BRITISH IN EUROPE

THE COALITION OF UK CITIZENS IN EUROPE

Addendum to Response of British in Europe and the3million to the second round of negotiations (week of July 17 2017)

Executive summary

- **British in Europe** (BiE) has already submitted a joint response with the3million to the second round of negotiations, in which real concerns were raised in regard to, among other issues, the EU position on freedom of movement for UK citizens in the EU (UKinEU).
- **British in Europe** now wishes to provide some follow-up on this issue, as well as the related issue of cross-border working, which it has set out in this addendum.
- In particular, we are concerned that:
    - The EU position would only safeguard the residence rights but not those of free movement acquired under Article 21 TFEU by UKinEU.
    - Those residence rights would be protected only in relation to the current EU Member State of residence.
    - The potential impact of this, inter alia, on cross-border working.
    - The limitations of the current definition of "frontier worker" under EU law in addressing this issue.

Introduction

As we noted in our joint response to the second round of negotiations, it is clear from the item "Further movement rights" in the joint technical note[1] that the EU proposes that UKinEU should only have protected rights in the state in which they have residence rights on Brexit day. As we also noted, what is surprising about this is that in paragraph 21(b)(i) of the final Negotiating Directives approved by the European Council on 22nd May, **the** rights of free movement are expressly mentioned as among the minimum rights to be preserved, in addition to rights of residence, and that this was by way of amendment to the earlier draft Directives.

Given this and Michel Barnier's statement in his Speech in Florence on 5 May that "Brexit should not alter the nature of people's daily lives", we would like to make some further comments on the issues of free movement rights and cross-border working. In addition, as an annex to this document, we have provided a series of case studies to show how important the right of free movement, and linked to this, the ability to work cross-border, is to UKinEU in particular. It goes without saying that these issues are also of great importance to EUinUK as well, although their rights of free movement will of course only be curtailed as regards the UK, and thus the specific problems related to loss of free movement across the EU 27 that we raise below in relation to cross-border working will not affect them, while other issues we raise will.

[1] https://www.gov.uk/government/publications/joint-technical-note-on-the-comparison-of-eu-uk-positions-on-citizens-rights

1. Free movement

It is clear from the joint technical note that the EU's current position is that what are referred to as "further movement rights" would not be protected.

It is, however, not clear that this is a concept actually grounded in EU law.

The right to move and reside freely across the territory of the Member States – two interlinked acquired rights

Article 21(1) TFEU states:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

In other words, there are two fundamental elements to the right (singular) of EU citizenship set out in this article: it is a composite right to *move* and to *reside* freely. The EU's offer only protects the latter aspect of this right of EU citizenship acquired by UK citizens in the EU, presumably on the basis that the right to move has already been exercised at the point of entry to another EU Member State and the EU proposal would not protect further movement rights.

However, this position cannot be correct. An argument might be made that rights of free movement are only relevant where citizens remain EU citizens since one of the aims of EU citizenship is to facilitate integration of EU citizens across the EU. This argument does not carry any weight – as we have seen, free movement is provided for in the same treaty article as free residence and forms part of the same composite legal right. Both elements are integral parts of EU citizenship, and the right of residence is linked as closely to the aim of integration as the right of free movement. Both are necessary to facilitate integration by assimilating the positions of all affected citizens. Further, long term third country nationals (TCNs), who are not EU citizens, are able to acquire both rights of long term residence **and** of free movement after five years in the EU under Directive 109/2003[2], (hereinafter "the Long Term Residence Directive"). Thus, how could it be argued that the residence rights of UKinEU should be protected while free movement rights should not, not least since both have been exercised and acquired?

Further, it cannot be argued that UKinEU will no longer be exercising rights of free movement at the point of Brexit. The free movement of persons takes the form of the departure of nationals of a Member State, who are therefore citizens of the Union, from their own Member State and their movement to another or multiple other Member States. UK citizens who moved from the UK and currently live in EU 27 countries have exercised their right of free movement as citizens of the Union at the point at which they went to live in another EU country, or multiple other EU countries, and they continue to do so as EU citizens pre-exit, in the same way as

[2] Directive 2003/109/EC concerning the status of third country nationals who are long term residents.

they have exercised and continue to exercise rights of residence in the EU 27 country where they live. This is also clear from case law: for example, Case C-359/13 *Martens* §30, where a Dutch national was considered to have exercised her rights to move freely by moving from the Netherlands to Belgium and to have continued to exercise those rights *throughout* the period during which she lived in Belgium.

Territorial scope of the right of free movement: one continuous right exercised across the territory of the Member States

Moreover, the right to move and reside freely is exercised "within the *territory* of the Member States". In other words, the territorial scope of the right is the EU and the Member States constitute one territory, within which EU citizens can move freely, as if there were no borders. This also implies that any exercise of rights of free movement, even if in relation to multiple EU countries, would be the exercise of one continuous right of free movement, rather than a series of rights or further rights of free movement, across that territory.

The wording set out in the directives and regulations relating to free movement support this interpretation. Directive 38/2004[3] ("the Directive") states:

> (1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.
>
> (2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

In other words, it seems clear that the right of free movement is one continuous right exercised across an area without internal frontiers, not a series of exercises of the rights in relation to individual Member States.

Indeed, it is clear from the wording of Article 1 of the Directive that this is the intention:

"This Directive lays down:

1. (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;"

In both cases (free movement and residence), the Directive, like the Treaty, refers to a "right" in the singular, and to the "territory of the Member States", territory being in singular and Member States in the plural.

[3] Directive 2004/38/EC, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

It is also relevant to note that it is established case law that "Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty" (see Cases C-127/08 *Metock and others*, and Case C-456/12 *O. and B*). In addition, "having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness"[4].

As regards the territorial scope of the right of free movement, case law has confirmed that, even in the case of derived rights of non-EU citizen spouses of EU citizens under the Directive to move freely within the EU, these apply across the territory of the Member States as if it were one territory. For example, in the recent Case C-202/13 *McCarthy* §41, the CJEU held that Article 5 of the Directive refers to "Member States" and does not draw a distinction as regards the state of entry to argue that such a third country spouse would have a right of entry across the EU, including in the country of which her/his spouse was a national, and, without an entry visa where that person holds the valid residence card referred to in Article 10 of the Directive.

Changes in circumstances: comparison with third country family members under the Directive

Not only is this case relevant to the issue of the territorial scope of the right of free movement as implemented in the Directive and whether it is one continuous right exercised across the territory of the Member States but it is also relevant to a comparison of the position of UKinEU with that of third country family members under the Directive.

Professor Eleanor Spaventa has argued[5] in relation to the rights of UK citizens in EU 27 countries post Brexit that it is important to look at how EU law treats those whose circumstances have changed and refers in particular to the case of family members of migrant workers, who are protected under the Directive in the event of a change of family circumstances even if they are third country nationals. She notes that under the Directive, "changes in circumstances might not be determinative of enjoyment of rights, even for individuals who are not Union citizens". She goes on to add, referring to third country national or "TCN" family members:

"In the same way as a change in personal circumstances is not determinative of TCN family members' rights, it cannot be determinative of the rights of British citizens in the EU. Furthermore, if Union citizenship means anything at all, it is unthinkable that a TCN with derived rights would be treated better than a Union citizen who has

[4] see for example Cases C-127/08 *Metock and others*, and Case C-456/12 *O. and B*

[5] Study for the PETI Committee "The impact of Brexit in relation to the right to petition and on the competences, responsibilities and activities of the Committee on Petitions" 2017 at: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583154/IPOL_STU(2017)583154_EN.pdf

exercised Treaty conferred rights, which are then lost by virtue of withdrawal from the EU. "

Given that, in the case of a change in family circumstances of a third country spouse of an EU citizen, that spouse would under the Directive and the above case law maintain the right of free movement and entry throughout the EU referred to under Article 5 of the Directive (and that this would be visa-free if in possession of the residence card referred to in Article 10), it does seem inconceivable that UK citizens, as former EU citizens, would lose their rights of free movement by virtue of withdrawal from the EU, an event over which they had little control, and in the majority of cases, no say.

The Long Term Residence Directive

It has been argued that at least those UKinEU who have acquired the right to permanent residence would potentially maintain their rights of free movement in accordance with the Long Term Residence Directive, which applies to third country nationals who are long-term resident in the EU. In response, similar arguments to those in the paragraph above might then be made, as to why it would be inconceivable that UKinEU should default to this third country citizen's status and lose the rights of free movement that they currently enjoy both before and once they have acquired five years' residence. In addition, it should be noted that the rights of free movement granted under the Long Term Residence Directive are inferior to those of EU citizens and apply subject to conditions, not least five years' residence and very much more limited rights of absence during these five years, the effect of which are such that many who have acquired five years' residence within Directive 38/2004 would lose it if the Long Term Residence Directive applied. Other conditions to which the acquisition of long-term residence is subject, unlike that of permanent residence, include in particular, the requirement to have "stable and regular resources" without recourse to social assistance in the Member State of residence and health insurance.

In relation to the Long Term Residence Directive, we note with concern the 2011 EU Commission report into the transposition and implementation of the Directive which described the situation, five years after it entered into force, as "deplorable." Several of the Member States that are home to the largest communities of UKinEU27 (France, Germany, Italy) were found to be in contravention of key provisions of the directive, including definition of status, refusal of status, giving LTRs the right to choose between a permit under national immigration law or EU law, the cost of applying for a permit, higher fees for tertiary education than are charged to EEA nationals and quotas on work permits for LTRs moving from one EU

member state to another[6].

We are aware of the REFIT procedure under way with respect to all the existing Directives on third country national legal migration, including the 2003 LTR Directive, and would welcome further information from the Commission on the timetable and likely content of any new proposal to amend this body of legislation that may impact on the default residual position as regards continued free movement rights of UKinEU27 across the territory of the EU post-Brexit[7].

Conclusions

In summary, and given all of the above case law, it can be concluded that UK nationals are currently exercising a single composite right of residence and free movement as regards their move to another or, over time, to multiple different Member States, and have thus acquired that right in relation to the "territory of the Member States" and not to one specific Member State. Since the right to move and reside freely contains two inextricably linked elements forming part of the fundamental EU citizenship rights set out in Article 21 TFEU, it is difficult to understand why the EU's proposal aims simply to guarantee one half - residence rights in the country of residence – and not the other, the right to free movement.

Ultimately, these issues go back to the fundamental nature of EU citizenship, which is confirmed in the Directive in its third preamble:

> "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence."

As Spaventa notes in her study[8] "Union citizenship has been construed as imposing limits on Member States' discretion in areas that are, otherwise, of exclusive national competence" and notes that this approach reflects the fact that Union citizenship is "the *fundamental status* of Union citizens". Following the conclusions in the judgment in Case C-135/08 *Rottmann* to their ultimate conclusion, one might even go so far as to query whether it is possible for the actions of a Member State (the UK), by withdrawing from the EU, to result in the withdrawal of EU citizenship from its citizens, given its fundamental nature and that it is a *status* that has been *acquired* – but that argument is for another day. Finally, as regards free movement specifically, settled case law of the CJEU has held that EU citizens should not be penalised for having exercised their rights of free movement. It would be ironic indeed if the very citizens who had made use of their rights to move as EU citizens were then to have their acquired EU citizenship rights restricted to the territory of one Member State.

---

[6] Report from the Commission to the European Parliament and Council on the Implementation of Directive 2003/109/EC COM (2011) 585 final: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/http%3A//ec.europa.euwhat-we-do/policies/pdf//1_en_act_part1_v62_en.pdf

[7] The Legal Migration Fitness Check: http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_home_199_fitnesscheck_legal_migration_en.pdf

[8] Study for the PETI Committee referred to above at footnote 3.

2. Cross-border working

The technical note sets out the EU's position on cross-border working or frontier workers, stating that "those who are working as a frontier worker at the point of the UK's withdrawal (or considered within the definition of a frontier worker e.g. jobseeker for six months) fall within the scope of the WA insofar as they retain the status of a frontier worker". The UK has, as yet, to take a final position but will consider offering reciprocal arrangements.

Frontier workers are EU citizens who are employed cross-border. They reside in one Member State and work in another, and return either daily or at least weekly to their country of residence.

However, there are two remarks that should be made in relation to the acquired rights of EUinUK and UKinEU post Brexit to work cross-border.

It should be borne in mind that frontier workers still face many obstacles in effectively exercising their rights of free movement, as a recent European Commission report notes[9].

And, more specifically, this definition does not cover all forms of cross-border working in which UKinEU and EUinUK are currently engaged. This is of particular significance to UKinEU, given the EU's current position on free movement rights for UKinEU, and for this reason it is critical to consider carefully all possible variations of cross-border working/careers currently pursued by UKinEU to ensure that the definition of cross-border working used in the Withdrawal Agreement is flexible enough to cover them – otherwise these workers will no longer be able to work cross-border.

Categories of cross-border working not covered by the definition of "frontier workers"

If the definition of frontier worker set out in Regulation 883/2004[10] and cited below were to be used in the context, large numbers of those currently working cross-border would potentially not be covered:

"'frontier worker' means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he/she returns as a rule daily or at least once a week."

For example, this would affect the following main categories of cases:

(a) Citizens living in one Member State and working in another MS but *less regularly* than weekly, or daily, including as an employee, self-employed person or as a director of a company.

[9] European Commission "Comparative Report: Frontier Workers in the EU" January 2015.
[10] Article 1(f) of Regulation 2004/883/EC on the coordination of social security systems.

(b) Citizens living in one Member State and working in *more than one* other MS, including as an employee, self-employed person or as a director of companies in different EU member states.
(c) Citizens living and working in one Member State and engaged in short term provision of services in one or more others.
(d) Citizens residing in one Member State and working on a short-term posting in another.
(e) Citizens providing services from the Member State of residence but collaborating with colleagues in another Member State and thus commuting regularly to discuss work matters with them and for other meetings.

Case (c) covers for example the case of a professional providing services on a temporary and occasional basis under Directive 2005/36/EC on the mutual recognition of qualifications[11]. Linked to the questions that we have raised in previous submissions concerning the guarantee of the right of establishment for UKinEU and EUinUK, it is not clear whether this form of cross-border working would be covered for these groups post Brexit.

Case (d) is likely to fall within the scope of the discussions between the UK and EU on posted workers and we noted our support for the UK's position on posted workers in our main response to the second round. There are however a number of questions here: would all currently posted workers be covered by the agreement reached on citizens' rights in the Withdrawal Agreement? Would UKinEU habitually resident in one EU27 country and currently posted to another or the UK be covered (presumably yes)? What about EUinUK in a similar situation? And what would be the position on postings for UKinEU who work for employers or clients with multiple offices across the EU going forward (given that the current EU proposal would not maintain rights of free movement?)?

Problems and Solutions

Since the five categories of workers set out above (a)-(e) would not be covered by the definition of frontier workers, a first problem is what conditions would apply to these workers in particular as regards working conditions, tax and social security post Brexit. The UK would thus need to ensure that EUinUK who work cross-border and are not covered by the definition were treated equally as compared to UK workers. The EU would also need to guarantee equal treatment to UKinEU working cross-border and not covered by the definition, whether in the EU 27 or the UK.

[11] Currently, depending on the relevant qualification, short-term provision of services in this way would be relatively straightforward, especially where the profession was regulated, and subject to only minimal formalities and compliance with the relevant professional rules in the country to which the professional moves.

But, more seriously, in the event that UKinEU were not able to benefit from rights of free movement across the "territory of the Member States" post Brexit, it would then become difficult or impossible for those UKinEU not covered by the definition of "frontier workers" to continue their cross-border work and, indeed, their careers, going forward.

There are two possible solutions. One would be a new, wider definition of cross-border working set out in the Withdrawal Agreement for both EUinUK and UKinEU with guaranteed rights of equal treatment attached to ensure that all those working cross-border at the point of exit would be able to continue to work in exactly the same manner as they do currently.

However, the obvious and simpler solution is to maintain the status quo: to confirm ongoing free movement rights for all UKinEU as well as to guarantee the existing general rights of equal treatment from which both groups currently benefit. This would also have the advantage of simply confirming the current situation and would not require changes to EU law or the current regime in the UK. This in turn would limit the scope for uncertainty, argument and litigation over the interpretation of a new definition.

In conclusion, to illustrate the importance of this issue to both UKinEU and EUinUK, and that of free movement to UKinEU, we attach as an Annex to this Addendum a series of case studies, which illustrate the rich and varied cross-border working lives of UKinEU.

22 August 2017

British in Europe