85 *Bouteiller v Commission* [1987] ECR 529, para 6; Case 233/85 *Bonino v Commission* [1987] ECR 739, para 5.

One possible reasons for a decision to declare supernumeracy are budget shortages requiring the reduction of certain categories of staff. It cannot be excluded that Brexit may lead to an overall reduction of the available Union budget, which might also have an effect on the Union's public service and thus may lead to such decisions. Once the general decision of supernumeracy within an institution, body, office or agency of the Union has been taken, a list of officials affected by such measures will be drawn up. The criteria for selection are, amongst others, the officials' "ability" or "efficiency." Their nationality is not amongst the criteria. If however, certain positions are sensitive to the nationality of an official, a strong argument could be formulated that this be taken into account with respect to their "ability" to perform loyally in the interest of the Union, or whether their supervision could cause "efficiency" problems. Nonetheless, it would not appear that a general transfer of specifically UK officials into a non-active status is possible under Article 41, since such approach might be understood as a case of "misuse of powers" under the second paragraph of Article 263 TFEU.

Article 42c of the Staff Regulations allows officials close to retirement age to be placed "on leave in the interests of the service" in order to achieve "organisational needs linked to the acquisition of new competences within the institutions". This formulation grants the institutions discretion to identify which "new competences" are required and whether their acquisition can best be achieved through transferring an official into leave under Article 42c of the Staff Regulations. However, also under this heading, UK nationality *as such* will not be able to serve as reason for finding the lack of ability to acquire required "new competences". These are service oriented and cannot be found in the passport carried by the official.

3. RESIGNATION, TERMINATION AND RETIREMENT DECISIONS IN VIEW OF EU GENERAL PRINCIPLES AND FUNDAMENTAL RIGHTS

The requirement of being EU citizen as a pre-condition of becoming an official or agent of the Union (Article 28(a) Staff Regulations and Articles 12(2)(a), 82(3)(a) and 128(2)(a) CEOS) is a legislative choice which is not required by primary law.

EU primary law is generally silent on the matter of nationality in the EU's civil service. Article 336 TFEU, which creates a legal basis for the Staff Regulations and the CEOS, makes no specific references to the nationality of individuals. The same holds true for Article 298 TFEU, which refers only generally and structurally to the need for an "open, efficient and independent European administration." Article 11 of Protocol (No 7) to the TEU and TFEU is neutral on matters of citizenship by explicitly granting rights and privileges to EU officials and other servants "whatever their nationality".

Where, however, discretionary decisions can be made, as in the case of Article 49 of the Staff Regulations, these need to comply with the requirements of EU general principles and fundamental rights. The Staff Regulations will thus be interpreted in compliance with the general principles and fundamental rights of EU law.[15] Amongst the most relevant general principles and fundamental rights of EU law are non-discrimination, the duty of care and good administration, requirements of legal certainty, the protection of legitimate expectations, proportionality and the right to a reasoned decision.

3.1. EU Citizenship and non-discrimination

When the UK's EU membership ends under the conditions of Article 50 TEU, UK citizens will no longer be citizens of an EU Member State. Therefore, decisions concerning them will be covered only by general non-discrimination clauses, as they will no longer benefit from the specific protection of non-discrimination on the basis of nationality in EU law. In detail:

The general principle of EU law, which prohibits discrimination, is regulated in Article 21 CFR. The prohibition of discrimination on the basis of nationality is explicitly stated as *lex specialis* in Articles 21(2) CFR and 18 TFEU. Article 21(2) CFR, despite speaking in general terms of "nationality", has always been interpreted by the CJEU in line with the concept of protecting Member State nationals against discrimination within the Union.[16] This limitation arguably also arises from the restriction under Article 21(2) CFR stating that the discrimination on the grounds of nationality is prohibited only "within the scope of the Treaties." Under this interpretation, the general principle of non-discrimination on the basis of nationality under Article 21(2) CFR offers protection only to EU citizens. Its scope of protection does not cover third

[15] See e.g. Case C-301/02 P *Tralli v ECB* of 26 May 2005, ECLI:EU:C:2005:306.
[16] C. Kilpatrick, Article 21 – Non Discrimination, in S. Peers, T. Hervey, J. Kenner and A. Ward, *The Charter of Fundamental Rights a Commentary*, Hart (Oxford: 2014), 21.28 at p. 587.

country nationals.[17] Therefore, if this interpretation is upheld by the CJEU, following Brexit, UK citizens will no longer benefit from the protection of non-discrimination on the basis of citizenship under Article 21(2) CFR and Article 18 TFEU as they will be third-country nationals. They will however continue to benefit from protection against discrimination on other grounds than nationality under Article 21(1) CFR, a principle explicitly recognised as guiding EU law for the civil service.[18]

This is in line with value choices under the Treaties more generally. Unequal treatment on the basis of nationality in the context of public service is in principle recognised in Article 51 TFEU, which explicitly allows for a link to be made between nationality and the "exercise of official authority". The concept of official authority has been subject to much case law since the seminal 1974 case *Reynders*.[19] Generally, the Court of Justice accepts discretion for Member States to identify the notion of official authority but sets certain limitations to this discretion. Case-law is generally concerned with private parties in supporting roles since it appears clear that that the civil service *strictu senso* of a Member State is fully covered by the notion of Article 51 TFEU.[20] Amongst the criteria the CJEU has accepted is the power to partake in decision making with coercive effect for the addressee.[21] The case law excludes from the exercise of official authority, activities which private parties undertake in support of public authorities. Functions that are "merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority by taking the final decision"[22] are not exercising public authority, but in contrast the taking of final decisions is. Article 51 TFEU, although aimed at Member States, can nevertheless be seen as an expression of a general understanding of the limitations on the exercise of official authority in the Union and the principle contained therein can thus be understood as justification for differentiation within the public service on the basis of nationality.

Discrimination on the basis of nationality between EU and non-EU citizens within EU law has also been found to comply with the ECHR's non-discrimination clause (Article 14 ECHR) by the case law of the ECtHR, for example in *Moustaquim.*[23] In that case, Belgian law discriminating between EU and non-EU citizens was not held to be in breach of Article 14 ECHR, which prohibits *inter alia* the discrimination on basis of national origin. The ECtHR ruled that, although there is differentiation in treatment,

[17] See for a recent case C-22/08 and 23/08 *Vatsouras and Koupatantze* of 4 June 2009, ECLI:EU:C:2009:344, para 52: "That provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries."
[18] Case C-20/71 *Sabbatini v European Parliament* of 7 June 1972, ECLI: EU:C:1972:48; Case C-249/96 *Grant v South-West Trains* of 17 February 1998, ECLI:EU:C:1998:63, paras. 29ff. The general non-discrimination clause (Article 21(1) CFR) prohibits arbitrary or unjustified unequal treatment but does not cover discrimination on basis of nationality, which is specifically regulated in Article 21(2) CFR. Case C-154/04 *Alliance for Natural Health and Others* of 12 July 2005, ECLI: EU:C:2005:449, para. 115.
[19] Case 2/74 *Reynders* [1974] ECR 631, paras 53-55.
[20] Much of the case law is concerned with private parties such as lawyers, notaries, accountants and audit professionals, veterinaries, technical experts and evaluators, private security services and school teachers. See e.g. cases such as Case 2/74 *Reynders* [1974] ECR 631, Case C-42/92 *Thijssen* [1993] ECR I-4047, Case C-114/97 *Commission v Spain* [1998] ECR I-6717, Case C-393/*05 Commission v Austria* [2007] ECR I-10195.
[21] Case C-114/97 *Commission v Spain* [1998] ECR I-6717.
[22] Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 22.
[23] ECtHR case No. 12313/86 *Moustaquim v Belgium* of 18 February 1991.

"there is objective and reasonable justification" for "the preferential treatment given to nationals of the other member States of the Communities" in Belgium because "Belgium belongs, together with those [EU Member] States, to a special legal order."[24]

Therefore, it would appear that the principle of non-discrimination offers very little practical protection to UK citizens within the EU civil service post Brexit.

3.2. Good administration and the *devoir de sollicitude*

Any personnel-related decision will have to comply with the principles of good administration, which are recognised explicitly as fundamental rights under Article 41 CFR, which explicitly recognises the right of individuals that a Union institution, body, office or agency handle their affairs impartially and fairly and within a reasonable time. Good administration is thus an 'umbrella principle', containing many specific sub-elements.[25]

3.2.1. Solicitude

Obligations arising from the principles of good administration are specifically developed in the case law of the CJEU regarding staff matters under the principle of care, also recognised as the duty of solicitude, which the General Court defines in the following terms:

> According to settled case-law, pursuant to the principle of good administration, the administration is obliged when taking a decision concerning the situation of an official to take into consideration all the factors which may affect its decision, and when so doing it should take account not only of the interests of the service but also of those of the official concerned.[26]

This *devoir de sollicitude* formulates a duty to take account of the interests of the official. The CJEU summarises this as: "the duty of the administration to look after the well-being of its officials";[27] "the duty of the administration to have regard for the interests of its officials";[28] "the duty to have regard for the welfare and interests of officials";[29] or, on rarer occasions, the duty of the administration to provide "equal consideration" for the interests of the officials.[30] All of this is necessary in the exercise

[24] ECtHR case No. 12313/86 *Moustaquim v Belgium* of 18 February 1991, para 49 *explanation in brackets added.*
[25] See also the In-depth Analysis 'The General Principles of EU Administrative Procedural Law', Policy Department for Citizen's Rights and Constitutional Affairs, European Parliament, 2015. Authors: Diana-Urania Galetta, Herwig C.H. Hofmann, Oriol Mir Puigpelat, Jacques Ziller.
[26] Case T-11/03 *Afari v ECB* of 16 March 2004, ECLI:EU:T:2004:77, para 42 with reference to Case 417/85 *Maurissen* v *Court of Auditors* of 4 February 1987, ECLI:EU:C:1987:61, para 12, and Case T-7/01 *Pyres* v *Commission* of 6 February 2003, ECLI:EU:T:2003:27, para 77; See also Case C-125/80 *Arning v Commission* of 29 October 1981, ECLI:EU:C:1981:248, para 19.
[27] Case C-321/85 *Schwiering v Court of Auditors* of 23 October 1986, ECLI:EU:C:1986:408, para 18 with further references.
[28] E.g. Case C-255/90 P *Burban v European Parliament* of 31 March 1992, ECLI:EU:C:1992:153, para 12.
[29] Case T-257/97 *Herold v Commission* of 11 March 1999, ECLI:EU:T:1999:55, (mots clés).
[30] See Case C-1/56 *Bourgaux v Common Assembly* of 17 December 1956, ECLI:EU:C:1956:15, para 438 where the Court held that the interests of the employees affected by the contested measure deserved "equal consideration"; the French version of this version reads that « (…) tous les interets en cause méritant *une égale sollicitude*» (emphasize added).

of the wide discretion an administration enjoys in relation to its internal organization.[31]

The *devoir de sollicitude* can thus in many ways be described as the institutional equivalence to the obligation of loyalty on the side of the officials (Article 11 of the Staff Regulations). This reflects the balance of the reciprocal rights and obligations in the relationship between the official authority and its agents.[32] According to the CJEU, "the principle of sound administration requires the Commission to *balance the interests* in question and in particular those of the individuals".[33] The balancing takes place between the interests of the service, on one hand, with, on the other hand, the interests of the officials to have their personal and moral well-being as well as their career advancement as outlined in Article 44 of the Staff Regulations taken into account.

The considerations of the *devoir de sollicitude* will thus need to be taken into account in the context of decisions under Article 28(a) Staff Regulations and the equivalent rules in the CEOS as to whether exceptions to the nationality requirement will be authorised for EU staff. The Civil Service Tribunal explicitly acknowledged a "principle of solicitude", which imposes on the Union institutions the obligation – within their discretion as regards the organisation and functioning of their respective units[34] – to impartially and fairly examine all the factors of the case inter alia*,* to check whether there is any other available position to which the agent concerned may be transferred.[35]

Therefore, although legislation regulates the case of an official or agent of the Union losing the citizenship of a Member State,[36] the *devoir de sollicitude* may require that an institution take into account the possible willingness of staff members to transfer to positions, which may be less sensitive in terms of nationality. One example can be employment in a position that is not perceived to involve the exercise of public authority.

A further element is that the institutions will be obliged to defend their servants of UK nationality against accusations concerning their professional integrity in carrying out their duties. Under the case law of the Civil Service Tribunal,

> an institution faced with an incident which is incompatible with the good order and tranquillity of the service (such as for instance the accusations concerning

[31] Case C-125/80 *Arning v Commission* of 29 October 1981, ECLI:EU:C:1981:248, para 19.
[32] See e.g. Case C-321/85 *Schwiering v Court of Auditors* of 23 October 1986, ECLI:EU:C:1986/408, para 18 (emphasis added) with further references and Case T-231/97 *New Europe Consulting v Commission* of 9 July 1999, ECLI:EU:T:1999:146, para. 39. This definition emphazises that the solicitude principle finds application only in regards to the EU agents and not the EU citizens at large, such as it is the case for right to good administration in its principle of care/diligence aspects.
[33] Case T-231/97 *New Europe Consulting v Commission* of 9 July 1999, ECLI:EU:T:1999:146, para. 39.
[34] See e.g. Case F-13/12 *BR v Commission* of 19 March 2013, ECLI:EU:F:2013:39, paras 33-35; Case T-143/09 P *Commission v Petrilli* of 16 December 2010, ECLI:EU:T:2010:531, paras 34-36.
[35] See Case F-63/11 *Macchia v Commission* of 13 June 2012, ECLI:EU:F:2012:83, para 41. A more restrictive approach was adopted by the GC under appeal – see Case T-368/12 P *Commission v Macchia* of 21 May 2014, ECLI:EU:T:2014:266.
[36] Articles 49 and 28 of the Staff Regulation as well as Articles 47 and 12 of the CEOS are clear and unequivocal in this respect.

> the professional integrity of an official in carrying out his duties), must intervene with all the necessary vigour and respond with the rapidity and solicitude required by the circumstances of the case with a view to ascertaining the facts.[37]

The institutions and bodies of the EU will be obligated "to take the appropriate action".[38] This obligation includes especially the duty to investigate fully and impartially all relevant facts including whether any accusations are unfounded. In all cases, they will need to act accordingly.

The obligations to full and impartial assessment of the relevant facts of the situation are also to be taken into account when developing the criteria in order to decide as to whether to allow for exceptions under Articles 12(2)(a), 82(3)(a) and 128(2)(a) CEOS and Article 28(a) of the Staff Regulations.

3.2.2. Timeliness

The principle of timeliness is also explicitly provided for in Article 41(1) CFR. Taking decisions in a timely manner is tied to notions of fairness since "slow administration is bad administration".[39] The notion of timeliness is also linked to concepts such as legal certainty. The CJEU has frequently ruled, referring explicitly to the principle of good administration, that there is an obligation on the public administration to avoid undue delays in decision-making.[40]

EU officials and agents affected by Brexit will generally have an interest in their situation being clarified. Therefore, a decision as to the possibility of granting an exception to the nationality requirement under Article 28(a) of the Staff Regulations and the equivalent Articles in CEOS must be taken in a timely fashion, allowing individuals to plan their future and their career options within and where necessary outside of the EU's public service.

For example, Union officials will be able to expect that the discretionary decision whether to require compulsory retirement under Article 49 of the Staff Regulations will occur in a binding fashion before or immediately after the moment of Brexit. In the absence of such a decision within a reasonable timeframe thereafter, the option of Article 49 of the Staff Regulations should not be hanging over an individual official as a constant threat to their position. In that case, the question arises under which conditions an omission to take a decision within a timely manner as required under Article 41(1) CFR may give rise to the protection of legitimate expectations as to the non-exercise of the right to terminate the employment relation.

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[37] T-5/92 *Tallarico v European Parliament* of 21 April 1993, ECLI:EU:T:1993:37, para 31; F-30/08 *Nanopoulos v European Parliament* of 11 May 2010, ECLI:EU:F:2010:43, para 139.
[38] T-5/92 *Tallarico v European Parliament* of 21 April 1993, ECLI:EU:T:1993:37, para 31; F-30/08 *Nanopoulos v European Parliament* of 11 May 2010, ECLI:EU:F:2010:43, para 139.
[39] Jacobs AG in Case C-270/99 P *Z v Parliament* of 27 November 2001, ECLI:EU:C:2001:639, para 40 with reference to Art 41 CFR and claiming that this was 'a generally recognised principle'.
[40] See, eg, Case T-81/95 *Interhotel v Commission* of 14 July 1997, ECLI:EU:T:1997:117, para 65; Case C-282/95 P *Guérin automobiles v Commission* of 18 March 1997, ECLI:EU:C:1997:159, para 37.

3.3. Legal certainty

As discussed in the context of the principle of good administration, one of the major problems for individual officials and agents of the Union is that, according to the formulation of the Staff Regulations and the CEOS, in principle a hiring authority may at any moment after Brexit invoke the issue of lack of nationality and terminate the employment relation. This would cause considerable uncertainty for the lives of UK nationals in EU services.

The principle of legal certainty, a constitutive element of the rule of law, is recognised as a general principle of EU law.[41] It provides expression to an important assertion of the rule of law that "those subject to the law must know what the law is so as to plan their action accordingly."[42] The principle of legal certainty also imposes an obligation on Union institutions to conduct administrative proceedings within a reasonable period.[43]

Ensuring that individuals have clarity as to their legal position is thus not just a matter of compliance with the principle of good administration but also of the principle of legal certainty.

3.4. Protection of legitimate expectations

The issue of legal certainty is also linked to the principle of the protection of legitimate expectations in Union law. However, the protection of legitimate expectation is more generally associated with individual rights and interests than the notion of legal certainty.[44] Under CJEU case law, the principle of protection of legitimate interests is applicable in all areas of EU law including, specifically, the law on staff matters.[45]

EU staff members with UK nationality will have had the expectation, underscored by e.g. Article 44 of the Staff Regulations developing the career path of EU officials, that their appointment as official or employment with an indeterminate contract would be an appointment for the entirety of their career.

[41] Case C-55/91 *Italy v Commission* of 6 October 1993, ECLI:EU:C:1993:832, para. 66; Joined Cases T-551/93 and T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos v Commission* of 24 April 1996, ECLI:EU:T:1996:54, paras. 76, 116, 119; Case C-43/75 *Defrenne v SABENA* of 8 April 1976, ECLI:EU:C:1976:56, paras 69 *et seq.*; Case C-143/93 *Gebroeders van Es Douane Agenten vs Inspecteur der Invoerrechten en Accijnzen* of 13 February 1996, ECLI:EU:C:1996:45, para. 27; Joined Cases C-205/82 to C-215/82 *Deutsche Milchkontor and Others v Germany* of 21 September 1983, ECLI:EU:C:1983:233.
[42] Takis Tridimas, *The General Principles of EU Law*, 2nd edn., OUP (Oxford : 2006) 242.
[43] Case T-125/01 *José Martí Peix v Commission* of 13 March 2003, ECLI:EU:T:2003:72, para. 111; Joined Cases T-44/01, T-119/01 and T-126/01 *Vieira and others v Commission* of 3 April 2003, ECLI:EU:T:2003:98, para. 167; Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Gobierno Vasco v Commission* of 9 September 2009, ECLI:EU:T:2009:315, paras. 296-307.
[44] See Case C-111/63 *Lemmerz-Werke* of 13 July 1965, ECLI:EU:C:1965:76 (English Special Edition, 239), where the concept of protection of legitimate expectations was first explicitly enunciated. See also Cases C-7/56 and C-3/57 to C-7/57 *Algera* of 12 July 1957, ECLI:EU:C:1957:7, para 118; Cases C-42/59 and C-49/59 *S.N.U.P.A.T. v High Authority* of 22 March 1961, ECLI:EU:C:1960:45, para 111, 172 f.; Case C-14/61 *Hoogovens v ECSC High Authority* of 12 July 1962, ECLI:EU:C:1962:28, paras 511, 548 (English Special Edition, 53); Case C-112/77 *Töpfer v Commission* of 3 May 1978, ECLI:EU:C:1978:94, para. 19; Case C-264/90 *Wehrs v Hauptzollamt Lüneburg* of 3 December 1992, ECLI:EU:C:1992:490.
[45] Case T-347/03 *Branco v Commission* of 30 June 2005, ECLI:EU:T:2005:265, para. 102

Under the case law of the CJEU, the entitlement to protection based on legitimate expectations involves several key elements:

- First, an expectation must have been evoked in "precise, unconditional and consistent assurances originating from authorised and reliable sources."[46]
- Second, those seeking to rely on the assurance must have an identifiable affected interest[47] and they must have justifiably relied on the expectation.[48]
- Third, the protection of private interests must deserve priority for the protection of expectations over the interest of the Union. Especially, the assurances given must comply with the applicable rules.[49] The case law has therefore been concerned with striking the appropriate balance between protecting legitimately held expectations as to the maintenance of a legal situation and legitimate exercise of rule-making powers.

The interest affected in the situation of Brexit is the continuation of the employment relation and the option of progression in the career path under the clear and authoritative provisions of *inter alia* Article 44 of the Staff Regulations for as long as officials served according to the principles of loyalty and impartiality (Article 11 Staff Regulations).

Whether the reliance of the officials and agents of the Union on the provisions of the Staff Regulations is justifiable, however, is not evident. As discussed, Articles 49 and 28(a) of the Staff Regulations and Articles 47 and 12(2)(a) CEOS (as well as the other Articles in CEOS relating to the nationality requirement) are independent of the reason of loss of citizenship and declare the effect independently of the performance and loyalty of an official or agent of the Union.

It would equally appear questionable, under the conditions established by the CJEU, whether officials and agents could establish legitimate expectations on statements and expressions of support which individual high-ranking representatives of Union institutions have given with regard to the concerns of the EU officials and agents of UK nationality.[50] The CJEU has acknowledged that where the EU authorities have

[46] Case T-347/03 *Branco v Commission* of 30 June 2005, ECLI:EU:T:2005:265, para. 102. See also Case T-444/07 *CPEM v Commission* of 30 June 2009, ECLI:EU:T:2009:227, para. 126; Case F-82/08 *Clarke and Others v OHIM* of 14 April 2011, ECLI:EU:F:2011:45; Case F-101/05 *Grünheid v Commission* of 28 June 2006, ECLI:EU:F:2006:58; Case T-3/92 *Latham c Commission* of 9 February 1994, ECLI:EU:T:1994:15 ; Case T-175/03 *Norbert Schmitt v European Agency for Reconstruction* of 7 July 2004, ECLI:EU:T:2004:214. See with further explanations as to the application of this principle in the context of staff cases : Sylvain Dalle-Crode, Le fonctionnaire communautaire – Droits, obligations et régime disciplinaire, Bruylant Bruxelles, 2008, 242.

[47] Case C-74/74 *CNTA v Commission* of 15 June 1976, ECLI:EU:C1976:84, para. 44.

[48] Case T-176/01 *Ferriere Nord Spa v Commission* of 18 November 2004, ECLI:EU:T:2004:336.

[49] Case T-347/03 *Branco v Commission* of 30 June 2005, ECLI:EU:T:2005:265, para. 102. For example, in staff cases, a promise to promote an official, based on an incorrect factual assessment, could, for example, not create a legitimate expectation, as the official ought to have been in a position to know that he did not satisfy the conditions necessary. See: Case C-228/84 *Pauvert v Court of Auditors* of 20 June 1985, ECLI:EU:C:1985:247, para. 14.

[50] The EU institutions expressed their firm commitment to ensuring legal certainty to EU citizens, including to their officials and civil servants. According to the European Council guidelines following the United Kingdom's notification under Article 50 TEU (http://www.consilium.europa.eu/press-releases-pdf/2017/4/47244658130_en.pdf), one of the priorities of the first phase of the negotiations is indeed to 'provide as much clarity and legal certainty as possible to citizens ... on the immediate effects of the United Kingdom's withdrawal from the Union'. The call for legal certainty and stability has recently been reiterated by the European Parliament in its resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P8-RC-2017-0237&language=EN). See also the relevant statements by the President of the European Commission Jean-Claude Juncker, the

given precise assurances,[51] which led them to entertain legitimate expectations,[52] these can be subject to protection. However, the assurances given to date do not appear to be precise and specific but instead are oriented towards offering support in finding a solution only. Therefore, with regard to future statements of the institutions and their representatives, it will be necessary to re-assess the situation on the basis of these criteria.

Furthermore, the CJEU has made it clear in its case law that an individual cannot rely on expectations based on statements by the administration, even if they amount to specific assurances, in order "to challenge the lawfulness of the legal rule on which the contested decisions were based".[53] The resultant loss of EU citizenship following Brexit falls within Articles 49 and 28(a) of the Staff Regulations and Articles 47 and 12(2)(a) CEOS (as well as the equivalent Articles in CEOS relating to the nationality requirement under Articles 82(3)(a) and 128(2)(a) CEOS). These rules are clear and precise and have existed since the early versions of the Staff Regulations, i.e. well before most, if not all, current EU staff members entered the service. Therefore, an official cannot have a protected legitimate expectation of continuous employment with the Union in the case of loss – for whichever reason – of citizenship of the Union.

On the other hand, when representatives of Union institutions declare that they will establish legal certainty for EU staff members of UK nationality, those staff members can develop legitimate expectations that their legal situation and the consequences of Brexit will be clarified in a timely and fair manner. They can expect that their employment situation regarding their lack of EU citizenship is settled for the purposes of Article 49 of the Staff Regulations and Article 47 CEOS.

3.5. Proportionality

All acts of the Union must comply with the principle of proportionality (Article 5(4) TEU) as defined by the case law of the CJEU. This has been, with respect to fundamental rights, summarised by Article 52(1) CFR, which requires that any limitation of a right be based on law, will not limit its essence and be the least onerous possibility of achieving the legitimate legislative aim and, finally, not be an overall unreasonable exercise of public powers.

Regarding staff decisions in the context of Brexit, the principle of proportionality offers only limited guidance especially in light of the possibility of terminating employment due to the lack of EU citizenship. The necessary balancing of interests is the same as that required under the principles of good administration and the duty of care. Additionally, principles of legal certainty, like the principle of proportionality, require decisions as to whether or not the possibilities offered by the Staff

Commissioners in charge of the dossiers of personnel and Brexit as well as former and current Presidents of the EP Schulz and Tajani.

[51] Case T-3/92 *Latham v Commission* of 9 February 1994, ECLI:EU:T:1994:15, para. .

[52] Case T-283/02 *EnBW v Commission* of 16 March 2005, ECLI:EU:T:2005:101, para. 89.

[53] Case C-443/07 P *Centeno Mediavilla and Others v Commission* of 22 December 2008, ECLI:EU:C:2008:473, para. 91.

Regulations and the CEOS be taken in a timely manner before or after the Brexit date.

The principle of proportionality could, however be used to discuss the legality of the provisions of the Staff Regulations and CEOS, especially in the context of an implicit review of the legality of the Staff Regulations and CEOS under Article 277 TFEU. However, also in this context, given the basic value orientation reflected in the Treaties, for example in Article 51 TFEU, explicitly allowing a linkage between nationality requirements with the exercise of public powers, might indicate that expectations as to questioning citizenship clauses of the like of Article 28(a) of the Staff Regulations should not be too high.

3.6. Right to a reasoned decision on granting an exception to the nationality requirement

The result of this analysis so far is that the decision whether to require an official of the EU to resign under Article 49 of the Staff Regulations needs to take into account the *devoir de sollicitude* as specifically developed in staff matters. The general decision to require an official who is no longer an EU citizen to resign, however, is not a violation of non-discrimination clauses if it is in the need of the service. The *devoir de sollicitude* as well as the principle of proportionality require measures that make such decision the least onerous for the official.

Where an agent's employment agreement is terminated under the applicable rules of the CEOS, this is not a discretionary decision. Nonetheless, where there are possibilities of deciding the details of the conditions of the end of service, it should be done in the least onerous way for the individual.

Both officials and agents of the Union may benefit from a decision to authorise an exception to the nationality requirement under Article 28(a) Staff Regulations and Articles 12(2)(a), 82(3)(a) and 128(2)(a) CEOS. Under Article 90(1) of the Staff Regulations, officials and agents may submit a request to the appointing authority that it take a decision relating to him or her. Article 90(1) of the Staff Regulations requires a reasoned answer and clarifies that the absence of an answer is a negative decision, which can therefore be challenged. The hiring authority can exercise its discretion as to whether or not to grant the exception only within the framework of the law, including particularly the general principles of EU law.

When making a decision whether to grant an exception, the hiring authorities will also want to take into account any comparable situations in the history of EU integration, international organisations and Member States' constitutional law. Such situations include officials and agents of the EU of Norwegian nationality, appointed and hired during the negotiation of Norwegian accession. Several such officials

remain employed in Union services,[54] and have only been able to do so as they were granted exceptions to the nationality requirement.

Another example from an organisation under public international law is the withdrawal of the United States of America from UNESCO in 1984. According to press reports, the 82 US citizens employed at the time received assurances by then UNESCO Director General Mr M'Bow that they would remain in their jobs, with the argument that as international civil servants they worked for UNESCO and not for the United States.[55]

However, taking a recent example of national constitutional law, the separation of Czechoslovakia into the Czech Republic and Slovakia on 1 January 1993 took place via a negotiated separation of public services and allocation of individual officers to either the Czech Republic or Slovakia. The contrast with the situation of Brexit where one of 28 Member States is leaving the Union, which continues to exist with 27 Member States, however, is obvious: given that the former federal state of Czechoslovakia was entirely dissolved to be replaced by two new separate entities, there was no possibility of continuation in a common civil service.[56]

[54] See e.g. Ms Anne Lisa d'Aloya who later brought the Case C-280/80 *Anne Lisa d'Aloya v Council* of 3 December 1981, ECLI:EU:C:1981:290.
[55] Bernard Weinraub, U.S. seen nearing a UNESCO pullout, in: *New York Times* of 14 December 14, 1984.
[56] See for some background of the difficulties of dissolution the facts of case C-399/09 *Landtová* of 22 June 2011, ECLI:EU:C:2011:415.

4. OTHER RIGHTS OF EU OFFICIALS AND AGENTS OF BRITISH NATIONALITY POST-BREXIT

The UK's withdrawal from the EU can have impact on the mobility, career development, residence rights, social security and pension rights of EU staff members of British nationality. The following part of the study addresses some of the possible questions in this respect.

4.1. Career development

In principle, under Article 44 of the Staff Regulations all EU officials are, within a grade, subject to the rules of automatic advancement.[57] Promotion is subject to availability and the selection of candidates within the service is according to ability and qualification. Therefore, in principle, irrespective of nationality, if post-Brexit an official remains in the EU's service, the rules on advancement and promotion are applicable.

Article 45 of the Staff Regulations establishes the general legal framework for promotion. In this respect, the CJEU held in 1981, in *d'Ayola v Counil,* that the institutions have discretion to determine the criteria for promotions within the constraints of the law. They may define the criteria for promotion even if that de-facto would disadvantage non-EU citizens working in EU services.[58] Therefore, post-Brexit there may be positions, especially on the levels referred to in Article 29(2) of the Staff Regulations, where EU citizenship might be regarded as necessary pre-condition for an advancement to that post. Identifying where that might be the case is within the discretion of the appointing authority.

In view of the discussion of the principle of non-discrimination addressed above, there is a possibility enshrined in law to privilege the hiring of EU citizens over non-EU citizens. Once hired, however, it would appear that the general non-discrimination clause of Article 21(1) CFR would be applicable to career development. This protects *inter alia* national minorities and thus nationals of a certain state, but it still allows justified differentiation according to the requirements of the service, as *d'Ayola v Council* of 1981 illustrates.

4.2. Social security and sickness insurance

The system of social and sickness benefits for officials is regulated in Articles 72 to 73 of the Staff Regulations without recourse to the nationality of those covered. Benefits are granted irrespective of the nationality of an official (Articles 72 and 73 are applicable to agents of the Union by analogy under Articles 28, 95, 136 CEOS). Where UK nationals continue to serve as EU officials and agents they will continue

[57] Under the conditions of the rules applicable and according to assessments under Article 43 Staff Regulations.
[58] Case C-280/80 *Anne Lisa d'Aloya v Council* of 3 December 1981, ECLI:EU:C:1981:290, paras 16-18. The plaintiff, a Norwegian citizen, had claimed *inter alia* violation of the principle of non-discrimination when she was denied promotion given that her typing skills in her first language Norwegian were not taken into account.

to be covered. All others have the rights accorded to officials terminating their service prior to reaching pensionable age.[59]

Especially relevant for UK nationals leaving the EU's public service are the rules outlined in Article 72(1a) of the Staff Regulations. According to these, after leaving the service of the EU an official may apply for a prolonged coverage of up to 6 months, unless the conditions described in the second sub-paragraph of Article 72(1a) of the Staff Regulations are applicable. This allows for unlimited coverage under the EU's sickness insurance system, for example, in cases of serious or protracted illnesses contracted before leaving the service. Those officials and agents who leave the service of the EU who are entitled to retirement pensions before reaching pensionable age are, under Article 72(2a) Staff Regulations, also entitled to EU sickness insurance benefits under the ordinary system.

4.3. Pensions

Brexit raises several issues regarding pensions, which will be addressed separately in turn. One concerns the entitlements that individual officials or agents of the Union have. Another is the way the pensions system is structured and financed. The latter question is a systematic one, which will have implications for the EU budget.

4.3.1. Individual pensions rights

Individuals who have worked for the EU public service have acquired pension rights, which are irrespective of their nationality. The structure and individual rights, as well as its system, are defined in Articles 77-82 of the Staff Regulations as well as Articles 39-40 and 109-110 CEOS, all with reference to Annex VIII.

Importantly, in the context of individuals leaving the service prior to reaching pensionable age, e.g. in the context of Brexit, under Article 9 of Annex VIII to the Staff Regulations, an official may also claim pensions prior to reaching their pensionable age when leaving the service. Under this Article, acquired pension rights can either be deferred in payment until the moment in which the person entitled to their pension reaches the pensionable age or can be, under certain conditions, paid immediately. One of these conditions is that the applicant is not less than 58 years of age.

Article 11 of Annex VIII to the Staff Regulations contains specific rules for the transfer of pension rights to other pension schemes of public bodies, international organisations or private activities with a pension scheme. This is also a set of rights especially relevant for individuals leaving the service prior to reaching their pensionable age. Where the conditions for such a transfer exist, (former) officials of the Union are entitled to demand transfer of their retirement pension rights into such schemes. Claims to the pension are then, unlike in the case of Article 9 of Annex VIII

[59] Under these rules Article 72 of the Staff Regulation describes the social security benefits which include sickness benefits. All officials benefit equally from the insurance against occupational disease or accidents under Article 73 of the Staff Regulations.

to the Staff Regulations, claims against the specific scheme or fund to which the transfer has taken place.

4.3.2. The EU pension system and Member States' obligations

Under EU law, rights relating to pensions are rights of individuals against the EU as a legal person. The pensions established under Articles 77-82 of the Staff Regulations are paid by the EU. Article 28a(1) first indent CEOS speaks about a "pension from the European Union".

The EU does not have a specific dedicated EU pension fund. Under Article 83 of the Staff Regulations: "Benefits paid under this pension scheme shall be charged to the budget of the Union". Individual officials and agents contribute a share of their salaries amounting to roughly the equivalent of 1/3 of the cost of covering pension payments.[60] Member States "jointly guarantee payment of such benefits in accordance with the scale laid down for financing such expenditure" (Article 83(1) of the Staff Regulations). In the event of Brexit, there is thus also a reduction of number of the guarantors of the pension payments. Solutions will need to be found for this situation, most likely in accordance with the share of the UK contributions to the EU's budget during the UK membership. It will be part of the negotiations under Article 50 TEU to identify the possible outcome.

4.4. Severance grants

For officials who are let go from Union services prior to reaching pensionable age, rights arising from the rules on severance grants will also be of importance. These are, for example, regulated for officials of the Union, who have not reached pensionable age at the time of termination of their service and who are not entitled to an immediate or deferred pension payment under Article 12 of Annex VIII of the Staff Regulations.

4.5. Immunity

Protocol No 7 to the TEU and TFEU grants officials and other servants of the Union within the EU Member States "whatever their nationality" several privileges which will be maintained also vis-à-vis UK officials and other servants within the EU. Protocol No 7, however, will no longer be applicable within the UK upon withdrawal.

Under Article 11(a) of Protocol No 7, officials and other servants of the EU enjoy "immunity from legal proceedings in respect of acts performed by them in their official capacity." This immunity exists within the EU. Whether there is the need to provide for an immunity clause applicable in the UK post-Brexit in the form of an agreement under Article 50 TEU is to be decided.

[60] The precise amount is established in Article 83(2) of the Staff Regulations.

4.6. Mobility and residence rights

Article 11(b) of Protocol No 7 grants active officials and other servants free movement rights in that they and the members of their families may "not be subject to immigration restrictions or to formalities for the registration of aliens."

Given the explicit formulation in the introductory part of Article 11 of the Protocol No 7 that these rules are applicable within the territory of each Member State irrespective of nationality, these rules are also applicable post-Brexit to EU officials and servants of UK nationality within the EU. They will not be applicable within the UK.

4.7. Taxation of salaries, wages and other emoluments

Under Article 12 of Protocol No 7 to the TEU and TFEU, officials and other servants of the EU are liable to tax only towards the Union. They are in the territory of the EU "exempt from national taxes on salaries, wages and emoluments paid by the Union." This includes salaries, wages and pensions.

Given that post-Brexit, Protocol No 7 will no longer be applicable vis-à-vis the UK, the UK in principle will regain the right to tax salaries, pensions and benefits of all active and former EU officials and agents who have their tax residence within the UK. EU servants wanting to avoid such possibility will need to maintain a tax residence outside of UK jurisdiction.

Since under Article 11 of the Protocol No 7 active servants of the EU have residence rights irrespective of their nationality, active servants should not have a problem in maintaining a tax residence outside of the UK. Retired UK officials might, on the other hand, face difficulties of establishing residence in the EU-27 post-Brexit. This will depend on the outcome of the Article 50 TEU negotiations.

5. RIGHTS OF RETIRED EU STAFF MEMBERS OF BRITISH NATIONALITY POST-BREXIT

UK withdrawal from the EU may also have consequences for EU officials and other servants of British nationality, who will be retired on the date of the UK's formal exit.

5.1. Pensions rights

As has been discussed on pensions in this study, in principle, anyone who has obtained rights to a pension having been a member of the EU's staff holds a claim against the EU. This is the legal situation, which will be applicable in case no Brexit agreement under Article 50 TEU is concluded or in case such Brexit agreement does not address this question.

However, the question may arise as to whether it will be possible to change the conditions of receipt of pension payments, and, especially, whether it will be possible to change the party obliged to pay the pensions. Should for example, as part of a Brexit agreement, the UK be made responsible for the payment of pension rights acquired under EU law by EU servants of UK nationality, the issue will arise as to whether the calculation or the level of pensions paid can be changed.

Several types of changes are imaginable post-Brexit. If the UK were to pay for the share of the UK nationals drawing pensions from the EU directly to the EU budget, or if the UK were to establish to the benefit of the EU budget a fund from which such pensions could be paid, there would be no repercussions for the individual pensioners.

On the other hand, should the result of the Brexit negotiations consist of a transfer of claims from the EU to the UK for all UK nationals who have retired from EU services, this would lead to an amendment of the pension rights. Any amendment of existing and acquired pension rights requires amendment of the rules of the Staff Regulations and the CEOS under the procedure of Article 336 TFEU in the ordinary legislative procedure. Such amendment of the Staff Regulations as a legislative act will need to comply with the principle outlined in Article 34 CFR on the protection of *inter alia* entitlements to pensions.[61] However, this obligation to observe the principle does not protect a specific amount of pension payments or the exact conditions of payments. The latter can be adapted to changing circumstances. In any case, such matters would arguably need to be addressed by a possible withdrawal agreement.

Whether entitlements to pension payments are protected via the right to property under Article 17 CFR has not been decided by the CJEU. It is possible to deduce from statements of the CJEU that entitlements derived *inter alia* from "the occupational activity of the person concerned" are protected by the fundamental right to

[61] On the effect of a principle in the Charter of fundamental rights see, Article 51(2) and Article 52(5) CFR.

protection of property.[62] Later definitions of property rights (not pensions related) by the CJEU such as e.g. in *Sky Österreich*[63] appear to confirm this. *Sky Österreich* defined property rights under Article 17 CFR as "rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit."[64] Pension entitlements do have an asset value, and allow for the exercise of such rights to the holders benefit, autonomously as individual. Arguably, therefore, any amendment of the EU entitlements to pensions needs to comply with the rules on limits under Article 17 CFR as spelt out in Article 52(1) CFR. Nevertheless, no clear case law by the CJEU exits in this area[65].

Irrespective of the details, a proportionate legislative reform of pension rights for former EU staff members of UK nationality appears possible in the post-Brexit context. Individuals who have already reached pensionable age are protected by the *principe de sollicitude,* which is also applicable in the relation between the official and the Union post-retirement.[66]

5.2. Sickness coverage

Under Article 72(2) of the Staff Regulations, an official who has retired regularly from the service of the EU continues to receive EU sickness benefits. Continued coverage requires continuous contributions from the beneficiary. Therefore, Brexit will not affect these provisions.

5.3. Taxation

Under primary law, pursuant to Article 50(3) TEU, the Treaties and Protocols, which under Article 51 TEU form an integral part thereof, will cease to apply to the UK from the entry into force of the withdrawal agreement or, failing that, two years after the notification of the withdrawing Member State. It therefore follows that the Protocol (No 7) on the privileges and immunities of the European Union, which in Chapter V

[62] See e.g. Case C-44/89 *von Deetzen v Hauptzollamt Oldenburg* of 22 October 1991, ECLI:EU:C:1991:401, para 27 (excluding from the right to property as a General Principle of EU law an advantage which does not derive from the assets or occupational activity of the person concerned); Case C-2/92 Dennis Clifford Bostock ECLI:EU:C:1994:116, para 19; Case C-38/94 Country Landowners Association of 9 November 1995, ECLI:EU:C:1995:373, para 14.

[63] See C-283/11 *Sky Österreich* of 22 January 2013, ECLI:EU:C:2013:28, para 34 finds that Article 17 of the Charter "applies to rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit."

[64] See C-283/11 *Sky Österreich* of 22 January 2013, ECLI:EU:C:2013:28, para 34.

[65] Also a reference to the ECHR under Article 52(3) CFR does not clarify the issue. Where the ECHR protects claims as property, the Charter should do so also under Article 17. Irrespective of the fact that it is also disputed in the ECHR case law whether claims to social security benefits such as pensions fall under the material scope of protection of Article 1 of Protocol No. 1 (.g. ECtHR No 65731/01 and 65900/01 STEC and Others v UK of 12 April 2006, para 47 se seq. and the dissenting opinions) even if that were the case (see e.g. ECtHR No 48321/99 *Slivenko v. Latvia* of 23 January 2002, para 121 which included also claims "by virtue of which the applicant can argue that he or she has at least a 'legitimate expectation' of acquiring effective enjoyment of a property right.") it would be well possible to address matters of pensions not in Article 17 of the Charter but, as is undoubtedly done in Article 34 of the Charter.

[66] Case C-229/84 *Sommerlatte v Commission* of 12 June 1986, ECLI:EU:C:1986:241, para. 19, see also : Sylvain Dalle-Crode, Le fonctionnaire communautaire – Droits, obligations et régime disciplinaire, Bruylant Bruxelles, 2008, 242.

contains a number of relevant provisions for the officials and other servants of the EU, will cease to apply to the UK.

Protocol No 7 to the TEU and TFEU refers *inter alia* to emoluments, which under Title V of the Staff Regulations include pensions and invalidity allowance under Chapter 3 of the Staff Regulations. Under Article 12 of Protocol No 7 to the TEU and TFEU, all salaries, wages and emoluments paid to its active or past servants, which include pensions, are "exempt from national taxes". However, when the UK terminates its Membership of the EU, it will no longer be bound by Protocol No 7. Former EU officials and agents living in the UK can thus be taxed on their EU pensions under national law. Whether they can argue that they had protected legitimate expectations as to the non-taxation is then a question for UK law.

6. AVAILABLE REMEDIES

The Staff Regulations offer a system of remedies that go beyond those in many other policy areas. Articles 90 and 91 of the Staff Regulations define a specific appeals and complaint system, which needs to be exhausted before a case can be brought before the CJEU. Under Article 270 TFEU, the CJEU shall have jurisdiction in any dispute between the Union and its servants within the limits and the conditions laid down in the Staff Regulations and the CEOS. Thus, under Article 91 of the Staff Regulations an appeal to the CJEU can be lodged only after the exhaustion of the complaint procedure. An appeal can be brought against any act of a hiring authority affecting a person, to whom the Staff Regulations apply, adversely in the sense that the individual has an interest in compliance with the law.[67]

6.1. Right to request for a decision

The possibilities outlined in Articles 90 and 91 of the Staff Regulations discussed in the following chapter are open to all individuals "to whom these Staff Regulations apply". These are not only officials, but also members of temporary staff including those seconded to the EU services as well as those on temporary contracts.[68]

6.1.1. Request for a reasoned decision

Article 90(1) of the Staff Regulations[69] provides for the right of "any person to whom these Staff Regulations apply" to request that the appointing authority take a decision relating to him or her. This individual right to a reasoned decision opens the possibility for individuals to demand clarification and declarations as to their legal position. The request for a decision is thus an important tool for addressing legal uncertainty for staff members affected by Brexit since it may also entail a request for a declaratory act clarifying legal positions. Requests under Article 90 of the Staff Regulations may, for example, include a declaratory decision aimed at clarifying the legal status of an individual of the kind that an institution or body of the Union will not exercise the possibility to request to resign under Article 49 of the Staff Regulation. This provision also helpfully formulates the consequences of silence to such request as being a negative decision.

Staff members will, therefore, be able to submit a request to the appointing authority under Article 90(1) of the Staff Regulations to clarify the situation as to whether they may qualify for an exception to the nationality requirement of Article 28(a) of the Staff Regulations and Articles 12(2)(a), 82(3)(a) and 128(2)(a) CEOS. A negative decision or a non-decision can be subject to a complaint under Article 90(2) of the Staff Regulations with the subsequent possibility of an appeal to the CJEU.

[67] For the conditions see: Case C-90/74 *Deboeck v Commission* of 16 October 1975, ECLI:EU:C:1975:128, para 12.
[68] Case C-417/05 P *Commission v Maria Dolores Fernández Gómez* of 14 September 2006, ECLI:EU:C:2006:582, para 36.
[69] Applicable by analogy to the CEOS under Articles 46, 117, 138 CEOS.

6.1.2. Complaint procedures

Article 90(2) of the Staff Regulations provides for a complaint procedure. Such a complaint can be made against an act affecting a member of staff adversely. Such an act can consist either of an act initiated by an authority, for example, a decision under Article 49 of the Staff Regulations. A termination of employment decision under Articles 49 and 28(a) of the Staff Regulation and Articles 47(c)(ii) and 12(2)(a) of the CEOS, as well as the equivalent provisions to that in CEOS, can be the subject of a complaint under Article 90(2) Staff Regulations, with the subsequent possibility of an appeal to the CJEU. Where the decision has financial consequences, the dispute will have "financial character" and in this respect, the CJEU will have under the second sentence of Article 91(1) of the Staff Regulations "unlimited jurisdiction".

A complaint under Article 90(2) of the Staff Regulations can also be brought against a decision following the request under Article 90(1) of the Staff Regulations or in cases where an authority "has failed to adopt a measure prescribed by the Staff Regulations."

6.2. Judicial remedies

Judicial remedies exist for the review of administrative actions with regard to the possibility of challenging an act (Article 263 TFEU). Further protection is granted by the possibility of requesting interim measures (Article 279 TFEU), incidental review (Article 277 TFEU) and the possibility of claiming damages (Article 340, second paragraph TFEU).

6.2.1. Appeal in the form of an action for annulment

An action for annulment can be brought against a decision following a demand (either under Article 90 or 91 of the Staff Regulations) to grant an exception to the nationality requirement under Articles 28(a) of the Staff Regulation and Articles 12(2)(a), 82(3)(a) and 128(2)(a) CEOS, which are the most relevant for British EU staff members. The standard of review in staff cases involving discretionary decisions has been defined by the CJEU. For example, in *Righini v Commission* the Union judge must limit the review to whether there was violation of essential procedural requirements, whether the decision was founded on factually wrong or incomplete findings, whether there was a misuse of powers, an infringement of Union law or an insufficient motivation. In addition, review will take place as to whether a manifest error has taken place in the exercise of powers. [70] Overall, any decision will be reviewed as to its compliance with the principle of proportionality (Article 5(4) TEU and 52(1) CFR). In the context of staff matters, especially relevant are the possibilities of requesting interim measures (Article 279 TFEU).

Equally, a decision by an institution under Article 49 of the Staff Regulations requiring an official with UK nationality to resign is subject to an action for annulment under Article 263 TFEU.

[70] Case C-57/06 P *E. Righini v Commission* of 26 January 2007, ECLI:EU:C:2007:65, para 14. See also Georges Vandersanden, La procédure et les voies de recours, in : Inge Govaere et Georges Vandersanden (éd.), La fonction publique communautaire – Nouvelles règles et développements contentieux, (Pratique du droit communautaire), Bruylant 2008, 111-140.

More problematic is standing under Article 263 TFEU against the termination of employment of "other agents". Where the appointing authority declares a termination, it can be challenged. Should the institutions and agencies in the event of Brexit take the stance that the termination of employment is, as in the case of Article 47 CEOS (and the other equivalent norms of the CEOS) a consequence of the legislative act, the question would arise whether there would be standing to bring an action for annulment against such act. Although it is in my view highly unlikely that no explicit or implicit administrative decision would be taken in the matter of termination of other staff agents of UK nationality, it is important to briefly outline the possible consequences of such situation.

Under CJEU case law, individuals cannot bring an action for annulment against acts not directly and individually affecting them. Although it is obvious that a Brexit-induced loss of employment directly concerns an agent,[71] an agent is, under the definition of the CJEU, not individually concerned because she or he are not individualised by the act. Since any agent is in the same situation as any other person covered by the pre-conditions of the law, under the case law of the CJEU, they are not in a position equivalent to an addressee of an act.[72] The fact that the number of people affected is identifiable does not change this according to the CJEU case law.[73] As acts of legislative nature, the Staff Regulations and the CEOS will also not be regarded as "regulatory acts" under the fourth paragraph of Article 263 TFEU.[74]

Therefore, individual agents of the Union should be advised, if they want to remain in the services of the Union, to seek clarification under the request for a decision granting exception from the citizenship requirement of Article 12(2)(a), 82(3)(a) and 128(2)(a) CEOS prior to the event of Brexit. Additionally, Article 91(4) of the Staff Regulations allows for an immediate appeal to the CJEU in combination with the request for the adoption of an interim measure. A possible interim measure may consist of granting an exception and temporarily protecting from the consequence of Article 47 CEOS (and the other equivalent norms of the CEOS).

6.2.2. Damages

The CJEU has awarded damages under the criteria of Article 340, second paragraph TFEU in respect of an action for damages in staff matters. Article 268 TFEU[75] grants the CJEU jurisdiction in disputes, which concern compensation for damage under the conditions set out in Article 340, second paragraph TFEU. While not containing any

[71] The CJEU holds that a "measure must directly affect the legal situation of the person concerned and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules" see e.g. Case T-69/99 *DSTV v Commission* of 13 December 2000, ECLI:EU:T:2000:302, para 24.
[72] Case C-25/62 *Plaumann* of 15 July 1963, ECLI:EU:C:1963:17.
[73] Case T-279/11 *T&L Sugars* of 29 November 2016, ECLI:EU:T:2016 :683, para. 83; Case C-276/93 *Chiquita Banana* of 21 June 1993, ECLI:EU:C:1993:151, para. 8; Case C-352/99 P *Eridania* of 28 June 2001, ECLI:EU:C:2001:364, para. 59.
[74] Case C-583/11 P *Inuit Tapiriit* of 3 October 2013, ECLI:EU:C:2013:625, paras 58-60.
[75] Prior to the Lisbon Treaty the Court made it clear that it did not have jurisdiction to entertain an action for damages under Title VI EU, see Case C-354/04 P *Gestoras Pro Amnistía and others v Council* of 27 February 2007, ECLI:EU:C:2007:115, paras 44–48. However, under the Lisbon Treaty the Court now has jurisdiction under Art 268 TFEU to hear disputes in relation to compensation for damages as provided for by Art 340, 2nd para and 3rd para TFEU. This jurisdiction apparently also includes compensation for damage caused by acts previously adopted under the Third Pillar.

substantive principles itself, the wording of Article 340, second paragraph TFEU has provided, in effect, the CJEU with a creative mandate to develop such principles using a comparative approach to determine Union liability including in matters of staff relations damages caused by hiring authorities. This includes (Article 340, third paragraph TFEU)[76] liability for damages caused by the ECB.[77]

Article 340, second paragraph TFEU provides an attractive remedy for staff members since an action for damages is, generally, according to the CJEU, "an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose."[78] Where an applicant brings an action for damages, the CJEU will not require the act that allegedly caused the damage to first be annulled under Article 263 TFEU.[79] The CJEU may, as demonstrated by *Cobrecaf v Commission*,[80] reject a damages action as inadmissible due to the inadmissibility of the annulment action, where "the action for damages is actually aimed at securing withdrawal of an individual decision which has become definitive and would, if upheld, have the effect of nullifying the legal effects of that decision."[81] In staff cases especially, it is important to take into account that, "the inadmissibility of an application for annulment of an act results in the inadmissibility of the application for damages where … the two requests are closely linked".[82]

Union liability can in principle arise only if the act, which has caused the damage, is unlawful due to a breach of law[83] intended for the protection of the individual.[84] Particularly with respect to staff cases, the CJEU has found that the prohibition against the misuse of power was intended to protect individuals.[85] The type of unlawful acts that the CJEU has reviewed include matters such as distortion of facts, failure to exercise diligence in duties of inquiry and a violation of the obligation to act within reasonable time,[86] and has ordered payment of non-pecuniary damages for the violation of those principles.[87] Damages also play an important role to remedy

[76] Art 340, 3rd para TFEU replaces Art 288, 3rd para EC with one that contains a wording similar to that used in Art 340, 2nd para TFEU.
[77] See also Case T-295/05 *Document Security Systems v BCE* of 5 September 2007, ECLI:EU:T:2007:243, para 76.
[78] Case C-4/69 *Lütticke v Commission* of 28 April 1971, ECLI:EU:C:1971:40, para 6.
[79] See Case T-178/98 *Fresh Marine v Commission* of 24 October 2000, ECLI:EU:T:2000:240; Case T-309/03 *Camós Grau v Commission* of 6 April 2006, ECLI:EU:T:2006:110, paras 78 and 79; Case T-193/04 *Tillack v Commission* of 4 October 2006, ECLI:EU:T:2006:292, paras 97 and 98.
[80] Case T-514/93 *Cobrecaf and others v Commission* of 15 March 1995, ECLI:EU:T:1995:49.
[81] See also Case T-180/00 *Astipesca v Commission* of 17 October 2002, ECLI:EU:T:2002:249, para 139, Joined Cases T-44/01, T-119/01 & T-126/01 *Eduardo Vieira and Others v Commission* of 3 April 2003, ECLI:EU:T:2003:98, para 214; Case T-86/03 *Holcim v Commission* of 4 May 2005, ECLI:EU:T:2005:157, para 50.
[82] Case C-417/05 P *Commission v Maria Dolores Fernández Gómez* of 14 September 2006, ECLI:EU:C:2006:582, para 51.
[83] Under the *Schöppenstedt* formula a 'sufficiently serious' breach was necessary. However, in Case T-415/03 *Cofradia de pescadores 'San Pedro' de Bermeo and others v Council* [2005] ECR II-4355, the CFI stated at para 85 that it was 'unimportant whether or not the rule of law infringed constitutes a higher-ranking rule of law'.
[84] Joined Cases C-5/66, C-7/66 & C-13–24/66 *Kampffmeyer v Commission* of 14 July 1967, ECLI:EU:C:1967:31.
[85] Case C-119/88 *AERPO and Others v Commission* of 6 June 1990, ECLI:EU:C:1990:231, para 19; Case T-489/93 *Unifruit Hellas v Commission* of 15 December 1994, ECLI:EU:T:1994:297, para 40; Joined Cases T-481/93 & 484/93 *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee v Commission* of 13 December 1995, ECLI:EU:T:1995:209, para 102. No Brexit-related staff decision could thus be taken in the context of holding UK nationals in the service of the EU 'hostage' in order to ensure UK concessions in negotiating an exit agreement under Article 50 TEU.
[86] Case T-217/11 *Claire Staelen v European Ombudsman* of 29 April 2015, ECLI:EU:T:2015:238, para 336.
[87] Case T-217/11 *Claire Staelen v European Ombudsman* of 29 April 2015, ECLI:EU:T:2015:238, para 336 establishing the damages *ex aequo et bono.*

a violation of the principle of legitimate expectations.[88] Specifically in staff cases, the CJEU has awarded damages for anxiety and hurt feelings in the context of emotionally charged procedures.[89]

Nevertheless, where an institution enjoys a discretion, the CJEU generally applies the requirement of a manifest disregard of the law, which makes it difficult to succeed in such compensation cases for individuals unless the violation of essential procedural requirements has been proven and such error had a causal link to harm suffered by an individual. The manifest error test, however, is mitigated in staff matters by the fact that in "disputes of financial character" the CJEU has unlimited jurisdiction (Article 91(1) Staff Regulations).

With regard to non-material damages linked to a faulty decision by a hiring authority, the case law of the CJEU has found that annulling such decision might already give sufficient redress.[90] Only where the party having suffered the consequences of illegality of an act can demonstrate additional damage beyond mere illegality of the decision in the form of additional and separable non-material damages, can such damages be recovered under Article 340, second paragraph TFEU.[91]

6.3. Ombuds-review

The Ombudsman is an alternative to judicial review ensuring good administrative practices and fair treatment of EU and non-EU citizens within the Union. However, in contrast to judicial review, ombuds-review commands have no binding authority and the Ombudsman's powers are ones of persuasion in the form of publicised investigations, critical remarks or recommendations directed at recalcitrant EU institutions, bodies, offices, and agencies. The Ombudsman can initiate an investigation on his or her own initiative, or, following a complaint submitted directly or through a Member of the European Parliament. Importantly, the aim of the investigations is not limited to undertaking an *ex post* review of grievances but also towards proactively improving administrative procedures for the future, avoiding further maladministration. In this respect, an investigation into handling of UK nationals in the EU staff might establish the guidelines for fair treatment in the context of Brexit. A complaint to the Ombudsman by officials and agents of the Union seeking to address what they deem to be a case of maladministration also opens the door for a mediated search for an amicable solution with the institutions.

[88] See e.g. Joined Cases C-104/89 & C-37/90 *Mulder v Council and Commission* of 27 January 2000, ECLI:EU:C:2000:38; and Case C-120/86 *Mulder v Minister van Landbouw en Visserij* of 28 April 1988, ECLI:EU:C:1988:213, para 16.
[89] Joined Cases C-256/80, C-257/80, C-265/80 & C-267/80, & C-5/81 *Birra Wührer v Council and Commission* of 13 November 1984, ECLI:EU:C:1984:341. See also Case T-48/01 *Vainker v Parliament* of 3 March 2004, ECLI:EU:T:2004:61, para 178, where the CFI awarded damages for suffering due to the considerable delay in the EP's procedure for the recognition of Mr Vainker's occupational illness.
[90] Case T-396/03, *Vanhellemont v Commission* of 22 November 2005, ECLI:EU:T:2005:406, para 78 (« l'annulation de la décision attaquée en constitue, en tout état de cause, une réparation adéquate et suffisante »); Case T-368/94 *Blanchard v Commission* of 9 January 1996, ECLI:EU:T:1996:2, para 29.
[91] Case C-343/87, *Culin v Commission* of 7 February 1990, ECLI:EU:C:1990:49, pt. 27-28 (« un préjudice moral détachable de l'illégalité fondant l'annulation et insusceptible d'être intégralement réparé par cette annulation »).

7. CONCLUSIONS AND POLICY RECOMMENDATIONS

The policy recommendations of this study address the legal consequences of UK withdrawal from the EU for both actively employed and retired EU staff members of British nationality.

It will be important to make EU staff of UK nationality fully aware of the fact that loss of EU citizenship may lead to the loss of employment by the EU. This is a result not of Treaty provisions but of a legislative choice in the rules laid down in the Staff Regulations and CEOS. Only the latter two, but not the Treaties, set out that EU citizenship is a pre-condition for employment of EU staff members.

Under the legislation in force, the two main categories of EU staff – officials and agents – are treated differently. The employment of EU officials of UK nationality may cease under the rules of the Staff Regulations in the event of Brexit. The employment contracts of EU agents of UK nationality automatically end in the case of Brexit-induced loss of EU citizenship under the rules of the CEOS.

The Union should inform EU staff of UK nationality that both EU officials and agents of UK nationality have a right to request a decision from their appointing authorities for an exception to the requirement of holding the nationality of a Member State of the EU. The appointing authority enjoys discretion whether to grant such exception. EU general principles of law limit the discretion of the appointing authority through the principles of good administration and the duty of solicitude. Compliance with these principles is subject to review by the CJEU.

Decisions regarding exceptions to the citizenship requirement should be based on a clear and transparent set of criteria. The criteria should take into account the interests of the service in maintaining staff of UK nationality and the interests of the individual staff members. Such criteria cannot be arbitrary. They have to comply with the general principles of EU law as stated above in this study. The criteria of evaluation within the annual reports laid down in Article 43(1) of the Staff Regulation (listing the "ability, efficiency and conduct in the service of each official") may serve as a guideline for the establishment of such criteria. Also the mode of entering the service, whether by means of an open competition or not, may be used as criteria.

As Brexit will affect the EU institutions and other bodies, they should jointly establish such criteria in the interest of ensuring good administrative practices, consistency and compliance with the principle of equality. One approach is to formulate them through internal guidelines of the appointing authorities, possibly in the form of an inter-institutional agreement (Article 295 TFEU) or a similar form.

A specific mediation system, possibly in the hands of the Ombudsman, might be helpful to handle disputes between individual service members and the EU institutions and bodies in the complex post-Brexit related staff matters.

Staff members of the EU acquire pension rights against the EU as a legal person (Article 47 TEU). Brexit does not change this. The EU is liable with its budget for honouring the claims of individuals. Member States act as co-guarantors of the EU's pension obligations (Article 83(1) Staff Regulations). As the UK will no longer be co-guarantor post-Brexit, solutions should be found to ensure that EU staff members have no disadvantage from this.

Protocol No 7 to the TEU and TFEU on the Privileges and Immunities of the European Union includes rules on individual rights of residence and on taxation. Since Protocol No 7 will cease to be applicable to the UK post-Brexit, only persons with residence within the EU will be able to benefit from the protections of Protocol No 7. Within the EU, pensioners of UK nationality will be third-country nationals. In future, they might face difficulties obtaining the right to residence unless the matter is addressed in an appropriate way in the context of the ongoing negotiations for a withdrawal agreement under Article 50 TEU.

The EU should reach an arrangement with its Member States to grant residence rights to former EU staff members and their families in terms replicating the rights under Protocol No 7. This offers a fair arrangement to individuals who have loyally served the EU as staff members. It is not their individual fault to have lost EU citizenship.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, focuses on the legal status of EU active and retired officials and other servants of British nationality in the context of the UK leaving the EU under Article 50 TEU. It examines the legal position of EU officials and other servants of British nationality with their rights and possible remedies. It further explores avenues towards solutions for open legal questions.

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