

ILPA has commissioned a series of position papers on legal issues relevant to the EU referendum. Each paper is accurate at the date of the position paper.

The purpose of the papers is to help inform the debate about the EU referendum, and they are available to be used as a resource by both ILPA members and the general public.

The position papers have been written by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

Copies of the other position papers can be found on the ILPA website at www.ilpa.org.uk

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EU free movement in practice at home and abroad

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Introduction

At its core the EU project remains a common or single market, involving reciprocal commitments so that not only products (goods and services) but also the factors of production (labour and capital) can circulate freely.

The free movement for workers and others exercising economic freedoms (eg service providers and recipients) has now largely been subsumed into the status of citizenship of the EU. Movement and residence in all Member States for EU nationals remains a defining feature of EU citizenship, so that UK nationals, as Union citizens, may in principle live anywhere they choose within the EU, and vice versa. The ultimate goal of EU citizenship policies is to simplify and strengthen the right of free movement and residence of all Union citizens.

Treaty provisions on free movement for EU citizens

The body of law relating to free movement for natural persons is based on several sources of EU law:

- Treaty on the Functioning of the EU (TFEU)
- Treaty of European Union (TEU)
- EU secondary legislation adopted on the basis of the TFEU, such as the Citizens' (Free Movement) Directive¹ 2004/38/EC, and
- case law of Court of Justice of the European Union (CJEU) which interprets and applies the above provisions

The EU treaties, including secondary legislation like the Citizens' Directive, have 'direct effect'. This means they can be cited and used by EU citizens to enforce their rights before national courts.

Who determines who is a citizen of the Union?

The significance of the various sources of EU law is that the legal concept of citizenship was formally introduced into the [European Communities](#) (EC) treaties by the Maastricht Treaty in 1992. Union citizenship is now addressed in Part II of TFEUⁱⁱ (Articles 20–24). Citizenship is also given a formal constitutional status in the EU legal order, through its inclusion in Article 9 TEU which provides that ‘Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship’.

So citizenship status is determined by reference to Member State nationality: all (and only) Member State nationals are European citizens (though people who are not EU citizens known as Third Country Nationals or TCNs, have derivative rights, through being family members of EU citizens for instance).

Member States have a largely unfettered power to determine the scope of their own nationality lawⁱⁱⁱ, and thus (collectively) to control who are the citizens of the EU. However, since a ruling of the CJEU in 2010^{iv}, it has been confirmed that Member States must have due regard to the status of European citizenship when determining matters of nationality.

The formal status of citizenship of the Union built on previous rights to free movement, residence and non-discrimination for workers, service-providers and service recipients (interpreted to include students since 1985^v), and others entitled to free movement under the various directives. The CJEU, together with national courts, have been key actors in the development of EU citizenship, with EU legislation reflecting many ideas initially developed by the judiciary (such as the Citizens’ Directive).

The vast majority of citizenship rights are enjoyed by mobile European citizens who have exercised rights of free movement throughout the Union. However, citizenship also extends rights of movement and residence in certain circumstances to the non-economically active (retirees for instance), although they usually need to have health insurance and sufficient resources so as not to become an ‘unreasonable burden’ on the host state.

What rights does EU citizenship bring to individuals?

European citizens enjoy a bundle of social, legal and political rights by virtue of their status. If you are an EU citizen, you (and your family) have the freedom of choice to decide where to reside, work and study in any of the 28 EU Member States, though the law imposes a number of limits on these EU rights. See the ILPA position paper on rights of entry and residence.

Rights derived from EU citizenship, which each UK citizen enjoys, include (among many others) rights relating to [equal pay for equal work](#) between men and women and the right to adequate rest and limited working hours (the [Working Time Directive](#)). Other individual rights include:

- the right to travel and move freely within the territory of Member States (Article 20(2)(a) and 21(2) TFEU)^{vi}
- the right not to be discriminated against on the grounds of nationality (Article 18 TFEU)
- the right to vote and stand as candidates in elections to the European Parliament and in municipal elections wherever they live in the EU, under the same conditions as nationals of that State (Article 20(2)(b) TFEU)^{vii}—this is an important basis for the EU’s democratic legitimacy as European Parliament elections in England, Scotland and Wales use proportional representation (in Northern Ireland by the Single Transferable Vote system)
- if their own country is not represented, the right to be assisted by another EU country’s embassy or consulate outside the EU, under the same conditions as a citizen of that country (Article 20(2)(c) TFEU)

- the right to petition the European Parliament, apply to the European Ombudsman and address the EU institutions (in any of the 23 EU languages), and to obtain a reply in the same language (Article 20(2)(d) TFEU), and
- the right to organise or support, together with other EU citizens, a citizens' initiative to call for new EU legislation.

So Union citizenship means enhancing EU rights and making sure that EU citizens can enjoy them in their everyday life. This includes fostering citizens' participation in the political life and development of the EU. An example is the European Commission's first EU Citizenship report in 2010, where new rules were introduced to ensure UK and other EU citizens could rely on being protected by a full set of passenger rights whether they travel by air, rail, ship, bus or coach. Passengers were similarly given the right to information, assistance and, in certain circumstances, compensation in case of cancellation or long delay^{viii}.

Conversely, the general principle that migrant EU citizens should be treated equally with national citizens is not unlimited. So Member States retain a degree of control in certain fields such as access to social security, which are dependent on residence, their economic activity, degree of integration in the host state and the nature of the benefit claimed^{ix}.

In the UK, the vast majority of EU nationals who come to the UK do so to work ([not claim benefits](#))^x, traditionally filling many vacancies in the agricultural and horticultural industries and making a [positive fiscal contribution](#)^{xi}. These jobs, given their temporary nature and low levels of pay, tend not to be taken up by British workers. However, many Europeans also work in strategically important jobs in other parts of the British economy, and are overrepresented in [higher-skilled](#)^{xii} as well as lower-skilled professions such as in the [NHS](#)^{xiii}.

In terms of UK citizens living or wanting to work abroad, [many British citizens](#)^{xiv} have moved to Europe for work, study or personal reasons, with around 1.8 million British nationals living in another European country for a year or longer, and 2.2 million living in the EU for at least part of the year. The government recently revealed that these remain the most up-to-date figures that they have^{xv}. The stereotypical image of British citizens in Europe is that of the retired pensioner living on the Costa del Sol. However, retirees are not the only British people to benefit directly from free movement and EU citizenship. It has also enabled British entrepreneurs to set up businesses in Europe, and provided UK workers with employment opportunities in other countries. In 2013, the German government, for example, launched a scheme that aimed to fill skills gaps in Germany [by recruiting British apprentices](#)^{xvi}.

Without free movement and residence rights, UK citizens who wish to move to, or remain in, an EU Member State, but who do not yet have long-term resident status, would be subject to possible quotas and EU-preference rules on labour migration. Highly-skilled British professionals could no longer simply be able to move to another Member State and take up work, but would have to apply for a Blue Card as provided for under EU law^{xvii}, or qualify as an intra-corporate transferee both of which would subject them to more restrictive rules than for EU citizens. Less skilled workers and self-employed British citizens would also be entirely subject to national laws on their admission (although they would have some limited equality rights under the Single Permit Directive^{xviii}).

As EU citizens, UK nationals also benefit from various health protections, both when travelling abroad and also when at home in terms of food safety. They have the right to:

- receive necessary healthcare in any EU country if they unexpectedly fall ill or have an accident during a visit to another EU country, under the same conditions as people insured in the host country—they can claim reimbursement either in the country that they are visiting while they are still there or when they go back to the country where they are insured
- choose to get planned healthcare (sometimes needing to seek prior authorisation from the insurer) in another EU country and be reimbursed for it at home, fully or partially depending on the circumstances

- benefit from harmonised food safety standards—compulsory checks take place throughout the agri-food chain to ensure that plants and animals are healthy and that food and animal feed is safe, of high quality, appropriately labelled and meets EU standards.

What about the wider and economic benefits of EU citizenship?

The single market refers to the EU as one territory without any internal borders or other regulatory obstacles to the free movement of goods, workers, services (and the right of establishment) and capital. Article 26(2) TFEU makes reference to 'the internal market', described as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the treaties.

The single market provides benefits for all Europe's 500 million citizens. For instance, academic and professional qualifications are recognised across the EU. Article 53 concerns legislative competence in respect of the mutual recognition of diplomas and certificates and other qualifications. This provides the most significant legal basis for the harmonisation of national legislation so as to facilitate freedom of establishment (and services). Below are some examples of the wider benefits of EU citizenship to individuals.

Setting up a business

The single market allows businesses to operate unhindered in all Member States. Companies have the opportunity to grow as they wish, establishing themselves in another EU country under the same conditions or to offer cross-border services from their own home base. Legal services are an example of a sector which has benefited enormously from the internal market. 76% of the UK top 50 law firms have at least one office elsewhere in the EU. The ability to open new offices stems from freedom of establishment (Articles 49 and 50 TFEU), but this is underpinned by the possibility for firm employees to move to those new locations^{xix}.

Education and research

Non-discrimination on grounds of (other) EU nationality has been said to be 'particularly important in the field of education' in view of the aims of Article 165(2) TFEU to 'encourage mobility of students and teachers'^{xx}.

The EU funds cutting-edge research in the UK, and on a level that many scientists believe would be [impossible to maintain](#)^{xxi} post-Brexit.

There are also many EU wide programmes from Comenius (school education), to Erasmus (higher education), Leonardo da Vinci (vocational training), to Grundtvig (adult education) and finally Jean Monnet (university-level teaching and research in European integration) which create opportunities for individuals (and teachers/institutions) to benefit from educational and cultural exchange across Europe. They also boost the skills and employment prospects of those taking part.

More than three million European students have, for instance, benefited from the EU's 'Erasmus' youth mobility scheme since it was established in 1987, including large numbers of British citizens. The British Council say that \$1bn will be allocated to the UK alone over seven years under Erasmus and that nearly 250,000 people from the UK will be able to undertake activities abroad with the [programme](#)^{xxii}.

There are currently EU rules on admission of students^{xxiii} and scientific researchers^{xxiv}. However, in the event that the UK left the EU, there would be no requirement to award UK citizens who wanted to study in EU Member States equal treatment as regards access to grants tuition fees or admission quotas as there is now^{xxv}. British students would also have more limited rights to work during their studies, and no right as such to stay on after their completion^{xxvi}.

Sharing of personal data

Data protection and privacy from 'Big Brother' oversight has become a [major cause of concern to the public in recent years](#)^{xxvii} and these concerns have found their way to the courts.

On 6 October 2015, the CJEU issued the *Schrems* judgment declaring the European Commission's 15-year-old '[US Safe Harbor decision](#)' invalid^{xxviii}. That earlier decision enabled US companies to self-certify that company practices ensured an adequate level of protection for personal data under the EU Data Protection Directive, thus permitting the company to transfer data from the EU to the US. The *Schrems* decision holds that US law does not afford adequate protection to personal data. Now any companies with offices in both the EU and US, any European company that outsources work to the US, and any company that sends information from the EU to the US need to independently verify that company transfers of personal data from the EU to the US meet the level of data privacy protection considered adequate by the [EU Data Protection Directive](#)^{xxix}.

Mobile phone roaming charges

On 30 June 2015, the European Parliament and the Council of Ministers reached an [agreement](#)^{xxx} to end data roaming charges, which will make it much cheaper to make calls and use the internet wherever you are in the EU. This was the culmination of ten years of work by the European Commission. Since 2007, prices for roaming calls, text messages and internet data have fallen by 80%. The price of using the internet on mobile phones while in other EU countries is now 91% cheaper than in 2007.

Consumer Protection

The Consumer Rights Directive^{xxxi} is an EU measure that gives EU citizens extra rights when buying in the UK and the EU. All EU members have agreed to it. In summary they:

- align and harmonise national consumer rules in several important areas, such as on the information consumers need to get before they purchase something, and their right to cancel online purchases—increased harmonisation means that consumers can rely on the same rights, wherever they shop in the EU
- strengthen consumer rights, ensuring a higher level of protection regardless of whether consumers are shopping on the high street or online, in their own country or elsewhere in the EU—for example, consumers will now have clearer information on prices, wherever and whichever way they shop, as traders will have to disclose the total cost of the product or service, as well as any extra fees.

Environmental Protection^{xxxii}

EU policy (Articles 191–193 of TFEU and Article 5 TEU) can be seen as contributing to a number of economic and social changes in this area.

The common EU approach to environmental protection avoids the inconsistencies and fragmentation likely to arise from the alternative model of primarily national or regional regimes for addressing climate and environmental issues. For companies operating at a European level this is a vital aspect of EU legislation and the reason why so many UK companies are keen to maintain European standards and legislation wherever possible.

EU measures have also helped to stimulate innovation across the EU. For example, innovation in the car industry has been driven by binding standards on emissions which came into place after the demise of a voluntary approach. This has helped the UK car industry to remain competitive at a time when manufacturers in less regulated zones such as the US have failed to adapt so rapidly.

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