Securing Citizens' Rights under Article 50:
Reflections on Phase 1 & Considerations for Phase 2 of the negotiations

Contents

I. Introduction

In December 2017, the EU Member States agreed that sufficient progress in Phase 1 of the UK/EU Article 50 negotiations — including, crucially, on citizens' rights — had been achieved, as set out in the Joint Report[1] of 8 December (the "JR"), clearing the way for Phase 2.

The issue of citizens' rights has thus widely — but incorrectly — been portrayed as resolved. **The3million** and **British in Europe**, as well as the European Parliament (see EP resolution of 13 December 2017), consider that the stated aim of ensuring that nothing would change for EU27 nationals in the UK and for UK nationals in the EU, is not met by the 'Common Understanding' reached in Phase 1 owing to glaring shortcomings, omissions and ambiguities, be it because issues were excluded from the negotiations contrary to the initial mandate or because of political expediency to reach a compromise. As things stand, the rights of some 5 million people risk being severely curtailed and the fundamental status of EU citizenship reduced to "life choices".

Since 'nothing is agreed until everything is agreed', these issues must be addressed in Phase 2 and accorded at least equal priority to that afforded other issues such as Northern Ireland. The most salient issues include:

- The need to guarantee genuine free movement for the protected group, including lifelong return and associated individual economic rights, recognition of qualifications and the right of family reunification with future partners.
- Protection must be extended to vulnerable, 'at risk' groups of citizens who are presently either not included in the scope of the Withdrawal Agreement (e.g. family members of returning citizens etc.), or those who are likely to face legal, digital, language, or evidential barriers to being registered under the Withdrawal Agreement.
- Citizens' rights — above and beyond the 'common understanding' reached at the end of Phase 1 — must be ring-fenced to ensure that all our existing rights are protected in any event.
- Negotiations during Phase 2 must be conducted in a transparent and accountable way, allowing us the opportunity to broaden our constructive engagement and dialogue.
- All ambiguities regarding scope and content of the agreement must be eliminated and everything that has been agreed by the parties needs to be meticulously transcribed into the Withdrawal Agreement to avoid any misinterpretation in implementation both in the UK and across the EU27 with potentially devastating consequences for the lives of hundreds of thousands of people following Brexit.

Detailed arguments are presented in the sections below setting out the principal considerations for Phase 2 (Section II), specific issues relating to implementation in the UK (Section III) and the inadequacy of Third Country National legislation for British citizens living in the EU (Section IV).

[1] https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en

II. Considerations for Phase 2 of the negotiations

There are still key outstanding and conflicting issues, as well as a lack of detail and a number of ambiguities that the negotiators must address to safeguard the rights of citizens in the UK and the EU.

Address outstanding issues not deemed to fall within the Phase 1 mandate

Free movement, economic rights and recognition of qualifications

Box 58 of the Joint Technical Note ("JTN")[2] sets out issues which had been raised by the UK in the course of Phase 1, but which were said to be "outside the scope of the EU mandate for the first phase of the negotiation". Almost all[3] are related to the Treaty right of free movement. In our view, the EU was wrong to say that they were outside the scope of the Phase 1 mandate, but more importantly they must be negotiated now so as to be included in the Article 50 agreement.

Article 20 of the EU Negotiating Directives of June 2017 opens, "*The Agreement should safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later … as well as rights which are in the process of being obtained …*"

Before Brexit, as EU citizens we all have the right under Art. 21 TFEU to move to another EU country to live or to work as an employee or self-employed or run a business, as well as the rights to provide services cross-border and to mutual recognition of qualifications. However, under the JR on the day Brexit becomes effective, for example:

- UK citizens in the protected group will lose their present right to move freely to another EU country for any purpose or to provide cross-border services in any country where they were not doing so the day before;
- EU and UK citizens with a UK professional or academic qualification will lose the right to have that recognised in any country where they were not relying on it to work the day before Brexit and where they do not have a specific recognition decision as provided for in the JTN;
- EU and UK lawyers who have previously practised in reliance on a qualification obtained in their home state, as they are entitled to do, will have that right removed completely.

This loss of rights is clearly inconsistent with the Negotiating Directives dated 22 May 2017. It has come about because EU negotiators introduced into the JR a qualification to their mandate which was not there at the outset - "to provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and **based on past life choices…**" (JR para. 6). Without this qualification these rights would have been unarguably within the scope of the negotiation.

Further, even if this limitation had been in the Directives from the outset, the fundamental rights of free movement and the related economic rights and mutual recognition of

[2] https://ec.europa.eu/commission/publications/joint-technical-note-expressing-detailed-consensus-uk-and-eu-positions-respect-citizens-rights_en

[3] We exclude "future healthcare arrangements" from this discussion, as it is the one issue in Box 58 which we agree is outside the scope of Article 50.

professional qualifications would still be in scope, because the "past life choice" of a citizen moving cross-Channel in either direction was founded in these rights. Two practical examples illustrate this:

- EU citizens moved to the UK and obtained a professional, or academic, qualification in the reasonable belief that it would be valid across the EU28. When they made that choice they had no reason to believe that negotiators representing the EU would deprive its own citizens of that right.
- Likewise, many UK citizens moved to other EU countries to work precisely because the EU is a territory without internal borders: from lawyers and lorry-drivers to caterers and IT contractors, this freedom to move for work and to provide services across borders was an essential part of their life plan.

We have already submitted detailed arguments which demonstrate beyond doubt (i) that as a matter of law these are existing EU rights and (ii) their practical importance to the protected group. See:

- For detailed legal argument on freedom of movement - BiE Addendum to Joint Response to Round 2[4] pp.1-6 as well as BiE Supplemental Addendum;
- For detailed argument on recognition of qualifications and economic rights – Joint Response to Round 3[5] pp.9-10, and Joint Response to Round 4 pp.3-4[6];
- For case studies showing the impact on people's daily lives – BiE Case Studies[7].

It has been suggested that the free movement rights of UK citizens in the EU will be guaranteed under the Long Term Residence Directive (2003/109) and other EU legislation relating to third country nationals or non-EU citizens. A detailed examination (see Section IV) clearly shows that if that Directive and that legislation provide for any rights, they fall way short of the present rights and would result in a dramatic change in the daily lives of many.

We have also heard it suggested that free movement for UK citizens in the EU might be discussed in Phase 2, but that this might not extend to their continuing to have the right to work in other EU27 countries and certainly not to provide cross-border services, as these are matters for the future relationship. We emphatically reject that contention for the reasons given above. There is no rational basis for breaking the right of freedom of movement up in this way *as it relates to individuals who have exercised it*.

We recall that, in its resolution of 13 December 2017, the European Parliament made it clear that full freedom of movement for UK citizens throughout the EU27 must be maintained. This includes the related economic rights and right to recognition of qualifications. Any other approach would be contrary to the letter and spirit of the Treaties.

Further, the UK offered EU citizens within the protected group a lifetime right of return to the UK post-Brexit, in exchange for free movement for UK citizens in the EU. When the issue of free movement is considered in Phase 2 of the negotiations, the existing JR provision for a

[4] https://britishineurope.org/wp-content/uploads/2017/08/BiE-and-t3m-response-to-20.7.17-week_FINAL.pdf
[5] https://docs.wixstatic.com/ugd/0d3854_4c470417a5484580898ff7194f7c6c96.pdf
[6] https://docs.wixstatic.com/ugd/0d3854_75cc82d8c64249c9a5531a4d459ebe3f.pdf?index=true
[7] https://britishineurope.org/wp-content/uploads/2017/06/BiE-Case-Studies-June-2017.pdf and https://britishineurope.org/wp-content/uploads/2017/08/British-in-Europe_Free-Movement_Master-Case-Studies_EC.pdf

5-year right of return for those with permanent residence rights should also be reconsidered for both groups.

Rethink the approach: issues highlighted by the European Parliament

The European Parliament highlighted a number of issues as requiring to be revisited or as being outstanding: the following are issues that need to be revisited.

Declaratory versus constitutive system of registration

Paragraph 3 of the EP resolution of 13 December 2017 requires, "*ensuring that the administrative procedure is light-touch, declaratory in nature and free of charge, placing the burden of proof on the UK authorities to challenge the declaration, and enabling families to initiate the procedure by means of a single form*". For this requirement to be met, the common understanding of the JR will have to be reconsidered.

The EU and the UK agreed at the end of Phase 1 that respective Member States can choose how they wish to 'register' EU27 citizens in the UK and British citizens in the EU from two options: the current declaratory approach in accordance with EU law or to apply a constitutive or conditional approach. British in Europe and the3million do not dispute the need for a registration system, but we do not recognise the 'constitutive approach' as a simple system of 'registration'.

Under current EU law, citizens' rights are derived directly from the EU Treaty (TFEU) and any registration systems put in place by EU Member States under Directive 38/2004 (the "Citizenship Directive") are simply declaratory or confirm those primary rights. This means that an EU citizen need not apply for a new status, they need only demonstrate that they possess the right.

However, the agreement reached by the EU and the UK in the JR indicates that Member States may adopt a constitutive approach to registering EU27 citizens in the UK and British citizens in the EU. This would mean that only those who make a formal application and, critically, whose application is then successful, would acquire the new status.

This is in keeping with the UK's wish to oblige EU27 citizens to apply for 'settled status' – an immigration status already in existence under domestic immigration laws - rather than simply to confirm their existing rights under EU law.

The EU thus accepted this departure from EU law. At the last minute an option was included in the JR so that EU 27 countries may require UK citizens in their boundaries to make fresh applications. This was a proposal on which there was no prior consultation. Were this constitutive approach to be applied — in the UK to EU citizens and potentially in EU 27 countries to UK citizens — following the UK's exit, existing EU rights would 'fall away' and citizens could potentially be without a legal status with dire consequences for them and their families.

EU citizenship is the fundamental status of EU citizens. What does this fundamental status mean if it or the rights attached to it can be withdrawn from an EU citizen who has exercised her/his rights of free movement due to the actions of a Member State? EU citizenship and the rights attached cannot simply be reduced to life choices.

Moreover, there is clear case law that the position of a citizen who has exercised his/her right of free movement is not comparable to that of a citizen who has not. Citizens acquire rights under Article 21 through their exercise of their free movement rights (see §§55 and 58 *Lounes*). This is the position of UK citizens in the EU. In addition, EU27 citizens in the UK remain EU citizens. The EU should push the UK simply to confirm their existing rights and to uphold the rights attached to that fundamental status, which until now has been recognised in the UK.

Given the constitutive element of the proposed new status, it is difficult to see how rights can be protected under the Withdrawal Agreement before the new status has been granted. We are concerned that this situation might create a legal and evidential void in the period between exit and an application for the new status having been granted and also after the grace period (which may need to be longer than the transition period in order to allow sufficient time for over three million nationals in the UK to be registered). It also raises questions as to the status of applicants whose application has been rejected due to errors, omissions or alleged 'fraud', or those who have been refused.

Extending family reunification to future spouses

Another concern of the EP resolution of 13 December 2017 is *"extending coverage of citizens' rights to future partners"*.

Future spouses of citizens in the protected group are not currently covered by the JR agreement. This would mean that such spouses would fall under domestic UK or other EU 27 immigration laws of family reunion. This is a particular concern in the UK as it would mean that future spouses, whether from the EU27 or outside the EU, would have to comply with the onerous and rigid UK immigration rules relating to family reunion, which would be likely to result in numerous refusals. We foresee that this will disproportionately impact younger generations, as well as citizens who following a divorce or the death of their spouse may wish to remarry after Brexit.

Clarify ambiguities in scope and content

The JR covers broadly EU27 citizens in the UK and UK citizens in the EU and their family members, who have lived in their respective countries of residence in accordance with the Citizenship Directive prior to the UK's exit from the EU. This means those who have exercised and relied upon their rights of free movement before the UK's withdrawal from the EU. Essentially, citizens may be required to demonstrate - at the discretion of individual Member States - that they have lived in their countries of residence in accordance with Articles 6 and 7 of the Directive. This means that a citizen must be and continue to be a worker, self-employed person, student, or self-sufficient person, or lawfully retain those rights, at withdrawal to be eligible.

<u>Personal scope: areas where clarity is needed as to the categories covered</u>

Who will be "Legally Resident"?

The JR applies to citizens who are "lawfully resident" in their country of residence. This, as set out above, is defined in accordance with the terms of the Citizenship Directive 2004/38/EC and Article 21 TFEU. It is well known that numerous EU citizens in the UK have struggled to register as having permanent residence owing to the Comprehensive Sickness

Insurance requirements and the 'genuine and effective' work test. The JR, however, does not preclude a Member State from adopting a less stringent assessment of "lawfully resident". On December 12th 2017 the then UK Immigration Minister said in evidence to a House of Lords Committee[8] that an EU citizen applying in the UK would only have to (i) show that s/he is an EU citizen, (ii) show that s/he is resident in the UK and (iii) pass the criminality test. "Simple as that" he said.

We assume that the Minister's evidence to Parliament was accurate and we agree that simple, light-touch, local evidence of residence and ID should suffice to register in the UK, albeit without systematic criminality and security checks that are not in the spirit of EU law. Given the importance of the matter to millions of people, and to ensure that the UK is legally bound, the negotiators should ensure that these simple registration criteria are recorded in the Withdrawal Agreement.

If that happens, a number of the ambiguities we record below will fall away, at least as far as the UK is concerned, and citizens will be kept secure from the UK's 'hostile environment'[9]. This would be a further relaxation of the lawful residence test as set out in UK proposal on Citizens' Rights dated 26 June [10] and the further UK technical note[11] published in November. However, despite this move away from a stringent application of the requirements under the potential Withdrawal Agreement, there is still much scrutiny required.

Dual citizens

The JR makes no reference to how dual citizens (UK and EU 27) are to be treated. Until recently, the UK did not recognise that EU27 citizens who acquired British citizenship were able to exercise free movement rights. The recent Court of Justice of the EU judgment in *Lounes* confirmed that EU citizens who acquire dual citizenship can invoke free movement rights in the country in which they have acquired nationality, in this case the UK. All UK citizens in the EU and EU citizens in the UK who have acquired dual citizenship should have the same rights under the Withdrawal Agreement as those citizens in the protected group who had not acquired dual nationality, including a right to family reunion.

Citizens who Return to their Member States of Origin

There is also ambiguity as to whether or not citizens returning to their Member State of origin from another Member State can continue to benefit from rights they enjoyed there. This right is commonly associated with the case of *Surinder Singh*. This is potentially significant, when UK citizens return to the UK having lived and worked in a Member State and who wish their non-British family members to accompany them. But it is also significant as regards the acquired rights of family members of citizens who have already moved back to their country of origin pre-withdrawal.

[8] https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/news-parliament-2017/brexit-citizens-rights-minister/

[9] For more information and additional resources and case studies on the UK's hostile environment please visit: https://www.the3million.org.uk/hostile-environment

[10] https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu

[11] https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk/technical-note-citizens-rights-administrative-procedures-in-the-uk

In order to ensure that those citizens whose rights derive from Article 21 TFEU, such as in the cases above, have further assurances, these ambiguities will need to be clarified in the Withdrawal Agreement. Further details will therefore be required when the legal text emerges.

Frontier Workers

The detail of what rights frontier workers will have as agreed in the JR requires more clarification, in particular, the rights of self-employed workers or those who travel at irregular intervals rather than on a weekly or daily basis. This is an issue of especial concern to many UK citizens in the EU and a particular issue for self-employed workers will be proving their status and thus that they fall within the scope of the final Withdrawal Agreement.

'Misuse' provisions

The 'misuse' provisions of the Citizenship Directive 2004/38/EC have made their way into the JTN. These provisions apply where a citizen has been found to be misusing their citizens' rights in the host member state. It will be very important to clarify if and how governments intend to use the 'misuse' provisions. The WA needs to set out clearly if and how these provisions can be used in the UK and across the EU 27.

'Temporary status'

Those who have lived in the country of residence for less than 5 years will be required to apply for temporary status in order to build up their time towards making an application for the grant of a new permanent status. The requirements for this application are unclear. For example, it is presumed that:

- there will be an application for such status where the constitutive system is applied in the UK and any EU 27 country but not where EU 27 countries choose to continue with the declaratory approach under EU law. This however needs to be spelt out. The consequences of not having any proof of a temporary status are especially concerning in the UK, which of course will no longer be a Member State.
- the conditions on which such status could be lost would be the same as those under the Citizenship Directive but this needs to be spelt out. For example, we presume that Article 14 of the Citizenship Directive would apply.
- Article 16 as regards continuous residence would apply but this needs to be spelt out.

Temporary absence

We do not know if those citizens who have previously resided in the UK or an EU 27 country and who are temporarily absent at exit will be covered by the agreement. There will be a considerable number of citizens who, for example, may have lived and worked for many years in their country of residence but who are temporarily absent from the country on the day of exit e.g. due to a work posting. Clarity will be needed on what test will apply to evaluate whether they fall within the personal scope – will this be a test of habitual or normal residence or other such test to determine whether or not they should be deemed to be resident in the UK or EU 27 country on the date of exit.

Retained rights of family members in the event of death or divorce

The retained rights of family members living with a right holder at exit, in the event that the right holder subsequently dies or divorces, are not clear. We presume that it is the intention for Articles 11 and 12 of Directive 38/2004 to apply but this is not specified and JTN box 20 on duration of rights refers to life-long protection for the right holder not of the retained rights of someone who originally derived their rights from a right holder.

Criminality and 'security' checks for all

In the event that the country of residence decides to apply the constitutive system, systematic criminal and security checks apply, even where the citizen is a current holder of a permanent residence certificate. This is a departure from EU law, which does not allow such systematic retrospective criminal checks. This will apply to all EU citizens in the UK, and to UK citizens who live in a country that decides to apply the constitutive system. The scope and extent of these checks is unclear.

Questions arise such as to the level of criminal offence that might lead to failure of a criminal and security check when an EU citizen applies for the new settled status; and in the UK as to whether there might be new public interest certificates and deportations after exit, combining past sentences with fresh sentences and thereby indicating that somebody had to be removed in the public interest for a minor offence.

In the EU 27, on the other hand, there is currently no information on whether EU 27 countries intend to apply the constitutive system, and thus whether or how such criminal and security checks might apply, and thus UK citizens in the UK are entirely in the dark as to the ramifications for them of this last minute agreement.

Potential data protection restrictions for EU nationals in UK

A bill going through the UK Parliament at present is proposing that access by a person to data held on them by the Home Office and others for immigration purposes should in some situations be denied. We are concerned that this will prevent EU citizens applying under the WA from being able to effectively challenge rejection by accessing their file and challenging errors. It is said that access will only be denied where it is in the public interest to do so but this creates a Kafkaesque situation, as it is only by having access to the data that the subject is in a position to challenge the decision that s/he should not be allowed to do so. A similar proposal in the UK was made by government some years ago but, rightly, dropped. In order that EU citizens should not face insuperable barriers when applying for registration, the WA should provide that this new restriction should not apply to the WA registration scheme.

Ensure no one is left behind

We are concerned that some of the most vulnerable groups of citizens appear to be excluded from the scope of the agreement and that others will be 'at risk' under the current terms of the deal. In particular:

- Zambrano carers who benefit from rights deriving from Article 20 of the TFEU do not feature in the agreement at all. As a result, third country nationals who rely on rights as

primary carers of British children will be at risk of removal if they do not fall under UK or EU 27 immigration rules. This would put the welfare of these children at risk.

- Citizens facing barriers to application: The current constitutive 'settled status' proposal in the UK is centred on applicants who have worked and engaged with the UK government, communicate in English and are computer literate. The UK government has indicated that services will be provided at some local libraries and that in exceptional cases home visits will be carried out to assist with applications for the new status. However, the details of this have been scarce. It is understood that the UK will not provide library services in London (except in Merton?). With a recently lessened budget, there are concerns that the UK government's Home Office (who will be administering the online application process) will not be sufficiently funded and equipped. The proposed tax and work status checks, criminality and security checks would increase the possibility of errors and maladministration. There are groups of persons who will be at risk should sufficient flexibility not be adopted to assist all EU27 citizens. Particular concerns have been raised about the elderly, disabled, children, victims of trafficking, those experiencing homelessness and other groups. This raises issues of equality and human rights as well as general access to justice. It goes without saying that the issues raised here as regards the UK could equally well apply potentially to UK citizens resident in EU 27 countries if they apply the constitutive approach.

Ensure correct interpretation in implementing the Withdrawal Agreement

The framework for enforcing rights under the future Withdrawal Agreement will see the concepts of direct effect and supremacy of EU law being implemented. Existing interpretations of EU law will apply. The European Court of Justice will continue to have a role for a limited period of eight years in the UK.

The provisions of the Withdrawal Agreement will be implemented into UK law through a Bill and will have effect in primary legislation, said to prevail over inconsistent or incompatible legislation. The JR states that this will apply unless Parliament repeals the primary legislation. We assume that this statement is simply by way of explanation of the UK principle of Parliamentary sovereignty. However, were such a statement to be included in the Withdrawal Agreement, it might be interpreted as giving the UK a unilateral opt-out. To avoid any such risk, it should be an express term of the Agreement that any repeal or reduction of the citizens' rights part would be a breach of the Agreement and of international law, and subject fully to the dispute resolution mechanisms of the Withdrawal Agreement.

It seems fairly clear that monitoring will be carried out by the Commission in relation to the EU, while the UK intends to set up an independent national authority to monitor the implementation of the part associated with citizens' rights. The scope, function and power of the body in the UK remains unclear and requires clarification. We would like to be able to input into discussions as to how this UK body will be established in order to have an understanding of those issues.

There is then the question what sort of dispute resolution system there will be under the Withdrawal Agreement itself whereby, for example, the EU could bring infringement proceedings against the UK or vice versa in case of breaches of the WA.

We would request that we are involved in the governance issues of the Withdrawal Agreement as they significantly affect our status, even if they are discussed in a separate stream from citizens' rights.

Considerations relating to the transition period

The UK and EU have agreed to negotiate a transition period. According to the European Council guidelines of 15 December, the EU would seek to ensure that the UK would continue to participate in the Single Market and all four fundamental freedoms during that period. In other words, it is our understanding that not only free movement of workers, but also free movement of persons will continue during this period and thus that Article 21 TFEU rights of free movement will continue. Consequently, during this period, UK citizens in the EU and EU citizens in the UK would keep their existing rights of free movement in the countries where they live and work across the EU.

General issues

1. What will be the date of implementation of the citizens' rights part of the Withdrawal Agreement? Presumably this will be the day after end of transition and the specified date in the Withdrawal Agreement would also be amended in line with this implementation date.
2. How would any constitutive application system be applied during the transition period? Would, for example, EU citizens already have to apply for the new status during this period and would this two-year period effectively become the grace period? The same question would arise as regards UK citizens in relation to any such system applied in an EU 27 state. However, full application of free movement would imply otherwise, as citizens would be covered by the existing declaratory system under the Citizenship Directive and that the two-year grace period should begin following the transition period.
3. How will those who arrive during transition be treated? This group of people would also enjoy full free movement rights during transition and will thus have exercised those rights. It could be argued that they have not relied on them as irrevocable rights, and thus that they should be treated in the same way as those who move after the transition period, but that does imply withdrawing rights that have been exercised. Moreover, if the transition period were in effect to be the grace period, and this group could not already apply for temporary status, citizens would simply be left without any rights on the day after transition and it is not clear whether they would be able to apply to stay under any new immigration system to be introduced. Similar concerns arise if a declaratory system applied.
4. Linked to this, will those who arrive post UK exit from the EU but during transition be covered by the personal scope and become part of the protected group under the Withdrawal Agreement?

Specific issues relating to UK citizens in the EU

5. What will the rights of UK citizens in the EU be? Will they only have rights of free movement or will they continue to benefit from EU citizenship rights under Article 20 TFEU as well during transition?

6. Guarantees should be sought that the protection from discrimination that applies (by virtue of Article 18 TFEU and Article 24 of Directive 2004/38 on free movement) will continue to apply to UK citizens during the transition period;
7. UK citizens who hold positions in local councils in other Member States (for example, representatives of communities of UK citizens in local councils in Spain) should be allowed to continue in post at least until the end of the period of their mandate; changes in national law should be explored in areas with large British communities so that such representation can continue.
8. Clarification should be sought as to whether Member States will withdraw the right of consular protection from UK citizens travelling outside of the EU so that an information campaign can be undertaken to inform UK citizens – perhaps as regards key third country locations - of this fact;
9. Petitions lodged by UK citizens before the date of Brexit should be protected; clarification should be sought from the EP as to whether in practice they admit petitions from third country nationals concerning their rights under EU law;
10. Clarification should be sought from the EU about the right of UK citizens (generally) to write to the EU after Brexit;
11. European Citizens Initiatives launched by UK citizens before Brexit should be given protection and allowed to run their course.

National law issues

12. There will also be issues as regards how national rules e.g. on dual citizenship where such dual citizenship is only possible if the second citizenship is another EU citizenship, but also in relation to matters covered by the Withdrawal Agreement e.g. the continued recognition of professional qualifications during this period, as the Withdrawal Agreement will not yet apply (such qualifications will need to be deemed to be Member State qualifications for the duration of transition).

III. Specific Issues in relation to domestic implementation by the UK government

Several key issues arise when considering how the UK government will look to implement this agreement[12].

Voluntary status

The UK government intends to roll out a voluntary scheme by the end of the year. We understand that the design, rules and implementation of this will run alongside the parties drafting of the WA. We have concerns about the risk of divergence and lack of scrutiny of these rules and wish for the UK government to be transparent in its approach. Whilst the3million and other groups have been invited to user group meetings, which have been welcomed, they do not provide sufficient urgent insight into the scheme. Given the scheme's significance, we hope for a more forward discussion on details as set out in this paper and those that arise in the future. It is not clear how the proposed scheme will work in practice, and what the status would be of persons who made a voluntary application for the new status prior to the Withdrawal Agreement being ratified and who were refused. In addition, it is not clear if the new voluntary application process could be used to proceed to an application for citizenship. Notably, those who do not apply for or are not successful in acquiring the new status may then be illegally in the UK. The consequences of this are expanded on below.

Grace period and errors

A grace period of at least two years after exit has been agreed within which citizens will be obliged to apply for the new status or face illegality and/or removal from the UK. It is not clear how this status will be documented and what employers, landlords, the National Health System (NHS) and other agencies will know what to do in the circumstances, and how they can be challenged in the case of errors. Given the numbers involved in the application process, great concerns have been raised about the criteria that will be applied, the aggressive approach by the UK government previously adopted and the historical problems it has consistently had with managing applications or complying with court orders. In addition, recent error rates of applications for permanent residence in the UK have been 10%. This has all been extensively reported on in the UK[13] and Germany[14]. Furthermore, budget cuts, lack of caseworkers and training and general lack of resources in the Home Office are also cause for concern and have been addressed in previous submissions to the negotiators.

Online rather than local applications

The methodology of application we understand will incorporate a new online system using existing data held by UK government on tax, pensions and benefits and on police databases. It is not clear whether and how international criminal databases would also be checked. Tax (HMRC), work and pensions (DWP) systems in the UK experience their own

[12] We have maintained consistent critique of the UK Government's approach to these negotiations and have provided detail comment on their proposal, previous behaviour and current activities. For detailed analysis please review the publications section of the3million website at: https://www.the3million.org.uk/publications

[13] https://www.theguardian.com/uk-news/2017/dec/25/asylum-offices-constant-state-crisis-say-whistleblowers-home-office

[14] http://www.spiegel.de/international/europe/as-brexit-nears-harrassment-of-eu-citizens-in-uk-rises-a-1181845.html

errors and data processing problems[15] [16]. This will place another burden on online applications[17]. Moreover, there are no provisions for those who cannot access online systems or who are not IT literate. There is no explanation as to what other means of data mining would be used as verification of an applicant's ID or employment status if applicants to not appear on HMRC or DWP databases[18].

Processing period

The UK has indicated that it would resolve applications within a 2-week period. However, a firm commitment to such a 2-week period as sought by the House of Lords has not been forthcoming to date. In view of the many barriers to a 'constitutive', on-line application and well-documented Home Office problems we have serious doubts about this timeline.

EU27 citizens with existing Indefinite Leave to Remain (ILR)

It is unclear whether or not EU27 citizens who already possess indefinite leave to remain documents will be able to acquire the new status for free and whether they have to undergo absence, criminality and other checks. Serious insurmountable evidential issues could arise in their case.

Deportations and removals

The UK government has a history of aggressively pursuing and removing foreign criminals[19]. These decisions are not always lawful. This was recently demonstrated by the CJEU ruling that confirmed that rough sleeping did not constitute an abuse of rights by EU nationals thus judging the deportation of such citizens by the UK government as unlawful[20]. The UK government will continue to have the ability to remove potential deportees pending appeals of decisions.

Appeal rights

These are not always guaranteed, for instance there are none in respect of voluntary applications during the period before the scheme becomes statutory. There is no right of in-country appeal in case of rejections due to alleged fraud.

Judicial oversight and Access to Justice

In view of the above it is particularly important to ensure that the UK government is sufficiently resourced and monitored. Access to justice will be essential in such cases. **Legal aid** is not strictly available to those who wish for legal assistance with immigration matters. The issue of access to justice, and specifically the cost of litigation, is rightly becoming a major constitutional issue in the UK[21]. This raises concerns about how EU27 citizens, especially those with fewer resources, will access legal representation should they need to

[15] https://www.ft.com/content/a913f086-7838-11e7-a3e8-60495fe6ca71
[16] http://www.dailyrecord.co.uk/news/uk-world-news/dwp-blunder-sees-75000-disability-11541450
[17] https://www.theguardian.com/politics/2017/nov/20/civil-servants-bordering-onclueless-over-brexit
[18] http://www.independent.co.uk/news/uk/home-news/public-health-england-nhs-department-of-health-doctors-of-the-world-immigrants-data-sharing-a7709856.html
[19] https://theconversation.com/when-britain-can-deport-eu-citizens-according-to-the-law-86896?utm_source=facebook&utm_medium=facebookbutton
[20] http://dpglaw.co.uk/wp-content/uploads/2017/12/Approved-judgment-RGureckis-v-SSHD-Ors.pdf
[21] https://ukconstitutionallaw.org/2017/10/26/tom-hickman-public-laws-disgrace-part-2/

challenge the UK government. The courts system is already under strain, and people seeking to challenge refusals or rejections of their applications or allegations of fraud in the application process face barriers to accessing justice.

Errors and omissions leading to allegations of fraud

Simple errors or omissions in making an application for the new status may also result in government allegations of fraud. This is a criminal offence with grave consequences including detention and deportation. This could result in applicants having to take legal action to clear their name from outside the UK or as part of criminal proceedings.

Failing to obtain the new status

The ramifications of not acquiring the new status — which might be as a result of an error by the UK government — are sizeable. Firstly, those who do not acquire the status will be illegally in the UK and at risk of criminal prosecution. Secondly, they will be liable to detention and removal from the UK. The UK is the only country in the EU to have indefinite detention for immigration cases. Thirdly, they will become victim to the 'Hostile Environment', a set of measures, both administrative and legislative, to make life so miserable for anyone without immigration status that they will 'self-remove'. It includes limiting access to employment, housing, healthcare, confiscating a driving licence, freezing bank accounts, restricting rights of appeal against the Home Office's decisions. And the Home Office has a tendency to appeal decisions then delay the appeal process unnecessarily. There is even a history of non-compliance with orders of the courts. These issues are well documented in the public domain.[6]

The3million have shown in their Alternative Proposal[22] that there is a viable alternative to the constitutive 'settled status' proposal. The EU and UK can and should agree a more flexible, fair approach to registration that is rooted in the absolute preservation of existing rights. The UK and EU should agree that only a declaratory, local, light touch approach will remove the risk of EU citizens living in the UK falling into the hostile environment.

[22] https://docs.wixstatic.com/ugd/0d3854_fb9c73b134584fc6aebe335b29604322.pdf

IV. The inadequacy of Third Country National (TCN) legislation as compared to EU citizenship rights: Why a Default to Third Country National Status is not acceptable or comparable to EU citizenship

Introductory remarks

When the UK leaves the EU it will be a third country and UK citizens will become, in EU terminology, third country nationals (TCNs). Moreover, they will be third country nationals without the usual TCN entry and residence documents. One aim of the Withdrawal Agreement, as we see it, is to protect UK citizens and their family members, currently exercising rights as EU citizens in EU countries, from these harsh consequences. We set out below why it is not acceptable for British citizens living in EU countries to be "transferred" to TCN status under EU law and furthermore why it should not be accepted that gaps in the Withdrawal Agreement can be somehow "plugged" with rights under the EU acquis for third country nationals.

As the analysis below sets out, the rights given to third country nationals resident in EU Member States are in many circumstances inferior to those enjoyed by EU citizens. In particular, there are a range of issues of central importance for the ability of UK citizens living in the EU to carry on living their lives and making their livelihood as at present – mobility between Member States, rights of self-employment, ability to provide cross-border services and recognition of professional qualifications – which are not adequately provided for in the EU acquis for third country nationals. These gaps will be looked at in more detail below in the context of "no deal" and Withdrawal Agreement scenarios, in addition to considering some of the positive aspects that the EU acquis on TCN may provide.

The EU acquis on third country nationals

The guiding approach to the rights of third country nationals residing legally in the EU was given in 1999 in the Tampere European Council conclusions, namely that third-country nationals who had resided legally in a Member State for a period of time and holding a long-term residence permit should be granted in that Member State a set of uniform rights which are near as possible to those enjoyed by citizens of the EU.

Since Tampere therefore, the EU, on the basis of its common immigration policy, has gradually developed a body of secondary legislation dealing with the entry, residence, right to work and other rights of third country nationals in the EU (including those of their family members). Denmark however does not participate in the common immigration policy, meaning it does not apply the EU acquis on TCNs. Ireland (along with the UK) has a right to opt in. This immediately shows the problem with falling back on this acquis: this is secondary legislation, which applies at most EU-26 and in some cases EU-25.

EU competence in this area is shared with the Member States. This means that national legislation concerning third country nationals can in some cases apply in parallel. In addition, given that competence is shared and rights are given via national implementation of EU directives, there can be significant differences in the way Member States deal with third country nationals under their national law (so a UK citizen in Italy, for example, may face a very different situation to a UK citizen living in Germany). It is very different to the position of EU citizens who enjoy uniform rights by virtue of the direct effect of Treaty provisions.

The key instruments dealing with rights of third country national under the EU acquis are as follows:

- Directive 2003/2009 concerning the status of third-country nationals who are long-term residents ("the long-term residence directive);
- Regulation 1231/2011 on social security coordination for third country nationals legally resident and in cross-border situation in the EU;[23]
- Directive 2003/86/EC on the right to family reunification;
- Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (to be replaced as from 23 May 2018 by Directive 2016/801 - see below);
- Directive 2005/71 on admitting TCNs for purpose of scientific research (to be replaced as from 23 May 2018 by Directive 2016/801 - see below);
- Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly-qualified employment ("the Blue Card directive" - proposal to revise under consideration by co-legislators);
- Directive 2011/98/EU on a single application procedure for third country nationals to reside and work ("Single Permit directive");
- Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of seasonal employment;
- Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.
- Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (to be transposed by the Member States by 23 May 2018).

The relationship between the various directives dealing with the rights of third country nationals (a table of which is attached at end) is complex and the European Commission is currently looking at the coherence and relevance of certain instruments in the context of a so-called REFIT Fitness Check, the results of which are expected to be published in mid-2018. Moreover, Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly-qualified employment (the so-called "Blue Card Directive") is in the process of substantial revision (Commission proposal of June 2016 still under negotiation: adoption expected summer 2018). It cannot be discounted that the revision of this legislation may in some way take into account the fact that UK citizens will in the future be within its personal scope.

The revision of the Blue Card Directive is of particular interest as one of the main aims behind its revision is to make better provision for the intra-EU mobility of third country highly skilled workers in the EU.[24] The proposal underlines how the Commission sees a need to improve the provision for intra-EU mobility of third country nationals. This is underlined by the European Migration Network's 2013 study on the intra-EU mobility of Third Country Nationals, which found:[25]

"The EU migration Directives that provide for mobility of third-country nationals, leave **significant areas of discretion** to Member States, and therefore to national laws in shaping mobility. Member States, acting legally, can and do limit or encourage such mobility, according to their national policies and priorities, thus creating differences in rules and

[23] Ireland opted into this regulation but the UK did not. The UK did opt into the similar but older Regulation 859/2003, suggesting that the EU-27 may apply this older Regulation vis-a-vis UK citizens
[24] COM(2016) 378 final, see for example the explanatory memorandum and recitals 38-41.
[25] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/doc_centre/immigration/docs/studies/emn-synthesis_report_intra_eu_mobility_final_july_2013.pdf

practice across the Member States…On a practical level, burdensome **requirements for entrepreneurs and self-employed persons** can prevent mobile third-country nationals from settling in another Member State. Burdensome processes related to the **recognition of degrees and diplomas** and particularly, the associated cost, duration and documentation requirements may deter third-country nationals from moving".

In the event of a no deal: default to third country national status?

British in Europe has been asked on a number of occasions: "What would be the effect of no deal?" The short answer to the question is that nobody knows for certain. The longer answer is that the default position for UK citizens in the EU would be a mixture of EU, national, and international law (including the European Convention on Human Rights). In terms of EU law, the application of the EU acquis on third country nationals would be central, at least in those 25 Member States where it applies.

The Long Term Residence Directive

Directive 2003/109 concerning the status of TCNs who are long-term residents ("the Long Term Residence Directive") would be particularly important in this context. This Directive, following on from the mandate given at Tampere, grants a specific "long-term resident" status to TCNs who have resided legally and continuously within the territory of a Member State for five years. Applicants for this status must show that they have stable and regular resources to provide for themselves and their families and comprehensive sickness insurance. There is also provision for Member States to apply national integration conditions (for example, attendance at language courses). The conditions to acquire long-term resident status are therefore more stringent than those that apply to permanent residence for EU citizens. Similarly, the family members who can enjoy rights with the long-term resident, are defined more restrictively than family members under the EU Citizenship Directive.

As regards rights, long-term residents enjoy equal treatment rights with nationals in a range of areas (e.g. access to employment, education and vocational training, social security (including healthcare) and social assistance) but a series of derogations apply. There is a right to equal treatment as regards recognition of professional diplomas and qualifications – this is however recognition in national law only and national procedures and costs will apply. As regards intra-EU mobility, long-term residents have the possibility to reside in the territory of another Member State for the purposes of employment or self-employment, pursuit of vocational training or studies, or "other purposes". The directive makes clear that this right is however without prejudice to the second Member State's competence to apply its own labour market policy as regards admission to its labour market. So, for example, if a Member State applies quotas on the number of third country nationals admitted to certain jobs or professions, it would still be entitled to apply these. There is also an explicit exclusion with regard to residence in another Member State for providers of cross-border services.26 In short, the status granted under the Long Term Residence Directive is much less favourable than EU citizenship: there is no free movement and no right to provide services in a second Member State.

We also note the 2011 EU Commission report into the transposition/implementation of the Directive which described the situation, five years after it entered into force, as

26 Article 14(5) (b) of Directive 2003/109/EC.

"deplorable." Several of the Member States that are home to the largest communities of UK citizens in the EU were found to be in contravention of key provisions of the directive, including definition of status, refusal of status, giving long term residents the right to choose between a permit under national immigration law or EU law, costs of applying for a permit, higher fees for tertiary education than are charged to EEA nationals and quotas on work permits for long term residents moving from one EU member state to another[27]. Under its Fitness Check (referred to above), the EU is currently reviewing the workings of this Directive, but it could be some years before any reform is made.

I*mpact of other EU third country national acquis*

Other instruments part of the EU TCN acquis could also provide some default rights in the case of no-deal. In particular, the so-called "Single Permit Directive" (Directive 2011/98/EU), which provides a catalogue of equal treatment rights to "third country workers" – persons legally residing and allowed to work – could provide some rights for those UK citizens not yet covered by the Long-term Residence Directive. Equal treatment with nationals as regards recognition of qualifications and equal treatment as regards social security (including healthcare) is, for example, covered. For students and researchers and their family members, Directive 2016/801, governing conditions of entry and residence for TCNs for purpose of research, studies, training and volunteering, sets out the various residence conditions and certain limited intra-EU mobility rights for the purposes of study and research.

Health and social security

In a no-deal situation, the reciprocal healthcare system based on Regulation 883/2004 would fall away with potential implications for provision of healthcare for UK citizens covered by an S1. However, most of the EU TCN instruments mentioned above give to persons within their scope a right to equal treatment with nationals as regards social security (a term under EU law which also includes healthcare).[28] These TCN equal treatment provisions could therefore provide a potential solution to this particular issue.[29] They would not however provide a solution to the question of pension uprating by the UK, which is a matter which could best be solved by the UK unilaterally or, alternatively, via bilateral agreements made between the UK and each Member State of residence.

Regulation 1231/10 extends the EU's social security coordination rules (in Regulation 883/2004) to third country nationals, who are legally resident in a Member State and in a cross-border situation. This means that the rules in Regulation 883/2004 could therefore continue to apply to UK citizens residing in an EU-27 country and moving to another EU-27 country if legally resident and in a cross-border situation. So, a UK citizen living and insured for healthcare in Germany could use an EHIC card when going on holiday to Spain, for

[27] 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

[28] See Article 11(1)(c) Long Term Residence Directive (Directive 2003/109/EC); Article 12(1)(f) Single Permit; Article 11(2) of Directive 2016/801 in the case of access to healthcare for students.

[29] This is provided that Member States approach reasonably the requirement to have comprehensive sickness insurance in order to obtain for example long-term resident status in the first place. The Commission's 2009 Communication interpreting the Free Movement Directive (COM(2009) 313) is however helpful in this regard: see point 2.3.2, which makes clear that healthcare provided on the basis of an S1 is to be regarded as comprehensive sickness insurance.

example. Similarly, the possibility for a UK citizen to aggregate insurance periods for work undertaken in EU-27 countries would also continue on the basis of Regulation 883/2004.

In the event of a deal under the Withdrawal Agreement that does not cover all existing rights

In the event of a deal under the Withdrawal Agreement ("WA") to protect the rights of UK citizens living in the EU, the question arises as to how the rights given by the WA will interact with the rights in the EU acquis for third country nationals. There are two key issues for British in Europe here: (1) can the rights in the EU TCN acquis be used to make up for gaps in the WA; and (2) Given that that citizens covered by the WA will have "special status",[30] will it nonetheless be possible for UK citizens with such "special status" to benefit from rights contained in the EU acquis for TCNs?

Can rights under the TCN acquis make up for gaps in the Withdrawal Agreement?

It has been suggested to British in Europe that, where the Withdrawal Agreement does not provide rights for UK citizens, they can nonetheless fall back on the EU acquis for TCNs. The gaps in the WA of most concern are free movement between Member States, recognition of professional qualifications, the possibility to work in an employed or self-employed capacity in another Member State (or a number of Member States) and/or to provide cross-border services. Yet the brief analysis of the TCN acquis above shows that it is precisely in these areas where it is at its weakest: third country nationals may have a right to work in an employed or self-employed capacity in one Member State but moving to work or take up self-employment in another Member State usually depends on an authorisation by the new Member State; while there is a right to move for up to 90 days within the Schengen zone, there is no right to carry on a business activity in another Member State. Various instruments (e.g. long term residence directive/Single Permit Directive) contain a right to be treated equally with nationals as regards recognition of professional and other educational qualifications, but this is very different from a guarantee that the qualification will be recognised (if it is not recognised for a national, it will not be recognised for a TCN either) and it can involve lengthy national procedures and considerable cost.

In short, reliance on the TCN acquis cannot make up these major gaps in the WA. Certain instruments, such as Regulation 1231/10 on social security coordination for mobile TCNs, will however be beneficial.

Will UK citizens and their family members within scope of the WA be able to benefit from rights under the TCN acquis?

The Commission's Communication of 8.12.2017 on the state of progress of the negotiations with the UK acknowledges that UK citizens covered by the WA will have "special status." The immediate question is whether we can have this "special status" but at the same time benefit from rights given to TCN under the EU acquis. Will "mix and match" of special status and other TCN rights be possible?

Secondly, as set out above, the EU's acquis on rights of TCN is complex: a particular complexity is that, if a person has rights under one instrument, he is often excluded from rights under other instruments. So, for example, long-term residents are excluded from rights under the Single Permit Directive, the Blue Card Directive and from rights under the

[30] Commission's Communication of 8.12.17 on the state of progress of the negotiations.

third country researchers and student directive. It cannot therefore be taken for granted that UK citizens covered by the WA will benefit from rights under the EU acquis for TCNs. In addition, in the majority of the instruments, the applicant has to fulfil certain conditions for admission to the EU, one of which can be residing outside of the territory of the EU at the time of application: for UK citizens living in the EU, these conditions cannot be fulfilled. To circumvent these various problems, we suggest that the WA should explicitly guarantee that we are entitled to benefit from rights given under the TCN acquis.

There is also the question of our family members. A number of the TCN directives exclude from their scope family members of EU citizens who have exercised their right of free movement. This general exclusion (which could catch potentially both EU and third country family members) should in the interests of legal certainty also be dealt with in the WA and set aside.

British in Europe and the3million

23 January 2018