

Preserving Citizens' Rights at Brexit – the current position

Executive Summary

This paper sets out the position taken by the British in Europe Coalition and **the3million** in response to the Negotiating Directives approved by the Council of the EU. Briefly:

- We welcome the Negotiating Directives, the transparency with which they have been put forward and the genuine consultation that has taken place over their content.
- However, any initial agreement on citizens' rights needs to be ring-fenced from the rest of the Article 50 negotiations if our current anxiety and uncertainty are to be brought to an end, regardless of the outcome of the negotiations. Objections that this is legally impossible are without foundation and the parties should take that into account as they commence the negotiations.
- We further ask that when the Directives are next reviewed there is clarification over the important issues of freedom of establishment, lawful residence, voting rights and certain matters that concern students.

Background and Recent UK "offer"

The opening of the negotiations over citizens' rights has shown the European Union (of 27) in the best possible light – united, prepared, transparent, willing to listen and sensitive to the plight of the almost 5 million individuals who risk being stranded on the wrong side of the English Channel as a result of having exercised their EU citizenship rights.

This transparency and the detail given of the EU negotiating position stand in stark contrast to the position of the United Kingdom, whose negotiating intentions remained shrouded in secrecy until this week.

We note that a detailed paper concerning the UK government's offer on the rights of EU citizens in the UK was published on 26 June 2017. We are in the process of making a thorough analysis of this paper in order to prepare a position paper comparing the offer to that already made by the EU. Until that full assessment is completed, however, we note the following general points as regards the offer:

General points

- **Cut-off date.** At the moment, a date between 29 March 2017, the date on which Article 50 was triggered, and the date the UK is due to leave the EU is being discussed. However, EU law applies in full in the UK until Brexit date and thus any date earlier than that would be difficult for the UK government to justify legally.
- **Jurisdiction of the CJEU.** The UK proposal states that the CJEU will not have jurisdiction in the UK. Whether this is the CJEU or not, there will clearly need to be some form of dispute resolution body and a way for individuals to enforce their rights as regards the final guarantee of citizens' rights set out in the Article 50 withdrawal agreement.
- **Lack of detailed proposals as regards the rights of UK citizens in the EU.** The detail of the proposal focuses on the immigration status post-Brexit of EU citizens in the UK and sets out only broad lines as regards the rights of UK citizens in the EU.

Specific points

- **Residence status of EU citizens in the UK.** The permanent residence rights of EU citizens would be exchanged for the new immigration status of settled status, akin to indefinite leave to remain in the UK. Those who have already acquired rights of permanent

residence will be obliged to re-apply, rather than automatically acquiring settled status. Those who can prove five years' continuous residence can apply, but details of what that proof should consist of have not yet been provided. Similarly, an assessment of conduct and criminality will be required but details of this have also not yet been provided. There will be no CSI requirement but the issue whether any minimum income requirement will be set is not addressed.

- Two-year Grace Period to regularise status. An ambitious timetable, given the numbers of people concerned.
- Family reunification. This raises issues as the proposal would mean a reduction of the rights of EU citizens in the UK to bring spouses and dependent family members, including elderly parents, into the UK, as either the same rules as apply currently for non-EU nationals would apply in future (this includes income thresholds, as regards the ability to bring in a spouse as a British citizen) or alternatively, post-Brexit immigration arrangements for EU citizens who arrive after the cut-off date. It is not clear (but likely) whether the same rules would apply to British citizens returning from the EU post-Brexit e.g. with EU spouses or wishing to bring in elderly parents-in-law to the UK.
- Pensions. The wording on pensions is unclear e.g. as regards the aggregated pension system (appears only to apply to pension contributions accrued pre-Brexit).
- Healthcare. The wording is vague, the UK "will seek to protect" the current healthcare arrangements under EU and UK law for UK nationals in the EU and EU nationals in the UK.
- Mutual recognition of qualifications. Again, the wording is vague and sets out general aims without any detail.
- Right of establishment and cross-border working. Again, the wording is not clear, as the UK government simply states that it will seek to protect the right of establishment for EU citizens in the UK and vice versa. There is also reference to seeking to protect the right to provide cross-border services although it is unclear whether this means cross-border working in general.
- Students. The position of students is unclear. This affects both UK citizens resident in the EU and EU citizens in the UK. UK citizens who go to the UK from their EU residence to study pre- and post-Brexit face issues as regards their permanent residence status, while the same would be true regarding EU citizens in the UK who leave to study in the EU. There are also issues concerning fees and the recognition of qualifications, particularly for students who are UK citizens from EU countries.

British in Europe, the Coalition of UK citizens' groups in the EU, and **the3million**, the largest group representing EU citizens in the UK, welcome the final version of the Negotiating Directives approved by the EU Council, and recognise that they go a very long way to ensuring that all our existing rights are secured. We welcome particularly the consultation, which the Commission held with our representatives on the draft Directives, and the fact that some of our concerns raised in that context are met in the final version.

However, one very big concern remains for all those who have crossed the Channel in either direction and there are some other concerns, equally important for those affected, which have a significant impact on only certain groups.

"Nothing is agreed until everything is agreed"

We continue to be very concerned by the principle that "nothing is agreed until everything is agreed", underpinning the Negotiating Directives. We understand that to mean that no binding agreement can be reached on our rights until other matters within Article 50, such as the outstanding UK financial contribution and the issues relating to borders, have also

been agreed.

We view this approach with great concern since it effectively negates the only point on which both the EU 27 and the UK are agreed, namely that citizens' rights should be dealt with before any other topic in order to bring to an end the period of uncertainty and anxiety which we have been enduring since June last year. Even if the EU and the UK were to agree relatively quickly on citizens' rights, it will do literally nothing to end our uncertainty and anxiety as long as that agreement risks being rendered null and void by a failure to reach consensus on other Article 50 negotiating priorities. The *only* way to avoid this problem is to ring-fence any agreement reached on citizens' rights, so that it remains effective whatever the fate of other issues to be negotiated.

We have heard it suggested that it is legally impossible for an agreement on citizens' rights to be ring-fenced, but have seen no convincing legal argument to that effect. We draw attention to the following:

- The notion that “nothing is agreed until everything is agreed” is not a principle derived from Art. 50 itself. It is a requirement set out in the Negotiating Directives, and is thus a political choice.
- Whilst that choice is understandable in order to prevent cherry-picking by one side or the other through a series of separate agreements, it is out of place in the negotiation over people's lives where there will be no “winners” and “losers” as between the UK and the EU-27. Each should be simply concerned to protect the legitimate expectations of its own citizens and those from the other side of the Channel who have chosen bona fide to exercise the rights they had while the UK was in the EU. The closest we have seen to an argument that ring-fencing is legally impossible is in the study for the AFCO committee of the EP by Tomás and Garrido¹. However even that study only argues that a separate agreement would be “inappropriate”, and the only reason given is that Article 50 refers to the word “agreement” in the singular. It would be strange if elegance and simplicity of drafting style (the avoidance by the drafter of the cumbersome “agreement or agreements” throughout) were to preclude, as a matter of law, a legal solution which is clearly just and entirely in keeping with the spirit and objectives of Article 50 and thus a purposive interpretation of that article. No authority has been cited for such a proposition. In fact, there are even some legal precedents in English and Irish law, as well as in the German language where the use of the singular does not preclude the plural.
- Conversely, it has been convincingly argued academically that adopting a separate agreement on citizens' rights under Article 50 complies with the spirit of that article and the wider objectives of the Treaties².

Ultimately, the purpose of ring-fencing is that if the parties are able to reach an early agreement on citizens' rights during the Article 50 negotiations, this will be based on the consensus that such agreement is final, it is not to be re-opened no matter what happens in the remainder of the negotiation, and that, most significantly, it will come into force even if

1 The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27, p.56.

2 Stijn Smismans, 'Brexit: a separate citizens' rights agreement under Article 50 TEU', at <https://eutopialaw.com/2017/06/16/brexit-a-separate-citizens-rights-agreement-under-article-50-teu/>

other aspects of the negotiations fail. The EU could ensure this by requiring the signature of a citizens' rights agreement as a precondition of entering the next stage of the withdrawal negotiation under Article 50, before discussion of the principles for future relations between the EU and the UK.

In any event, it will be necessary *before* Brexit, for there to be legislation in the EU, and possibly in the UK, if agreement is reached on citizens' rights. UK citizens in the EU will no longer be nationals of a Member State or European citizens the day after Brexit, so legislation will be necessary to extend existing laws to cover them. Legislation may also be required in the UK to continue the application of EU rights to those citizens affected by the agreement, but that will depend on the language of the Repeal Bill.

Outstanding matters in the Negotiation Directives

Freedom of establishment: To those people who have moved countries in order to pursue a career through the medium of establishing a company or other legal entity, it is essential that they should be able to continue to do so. Their right under EU law to follow this course is guaranteed by Art. 49 TFEU. Many of course will be providing employment to citizens of their host country through this means.

It is important to recognise that the freedom of establishment we are referring to here is that of the individual citizen, not that of the company. It is the individual who is guaranteed the right by Art. 49 ("nationals of a Member State" in the wording of the Article). Art. 49 creates both a prohibition and a right. The prohibition is against Member States adopting restrictions which discriminate against individuals who are not nationals of that State in relation to the setting up and running of undertakings, such as companies. The right conferred on these individuals is to run such undertakings on equal terms with nationals of the host State. It is these EU rights of individuals who have already moved cross-Channel that we seek to protect.

The right to continued freedom of establishment is clearly within the general words of Art. 20 of the Annex to the Negotiating Directives, but is not expressly spelled out in the more detailed Art. 21, which refers specifically to the right to take up and pursue self-employment set out under the second paragraph of Article 49 without further reference to the additional wording in Article 49 relating to the management of undertakings. This difference of treatment of this fundamental EU right causes serious concern to those affected and ought, with respect, to be removed by including this right specifically in the list under Article 21. We hope that this proves possible when the Directives are next considered.

Students: Students who have commenced their studies pre-Brexit clearly fall within the general group of individuals who have exercised an EU right before the cut-off date and they ought to be guaranteed the continuation of that existing right on the same terms as before. Yet, under Art. 22 of the Annex, it is not clear if students who commence studies pre-Brexit (i.e. in 2017/18) but obtain their degrees post-Brexit will have them recognised throughout the EU 28. Similarly, it is unclear under Art. 21, whether those students who commence studies pre-Brexit but continue them post-Brexit will be subject to the same fees for the entire duration of their studies. And there are also serious issues for British students normally resident in a EU 27 country, or EU students normally resident in the UK, and who have acquired permanent residence in their country of residence – by leaving to pursue their studies elsewhere pre-Brexit, will those rights of permanent residence be lost in the event that they spend more than two years outside their normal country of residence? We hope

that these points can be expressly dealt with when the Directives are next reviewed.

“Lawful” residence: On residence, the requirement of Directive 2004/38 that residence should be “lawful” is continued in the Annex. Whilst this is understandable, this has allowed the UK to interpret this to include a requirement for comprehensive sickness insurance (CSI) and the EU should be negotiating to ensure that the UK treats that requirement as satisfied by the availability of National Health Service treatment. Failure to do so would leave thousands of EU citizens who have ‘de facto’ been legally living in the UK as ‘unlawful’. This would also contradict the view of the European Commission, which has declared the position of the UK on this matter as a misinterpretation of EU law.

Similarly, the UK has interpreted another aspect of the Directive by introducing a minimum income level for workers (employed and self-employed). The qualifying criteria for this threshold is that it must meet the Primary Earnings Threshold (PET) set by HMRC, at which employees start paying National Insurance. However, while the Directive states that the work should be “genuine and effective”, no further conditions apply and there is no requirement for a minimum income. Currently the threshold is set at £157 per week but many do not meet it. For instance, someone working part-time on minimum wage or zero-hours contract. Applicants for permanent residence who do not meet this income threshold can be turned down. Therefore, the UK should treat and people below an income threshold as exercising treaty rights. The UK is not the only country to impose some kind of minimum income threshold or criteria which describes what is acceptable or meets the “genuine and effective” benchmark. However, this should not be taken to mean that the imposition of a minimum income threshold is compatible with EU law. Examples of cohorts affected: people with an irregular employment history who may only work sporadically (for instance people with disabilities or long-term illness), people in part-time employment and on minimum wage, people on zero-hours contracts, etc, as well as carers (they are not allowed to earn more than £100 per week when in receipt of the carers’ allowance).

Voting rights: There is in the Annex to the Negotiating Directives no express reference to voting rights or to Council Directives 94/80/EC or 93/109/EC which govern them. These rights are very important to citizens resident on both sides of the Channel, and we suggest an amendment to provide, "At the very least EU citizens in the UK and British citizens in the EU should not lose existing voting rights including for European Parliament and local/mayoral elections as appropriate".