BRITISH IN EUROPE

THE COALITION OF UK CITIZENS IN EUROPE

Analysis of Draft Withdrawal Agreement Published by the Commission on 28 February 2018

INTRODUCTION

On Thursday 22nd March, the European Council will consider the draft UK Withdrawal Agreement prepared by the EC Article 50 Task Force ("the draft"). The aim is to produce a legally enforceable agreement embodying the political understanding reached in a Joint Report (JR) last December and dealing with other outstanding issues.

The European Parliament's resolution of 13.12.17 made it clear that the JR did not go far enough in a number of important respects. **British in Europe** and **the3million** published a detailed critique of the JR[1] with suggestions as to what the Withdrawal Agreement needed to include to achieve the stated aim of ensuring that nothing would change for EU27 nationals in the UK and for UK nationals in the EU.

In preparation for the European Council's consideration of the draft, we have conducted a review and prepared a checklist of initial comments. We will supplement this with a detailed legal analysis of the draft once adopted. Our comments cover the following:

- Outstanding issues e.g. free movement, future family reunification.
- Omissions from the text e.g. persons not currently covered.
- Ambiguities e.g. the position of dual citizens and Initial drafting comments.

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

CHECKLIST

Outstanding issues

1. **Article 32: Free movement for UK citizens in the EU ("UKinEU") and lifelong right of return for EU citizens in the UK ("EUinUK").** This is linked to the issue of whether associated individual economic rights, and recognition of qualifications will apply across the EU for these citizens. Although this is an outstanding issue and still subject to negotiation, the draft goes much further and specifically *excludes* free movement rights for UK citizens in the EU. It makes clear that this exclusion covers:

   - Free movement rights to other Member States;
   - Right of establishment in other Member States;
   - Right to provide services on the territory of another Member State; AND
   - Right to provide services to a person established in another Member State

   This last is an entirely new and highly restrictive provision introduced at a late stage into the negotiations by the Commission without prior consultation. It is not even clear from the wording what it means. It could mean:

   1. That it is intended to prevent a UK citizen residing in an EU27 country from providing services to a national of another Member State anywhere – so a UK translator in Germany would not be able to provide a service to a Dutch client even if the client comes to her office; or
   2. That it is intended to prevent a UK citizen residing in Germany from providing services *in Germany* to a national of another Member State if that person is not physically present in Germany.

      Even if the marginally less restrictive second interpretation is intended, this provision is entirely unacceptable because:

   - Apart from all the arguments we have raised in the past as to why those UKinEU who have already exercised free movement rights (an important distinction in CJEU case law) should

[1] See joint British in Europe/the3million paper "Considerations for Phase 2" of 23 January 2018: https://britishineurope.org/wp-content/uploads/2018/01/Considerations-for-Phase-2-23-01-2018.pdf

have them safeguarded, this new provision simply ignores the way the world works in the EU in the 21st century, partly due to the success of the Single Market and partly due to technology. The right to work that the JR purports to guarantee in the host state will be meaningless for large numbers of self-employed people[2]. A UKinEU translator or IT consultant based in Germany, asked by a French company to provide it with translation or IT services remotely *from Germany*, would have to refuse simply because the client was established elsewhere and not physically present in Germany.

- Looked at from the point of view of the EU client, such a rule would represent an irrational restriction on their freedom to choose their service-providers: from the point of view of the UKinEU worker, it could easily spell bankruptcy.
- Moreover, the enforcement of this pedantic distinction is going to require a mountain of complex bureaucracy, simply to verify that UK citizens are no longer doing what they moved to the EU27 to do.
- The absurd mirror image of this, if reciprocity were to apply, would be that the UK would make similar provision to prevent EU27 citizens based in the UK from working for nationals of their home or any other EU State.
- More incongruously still, a UK lawyer established as an avvocato in Italy will be able to provide advice to a US or Australian client without difficulty, but will have to decline to advise a client who happens to be based in the EU.
- The provision will have to be redrafted in any event, since the wording is not clear. It is so badly thought through in policy terms that it ought to be deleted altogether.

2. **Articles 12-18: Securing our status.** We will not repeat all the arguments we have made previously concerning the acceptance by the EU of the UK's proposal for settled status[3] and, the inclusion at the last minute, due to reciprocity, of an option for EU 27 countries to apply a similar conditional application system to UKinEU, in clear departure from EU law. The draft deals with this in Title II, Chap I:
   - **Overall comment:** Paragraph 16 of the JR provided States with two options for registering residence rights. Article 17 of the draft WA provides over 3 pages of detailed explanation of the option for a new conditional system, followed by a single paragraph merely acknowledging the existence of an option not to require new applications to be made. In order to avoid confusion on this important topic, this section should start with a clear statement of the two options, followed by such detail of each as is necessary. The explanation of the option of retaining the present declaratory system should expressly refer to the procedures in Directive 2004/38, thereby simplifying the drafting in the WA at the same time as retaining a system which has stood the test of time and legal consideration.
   - **Article 17: Member States with existing registration systems.** the drafting seems to assume a system (like the UK) where to date citizens have not been registered. In EU countries where they have been registered, but have not formally been required to have permanent residence cards, some of these provisions should fall away e.g. 17(1)(j)-(m)
3. **Article 9: Future family reunification.** In contrast to free movement, this right, which is also still subject to negotiations, has been included in the draft. We are happy to support this for both groups, as a failure to provide it will result in discrimination vis-à-vis the younger demographic in the UKinEU and EUinUK groups.

Omissions

1. **Article 9: Family reunification. "*Surinder Singh*" rights for returning citizens.** This is not covered. Citizens returning to their home countries post end-transition should be able to do so with their non-British or British non-EU spouses under EU rules, not national immigration rules. Put simply, a German citizen who leaves the UK post end-transition must be able to return to

[2] The draft does not make clear whether it also prevents UK workers employed by an EU company from providing services to clients of the company based in other States.
[3] For example, see joint paper with the3million, Considerations for Phase 2, as above.

Germany with a British spouse, and a British citizen who leaves Germany to return to the UK with a German spouse must be able to do so too, both under EU rules as they can now.

2. **Article 9: *Zambrano* carers** (non-EU parents caring for children who themselves have rights under the WA)**.** The draft does not cover them, but should.
3. **Article 25: Recognition of qualifications limited to host State or State of work.** This limitation is linked to free movement for UKinEU but it will impact *all* those who hold UK qualifications, whether EU citizens in the UK or UKinEU.
4. **Rights of lawyers to establishment under their home title in the host state.** Article 2 of Directive 5/98 allows lawyers to establish themselves in another Member State under their home title. Where a person who falls within the personal scope of the draft and their sole place of establishment is in their host state of residence so that they practise solely out of the host state, there appears no logical reason to exclude such establishment under Article 2. There is no logical reason why a French or German lawyer currently practising under their home title and solely established in the UK, possibly dealing with French/German clients both in the UK and in France/Germany should not continue to do so; the same is true for a UK lawyer who actually resides in their host state, and practises solely out of that host state. This clear removal of an existing right to practise could not come at a worse time: an Italian in the UK in doubt about his/her post-Brexit rights is most likely to want advice from a co-national: this restriction removes a set of UK-based Italian avvocati from being able to give such advice.

Ambiguities

1. **Articles 8(c), 9(1)(a), and 9(1)(b): Dual citizens.** It is not clear that the drafting of these articles covers those EUinUK and UKinEU who have decided to take dual citizenship and this should be clear, in line with the Lounes case law. The draft must expressly cover those with dual citizenship and clarify that, where conflict arises between their rights as a person within the scope of the WA and their rights as nationals, their WA rights represent their minimum entitlement and as an add-on to their rights as a citizen in the host state.
2. **Articles 8(b), 8(d), 9(1)(c), 9(1)(d), 23(2) and 24. Frontier workers.** There are a number of issues that need to be clarified. In the definition, how frequent, regular or recent as at Brexit does the economic activity have to be? How are status and state of work to be evidenced, in particular for self-employed frontier workers? What happens once the current job in the state of work comes to an end? There must be at least a "grace period" of, say, a year to get another job/establish another business.
3. **Articles 9(1)(a) & 9(1)(b): Temporary absence.** Since it appears that citizens must show that not only have they exercised residence rights before end of transition period but also continue to reside post the end of transition, it must be clear that a temporary absence from the host country on the day after end of transition, e.g. due to a work posting or need to care for a sick relative, does not affect the rights of such a citizen.
4. **Article 17(1)(h): Criminality checks.** We will not repeat what we have said as regards systematic criminality checks[4] other than to note that as regards Article 17(1)(h): where citizens are exchanging a permanent residence card for any new status, no systematic criminality or security check without reasonable suspicion of its necessity should be carried out.
5. **Articles 18 and 19**: Some redrafting of Articles 18 and/or 19 is required as at present they are self-contradictory. Chapter VI of Directive 2004/38 contains important safeguards for those who are accused or guilty of misconduct: in addition to due process requirements the safeguards also prevent deportation unless such a measure is proportionate having regard to the offence and the personal circumstances of the offender and his/her family. Art. 19 of the Commission's draft says that these safeguards apply in *any* case of restriction of residence rights. Art. 18.1 says that Chapter VI applies to conduct prior to the end of the transition period, but Art. 18.2 clearly implies that it does not apply to post-transition conduct. The WA needs to make clear what parts of Chapter VI apply in the case of post-transition period conduct: among other things, in addition

[4] See for example our Considerations for Phase 2 paper as above.

to the procedural safeguards of Chapter VI, it needs to be made clear that, whenever the misconduct took place, residence rights can only be restricted in a way which is proportionate, so that Directive Articles 27.2 and 28 should apply.

6. **Articles 22 and 23: Rights of self-employed persons.** These are currently subject to Article 32 in the draft. Please note our comments above on Article 32.
7. **Article 29(1): Social security coordination.** The drafting is unclear but the meaning appears to be that the full acquis on social security applies to the rights of those covered by this title on social security.

Conclusion

- All outstanding issues should be negotiated within the scope of the Withdrawal Agreement, including, in particular, genuine free movement rights, and all interlinked economic rights/recognition of qualifications, as well as future family reunification, and should remain a priority for this phase of the negotiations.
- The gaps, clarifications and ambiguities that we have identified should be dealt with.
- As "nothing is agreed until everything is agreed" 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.

6 March 2018

British in Europe