ANALYSIS PAPER 1:
Comments by the3million on Part II of the draft Withdrawal Agreement

Introduction

Following the publication of the draft legal text of the Withdrawal Agreement (WA), **the3million** would like to share with you comments and observations, which are set out in two documents. In this document we provide comments on Part II of the WA. This should be read in conjunction with our Analysis Paper 2 that provides comments on the implementation and enforcement issues covered by Part I and Part VI of the WA.

This paper provides comments on specific articles of Part II of the WA, suggesting amendments to the text. However, we first want to draw your attention to three overarching problems in the approach of the WA. They need more profound political consideration and cannot simply be addressed by minor text amendments to the current WA. The EU citizens in the UK face three problematic challenges, to which the WA as it stands does not provide a proper answer:

1) The risk of No Deal is ever greater. The only solution is ring-fencing of citizens' rights via a separate agreement.
2) The WA applies a formalistic approach to the criteria of Directive 2004/38. This ignores the particular difficulties of applying such criteria in a country that never had a registration system and will not provide the normal EU legal protection once it is no longer a Member State. The only solution is for the political commitments made by the UK on the nature of the registration system to be set out in detail within the WA, or within a separate Protocol attached to the WA (or to a separate citizens rights agreement).
3) The WA tries to compensate for the 'enforcement gap' left by the fact that the UK will no longer be part of the EU judicial system. However, the enforcement tools provided by the WA fail to protect us properly. We propose, in particular, that the Independent Authority provided in Article 152 should be a EU-UK body and cannot simply be a UK body under control of the Government. (this it worked out in our second paper)

The remainder of this document deals with comments and amendment proposals to address particular gaps of the WA with regard to the protection of certain categories of vulnerable people, as well as shortcomings in the registration procedure and the description of the material scope of some rights.

Ring-fencing citizens' rights; considering a separate Citizens' Rights Agreement

Before discussing any content of the WA, it is important to note that the text will only provide protection if it gets adopted and ratified. However, at this critical stage in the negotiations it is increasingly clear that we cannot be confident that a WA between the EU and the UK will be successfully concluded.

The debate on the Northern Irish border question in particular has brought sharply to the forefront the inherent contradictions of the UK Brexit approach and the huge gap between the positions of the UK and the EU. The risks of no deal are increasing daily. The

consequences of this will be dramatic for EU citizens in the UK (EUinUK) and British citizens in the EU (UKinEU), who will find themselves in a complete legal limbo. Not only will they face a period in which their status will be entirely unclear (with huge immediate consequences for travel, access to services, potential discrimination in the private sector etc), when a national solution will be finally adopted this will be far inferior to their current rights. Moreover, failing to agree a deal will profoundly upset relations between the UK and EU. This will put a strain on the necessary dialogue needed to ensure coordination of social security, entitlements already built up and people's options to move back to their country of origin if they desire to do so.

The3million have campaigned for a ring-fenced solution of citizens' rights previously, but as the negotiations unfold the urgency of it becomes ever more apparent and the idea is gathering increasing support from legal experts and decision-makers. A number of proposals have been put forward for how this could be achieved. A separate citizens' rights agreement can be adopted under Article 50 TEU at an earlier stage than the rest of the divorce negotiation. This will also allow its ratification in the UK prior to Brexit day and ensure that citizens' rights are protected even if further negotiation fails.

Legal experts have argued that although Article 50 TEU mentions 'agreement' in the singular, more than one agreement can be adopted under that Article. It is common jurisprudential practice to interpret words in the singular in the plural and vice versa; and such a reading would respect a teleological reading of Article 50. The Commission proposal to adopt a separate Protocol on Northern Ireland seems equally to accept the possibility of a plurality of texts under Article 50.

To remove any remaining doubt about that possibility, we will like to draw your attention to Article 218TFEU which allows the EP, a Member State, the Council or the Commission to ask the CJEU for an opinion on the legality of a draft Treaty. We would urge the EU institutions to make such a request on the basis of the current draft WA, asking the CJEU's opinion on whether the WA can be split up and Title II could be adopted as a separate Agreement under Article 50.

The draft provisions of the WA regarding citizens' rights can be taken as a starting point for a separate citizens' rights Agreement. Given the current prospects of the negotiation, and daunting consequences of a no deal for EU citizens, we urge the EU Institutions to explore this avenue further.

Taking the UK context seriously; considering a Protocol on citizens' rights.

Trying to ensure the protection of EU rights in the context of a country that is no longer member of the EU is challenging. Oversight by the CJEU will not be guaranteed fully. The WA takes this partially into account, for instance by providing the creation of an Independent Authority. However, the WA fails to recognise the particular and unprecedented challenges of the UK context as a country that will be outside the EU when it comes to the application of the substantive criteria of EU law regarding the right to reside.

Applying requirements such as Comprehensive Sickness Insurance (CSI), 'genuine and effective work', and 'sufficient resources' makes sense when a country is part of the EU, under full control of the CJEU and when these criteria have been properly and transparently applied over time. However, it becomes highly problematic when these criteria have not

been applied for decades (due to absence of a registration system), have been applied improperly (such as the criterion of CSI), and suddenly would be applied to over 3 million citizens at once, in the context of a country that is no longer part of the EU. In this context, registration for a new permanent status under the WA will become a sword of Damocles, with unsuccessful application ultimately implying obligation to leave the country. Applying the full criteria of EU law for recognition of residence in this context is a recipe for disaster, particularly in the context of the UK's hostile environment to immigration.

It is therefore very disappointing that the EU appears to have ignored this complex reality and has failed to protect its citizens properly by simply stating that the UK can apply the normal discretion of EU law in the application of the substantive criteria for recognition of residence. The WA only provides a generic provision allowing a Member State to apply more favourable measures. In the case of the UK we do not believe this will provide adequate protection. The failure of the EU to recognise the particular challenges of the UK context is particularly surprising given that:

a) the UK has already shown bad implementation of these criteria even while still part of the EU, as shown with the criteria of comprehensive sickness insurance (and without this leading to effective EU enforcement);
b) the UK itself has admitted that a maximalist application of EU law criteria in the registration process would be impossible to implement.

The UK Government has made several statements that it would not apply the criteria of CSI and 'genuine and effective work'. It has also set out a registration proposal that appears to be based mainly on proof of legal residence and criminality checks. However, it remains unclear whether the non application of the 'genuine and effective work' test would imply no check on work at all, and (by consequence) neither of any means testing of 'sufficient resources' (which normally comes into play when not in work); or whether work and means testing would still feature somewhere in the registration process via the requirement of 'legal residence'. For instance, the current UK proposal for the registration system would start from HMRC data, and thus focus on people in work. This raises the question of what will be the burden of proof for those not in work. In light of this, the current text of the WA fails to protect EUinUK against the UK Government changing its mind over the political statements made and over applying simplified criteria for granting permanent residence status in the future.

We therefore urge for the criteria applied in the UK registration procedure to be clearly set out in the WA. This means giving binding force to unilateral commitments the UK has already repeatedly made. In this way, it will be clear that the UK will not apply the CSI criterion, or apply any work or means testing, and apply criminality checks only in full respect of EU law.

We appreciate that the EU might have been reluctant to including such commitments out of fear that it would undermine the discretion provided to Member States in the application of Directive 2004/38/EC. However, the WA is an international Treaty that can set specific provisions for one party. It can take into account the particular situation of a country no longer part of the EU, thus requiring specific guarantees to protect citizens' rights. While we believe this can be done within the WA itself (and some of its provisions are already specific to the UK, e.g. regarding the Independent Authority), this can also be done in a **separate Protocol** (setting out the UK registration system), added to the WA (or ideally, to a separate Citizens Rights Agreement). A Protocol has the same legal effect, but might help clarify this

is to take into account the specific circumstances of a Member State withdrawing from the EU. A Protocol might take away the Member States' reluctance to include these commitments.

The inclusion or not of such specific provisions regarding the UK registration system is potentially the most important issue having an impact on how many citizens might be negatively affected and face the UK's 'hostile environment' and potential deportation. Whether a country is part of the EU or not has a profound impact on how the application of EU law criteria and a registration system will work in practice.
We therefore urge the EU to take this reality finally into account and provide specific provisions for the UK registration system in the WA or separate agreement, or Protocol attached to it.

Particular gaps in the text, and provisions requiring amendment

Articles 8 and 9; the problematic requirement of 'continuity of residence'

Paragraph 1 (a) and 1 (e) (i)

The definition of the scope of Part II requires the continuity of residence after the transition period. Article 10 then states that "Continuity of residence for the purposes of Articles 8 and 9 shall not be affected by absences as referred to in Article 14(2) and (3)." Article 14(2) and (3) refer then to Article 16(3) and Article 21 of Directive 2004/38/EC.

This definition of 'continuity' in a negative way (namely it is not how Directive 2004/38/EC defines it) is confusing. It does not tell the reader what continuity means. This leaves scope to confusing and damaging interpretations of the 'continuity' requirement in Articles 9. It may imply that people who have legally built up rights but are for some time absent from the host state and then return do no longer fall under the scope of Part II (with potential exception of its Title III).
Moreover, it is wrong to assume that citizens who resided in the host country but do no longer reside at some stage after transition, will be fully protected by Title III of Part II which deals with the coordination of social security. Somebody who has been resident in the host country, but leaves might still need protection of the WA, for instance in relation to professional qualifications.

The requirement of 'continuity of residence' within the definition of the personal scope of Part II puts these people at risk.
This can be avoided by deleting this requirement from the definition of the personal scope, and simply using this requirement where it really matters. Article 14(2) and 3) will then still refer to 'continuity of residence' for those cases where it is relevant, namely in the calculation of permanent residence. Article 14 makes also clear that periods of residence post transition can still contribute to building up permanent residence, within the limits provided by Directive 2004/38/EC. To achieve this outcome, there is no need to also put a continuity of residence requirement in the definition of the scope of application of Part II, which puts certain groups of people at risk.

We therefore propose that Article 9 will be amended by removing the requirement "and continue to reside there thereafter" in (1)(a), (b), (c), (d), (e)i, (f); and (2).
An alternative solution is to replace 'and continue to reside there thereafter' with 'and reside there thereafter'. This would take away the problem of interpretation of 'continuity'. However, it does not resolve the issue of protection (such as professional qualification) needed for those who resided prior to transit and have moved away.

Similarly, the requirement 'and continue to reside there thereafter' should also be removed from the definitions of 'host state' in Article 8(c) , and of 'state of work' in Article 8(d).

Article 9, Paragraph 1 (e) (iii) – third condition

The wording of this condition appears to refer to separated or divorced couples since it refers to rights of custody. This therefore seems to exclude children born after transition to one parent who is covered by the WA and the other who is a third country national but who are not separated or divorced. This will need further clarification.

Article 12. Residence rights

For the reasons set out above, we believe that the WA should set out in detail the registration procedure that will be applicable in the UK, corresponding with the political statements it has made regarding not applying the criteria of CSI, 'genuine and effective work', and 'sufficient resources'. This would require a substantive redrafting of Title II, Chapter 1.
As suggested above, the alternative is to set out these commitments by the UK in a Protocol.

In both cases, we suggest that Article 12 will include a fifth paragraph stating:

"The host state can apply more favourable conditions for obtaining, retaining or losing residence rights. The application of more favourable conditions does not lead to those profiting from them falling out of the scope of the Withdrawal Agreement"

Clarification: we believe this extra paragraph is needed since the Court's judgement in Ziolkowski might lead to an interpretation that considers that more favourable conditions would bring citizens merely within the scope of national law.

Article 14(3) right to return.

As we have repeatedly stated, without a life-long right to return our current status will be substantially altered. Once out of the EU, we have no possibility of relying on free movement in the future. By definition, EUinUK have family and social connections in more than one country, and there are many reasons why we may have to move between them at some stage in life. Only a life-long right to return protects us to keep the social ties we have made with the host country even if we had to depart for some time.
This right of life-long return for EUinUK corresponds with the possibility to retain free movement for UKinEU throughout the EU, which we equally support.

We propose to replace Article 14(3) by the following provisions:
'Once required, the right of permanent residence can be lost only on the same grounds as nationals of the home country can be deprived of it'

Article 17 – Issuance of residence documents

Article 17 sets out the constitutive approach agreed between the UK and the EU to register those impacted. Our campaign has maintained that a constitutive approach is not necessary to register and protect citizens. Indeed, it is counterproductive and not in the spirit of protecting our rights.

Article 17(1) conditions right under the agreement on the issuing of a document. As observed by our partners and other commentators, this is contrary to article 25 of the Directive 2004/38. It is equally contrary to international law. The rights granted to an individual under an international treaty, such as this Withdrawal Agreement, would not be conditional on the issue of a "new residence document" confirming the right granted. As we have argued previously, the "new residence document" should be evidence and confirmation of a status that exists by itself. By also making the rights under the WA conditional, where mistakes are made and errors occur, applicants will become subject to the UK's Hostile Environment and the plethora of dire consequences.
In the interests of protecting citizens from this risk, we ask that the paragraph be amended as follows: "The host State may require …. to apply for a new residence document as evidence of the enjoyment of the rights under this Title"

Article 17(1)(c) establishes a one year extension to the grace period following the transition period reflected in 17(1)(b). Like the BiE, we have doubts as to the effectiveness of this clause. We add that one year may not be sufficient an extension to cope with the numbers of people involved. The full scale of those applying is not yet fully understood. We would suggest a more flexible approach be adopted to the time frame of the extension.

Article 17(1)(h). EU citizens who already have a permanent residence document or (particularly elder EU citizens who arrived in the UK prior to the PR procedure) who hold indefinite leave to remain should not be asked to apply again, but should be granted their residence document automatically, free of charge. They should simply be sent the new residence document to replace their current card (without any additional checks or application).

Article 17(1)(k),(l) and (m) sets out the requirements for documents to demonstrate the various criteria under the Directive 2004/38 relating to worker, self-employed etc. status. We have previously demonstrated that the UK has failed to fully apply this criteria to those in the UK. In particular those who have failed to acquire comprehensive sickness insurance. In our alternative we set out a light touch residence test that negate the need for a complex assessment of applicants meeting those requirements. As set out elsewhere in this paper, we call for a protocol moving the issue of registration and citizens rights away from certain clauses of the Directive 2004/38 and instead creating a separate, bespoke arrangement for this impacted by the WA.

We have expressed concerns about the scope and definition of criminality and security checks in our previous papers. The scope and definition of these checks is undefined within article 17(p). Furthermore, like BiE, we oppose the requirement to self-declare. In the UK context, there is a risk that those who make mistakes will be punished and erroneously exposed to the Hostile Environment. There is no doubt a need to remove those who are a danger to the public, but the UK can identify these individuals without the need for compulsory checks with applications. Indeed, those who are a risk should be already identified and removed.

Judicial and administrative redress procedures are essential and we welcome that 'any decision' refusing a grant will be subject to such scrutiny. Like BiE we seek clarification that any decision includes not only 'rejection' and 'refusal' decisions. We add to this a clear need to protect those who apply from decisions alleging sham marriages or fraud which can result in persons currently falling outside of the scope of the Directive 2004/38.

Articles 18 and 19. Restrictions and safeguards

We continue to have reservations about the approach taken in the December Joint Report regarding criminality checks. Directive 2004/38 did not have the intention to provide systematic criminality checks as part of the registration (neither for temporary nor permanent registration). It allows expulsion for reasons of public security but this would imply criminality checks only on an ad hoc basis. However, the Directive did not provide for a systematic criminality check as part of the registration system. We believe that the WA's acceptance of systematic criminality checks as part of registration profoundly undermines our existing rights.

This approach is problematically translated into the WA. Firstly, the WA introduces the concepts of 'criminality and security' checks. These have not been defined under EU law. The Directive only talks about grounds of 'public security'. The WA should stick to the concepts of the Directive, for which the case law is established. Otherwise, it simply invites for broad interpretations, leaving the UK wide discretion to curtail existing rights.
The WA refers to the Directive's procedural guarantees in relation to expulsion. However, even in relation to crimes committed prior to the end of the transition, to which in theory EU law still applies, the broader definition of 'criminality and security' used for registration opens up the potential for expulsion beyond what is currently allowed under public security by the Directive. It remains in any case to be seen how effective the EU could invigilate to what extent the UK respects EU law on this matter. This is most particularly alarming in light of the UK's intention to include an exemption on data protection for immigration purposes.

Secondly, most shocking is how EU citizens have been deprived of their rights in relation to conduct in the future; thus undermining their current status of permanent residence.
Article 18(2) leaves it entirely to the host MS to set rules on potential restriction of residence due to conduct. That means that even people with permanent residence are at a considerable risk of expulsion.

Within the Directive the option for expulsion of somebody with permanent residence are defined in a very restrictive way. The WA takes this protection away. Article 19 does not compensate for that.

The relationship between article 18(2) and Article 19 is very confusing. Article 19 says the safeguards of Title VI of the Directive will have to be respected. Title VI of the Directive defines the public policy, public security and public health grounds that allow potential restrictions of rights, as well as some procedural safeguards.

Article 19 WA refers to the full Title VI. However, when one reads Article 19 together with Article 18, one has to conclude that Article 19 only seems to refer to the procedural safeguards set out in that title. Put differently, it is not the full guarantee of Title VI, which would only allow restrictions on the basis of public policy, security and health. Otherwise, the distinction between Article 18(1) and 18(2) does no longer make sense. According to Article 18(1), conduct prior to end of transition has to respect the Directive to the full, hence only within existing definition of public security etc. Article 18(2) instead leaves it up to host country to decide on definition of conduct, which can go considerably behind public security etc defined by the Directive. It would therefore follow that only articles 30-33 rather than the full Title VI are still applicable for conduct post transition.
So what happens then if the UK would decide in the future that people with permanent residence could be deprived of rights or deported e.g. after an accumulation of traffic fines? This might seem far-fetched, but not that much if you consider the UK's current practice of the hostile environment, and the proposal to provide an immigration exemption on data protection rights.

Hence, beyond the principal argument that we believe that a systematic criminality check for the registration is against the spirit of the Directive and our acquired rights, we believe that the WA should at least be amended in the following way:

a. If criminality checks remain part of the registration system, the WA needs to include a clearer requirement that a 'criminality and security' check cannot lead to a failure of registration other than on the basis of the grounds of public security provided in the Directive.
b. Article 18(2) should be removed (and as a consequence 18(1) redrafted). Our permanent residence status should not be undermined by allowing the host state considerably more scope for removal on the basis of conduct.

Article 29. Gap in social security coordination

Article 29 (1) seems, at first sight, to suggest that citizens will retain all their rights in terms of social security coordination. However, this is not entirely clear regarding certain aspects of health care provision, particularly when read together with the following provisions of Article 29.

Para (3) in particular states that planned treatment abroad which was already started prior to the end of the transition period would be covered. This seems to imply that this right disappears after the transition period.

In this context it is particularly worrying that Article 29 does not explicitly mention EHIC. Article 29 thus explicitly provides for ongoing protection within the host state of residence, and for a continued application of coordination rules (and portability of acquired rights) when one moves to another EU in the future and becomes resident there. However, Article 29 remains silent about existing protection that concerns mere travelling (EHIC), and implicitly excludes protection of planned treatment abroad.

If it is indeed the intention to take these rights away that would be particularly damaging for EUinUK and UKinEU These citizens are bound to travel due to family ties abroad and travel proportionally more intensively. Without EHIC, these citizens have to rely on private insurance. This is particularly prohibiting for people with chronic conditions, for whom such private insurance is often unaffordable. These people thus risk being deprived from the normal interaction with their family abroad.

We therefore strongly urge that Article 29 is explicit in guaranteeing the continued application of EHIC.

We also ask for Article 29 (3) to be revised to make clear that planned treatment abroad will also be available after the transition period. In the end, this scheme is based on the prior permission by the state of residence, so keeping the scheme can hardly be said to undermine sovereignty.

Article 32.

The reference to the scope of rights for UK nationals in the EU under Art.32 is a matter that still requires further discussion, as is the equivalent life-long right to return for EU nationals in the UK. We call on the negotiators to resolve this matter as a matter of urgency given the significant impact it has on people's lives.

Article 34.

An extra paragraph needs to be included:

"The application of more favourable conditions does not lead to those profiting from them falling out of the scope of the Withdrawal Agreement"

Clarification: we believe this extra paragraph is needed since the Court's judgement in Ziolkowski might lead to an interpretation that considers that more favourable conditions would bring citizens merely within the scope of national law.

Specific categories at risk: Zambrano, Surinder Singh, dual citizens

We continue to be concerned about categories of citizens who still appear to be excluded from the WA (e.g. Zambrano carers, Chen/Texeira and Surinder Singh), and the text will need to clarify the manner in which dual nationals will be able to evidence their rights under the WA.
We support the suggestions made by The British in Europe for amendments to Article 9 in this regard.

At the same time, we believe it requires equally an amendment of the definition of family members in Article 8. We support the amendment suggested by Prof. Steve Peers in this regards. Article 8(a) should be replaced by:

(a) "family members" means family members of Union citizens or United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and of the Council, or whose status derives from Articles 20 or 21 TFEU, irrespective of their nationality and who fall within the personal scope provided for in Article 9 of this Agreement.

Enforcement

We believe the procedural safeguards provided in Articles 30-33 of the Directive are insufficient. The provisions of the Directive are not sufficient when applied in the context of a country that is no longer part of the EU, and where registration will be of a constitutive nature (within a 'hostile environment').