

Comments of British in Europe and the3million on the draft Commission Recommendation for a Council Decision authorising the opening of the negotiations for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (the "Commission Recommendation") and its Annex, setting out the negotiating directives for those negotiations (the "Annex")

British in Europe and the3million

British in Europe is the coalition of UK citizens' groups resident in Europe and the3million is the largest group representing EU27 citizens resident in the UK. Together we represent the interests of all those citizens who have moved across the English Channel in reliance on their freedom of movement and related rights under the EU Treaty and whose lives risk being turned upside down if these rights are not preserved by an agreement on Brexit.

On 1st February British in Europe published an Alternative White Paper ("AWP") setting out its proposals for citizens' rights (copy attached for ease of reference); the3million have subscribed to the contents of that document, as well as publishing their own Alternative White Paper during the same period. We frame some of our comments on the Council's Negotiating Guidelines by reference to that document.

The Guidelines

We start by welcoming the Negotiating Guidelines adopted by the European Council on 29th April as a huge step forward in obtaining the majority of the rights that we seek to safeguard. Similarly, we welcome the opportunity to comment on this Commission Recommendation and the Annex setting out directives for the negotiation of the agreement with UK. We appreciate the commitment to transparency and openness shown by the European Commission and look forward to a similar commitment from all the negotiating partners.

However, we have a number of reservations and some points that we would like to see clarified.

Reservations

1. **Lack of ring-fencing:** The most serious omission in the Negotiating Guidelines plus Commission Recommendation and directives set out in the Annex is that there is no proposal to ring-fence the agreement on citizens' rights. It is clear from the reference in the Explanatory Memorandum set out in the Commission Recommendation to the principle that "nothing is agreed until everything is agreed" and thus that "individual items cannot be settled separately" that the EU is not yet prepared to commit to ring-fencing the initial agreement which both the EU and the UK Government propose to seek on citizens' rights. Any such agreement will therefore be dependent on the parties reaching overall agreement on all aspects of the Article 50 negotiations. The arguments in favour of ring-fencing the issue of citizens' rights are obvious and overwhelming:
 - a. If there is no ring-fencing we will not be able to sleep any better following an initial agreement on our rights, as it will be purely provisional. Both

sides are on record as saying that their top priority is to reach agreement on our rights because of the anxiety that the present uncertainty is causing. Failure to ring-fence will prolong both our uncertainty and our anxiety in exactly the way that both sides to the negotiations are seeking to avoid.

- b. Without ring-fencing we will be bargaining chips. In addition, the prospect of there being no deal is not far fetched. The whole agreement on individual rights could fall if one side did not concede some unrelated advantage sought by the other, in particular, if agreement were not reached on the financial settlement.
 - c. Whilst we understand that the rationale behind nothing being agreed until everything is agreed is to prevent cherry-picking by either side, there is no reason for this consideration to apply to citizens' rights, as this is not an issue on which either the UK or the EU27 could be regarded as a 'winner'. Each side has an interest in looking after its own citizens resident abroad, as well as in looking after those citizens from abroad who are living and working in their countries.
 - d. There is no legal obstacle to ring fencing an agreement on citizens' rights early on in the process. There are precedents for this in EU law and other EU agreements.
2. **"At least" provisions:** The next issue concerns the "at least" provisions in paras. 21 and 22 of the Annex to the Commission Recommendation, which suggest that the EU might be prepared to settle for less than the full status and rights set out in paras. 11 and 20. The whole point of our AWP and the Governing Principle set out in AWP para. 6 is that *all* our rights need to be preserved. The reason for this is set out in AWP para.7 referring to the report of the UK House of Lords EU Committee on Brexit acquired Rights. Although many of our major concerns have been expressly recognised in paras. 21 and 22 of the Annex, we would be concerned if the ultimate agreement fell short of para. 20.
 3. **"Lawful" residence:** On residence the requirement of Directive 2004/38 that residence should be "lawful" is continued in the Annex. Whilst this is understandable, this has allowed the UK to interpret this to include a requirement for comprehensive sickness insurance (CSI) and the EU should be negotiating to ensure that the UK treats that requirement as satisfied by the availability of National Health Service treatment. By contrast para. 21(b)(i) of the directives in the Annex contain proposals for a simple and inexpensive procedure for obtaining permanent residence which implicitly criticise the Home Office's 85 page document and large fees, proposals which we all welcome and which will help the EU citizens in the UK to overcome the present 30% refusal rate¹.

¹ This of course also picks up the recommendation of the most recent report of the House of Commons Exiting the EU Committee.

4. **Freedom of establishment:** Para. 21 of the Annex does not expressly refer among the “at least” requirements of the EU in the negotiation to the right of establishment, despite reference to Article 49 of the Treaty, though the narrower right of self-employment is expressly provided for, which forms part of the right of establishment.

Freedom of establishment in its full sense as set out in Article 49, also taking into account the provisions of Article 54, is important because many individuals who have moved across the Channel do operate through the medium of a company or other legal entity, and do need to have their right to continue to do so, i.e. the right to set up and manage undertakings, guaranteed.

5. **Students:** There is no express reference in the directives in the Annex to students, though the right of existing cross-Channel students to reside as long as their studies continue is implicitly but clearly covered by Para 21. In para. 35 of the AWP we do raise a series of concerns over students limited to those already residing cross-Channel or who are studying or in the past have studied cross-Channel, which we believe should be addressed.
6. **Voting rights:** There is in the Annex no express reference to voting rights or to Council Directives 94/80/EC or 93/109/EC which govern them. These rights are very important to citizens resident on both sides of the Channel, and we suggest an amendment to provide, "At the very least EU citizens in the UK and British citizens in the EU should not lose existing voting rights including for the European Parliament and local/mayoral elections".
7. **Dispute resolution:** The most perfect agreement on citizens' rights will fail if there is no effective enforcement mechanism available to EU27 nationals in the UK and UK nationals in the EU27. The directives in the Annex contain provisions about the adjudication of disputes and governance of the Agreement. We welcome the proposal in Article 42 of the Annex to maintain the jurisdiction of the CJEU and the continued supervision by the Commission of all matters relating to citizens' rights. We cannot envisage any other dispute resolution mechanism that would be equipped to deal with the likely hundreds, if not thousands, of disputes over the coming years relating to this Agreement and citizens' rights. Citizens whose rights fall under the Agreement will need to have guaranteed and easy access to the CJEU. This must include the right to claim legal aid to bring cases.

Doubts concerning the interpretation of the directives in the Annex

There are a number of areas in which there is doubt about what is intended. This is hardly surprising given the breadth and complexity of the negotiations and the status of the directives in the Annex as a high-level instruction to negotiators, but we would welcome clarity on the points that follow.

Some of our doubts might seem a little 'picky' because the correct interpretation is clear to some, but we felt it important to clarify any reasonable doubt at this stage rather than leaving it to be resolved only later after an agreement has been reached. If nothing else, clarity now serves to avoid litigation later.

Specific areas where the directives are not entirely clear are:

1. Does the reference to Directive 2004/38 simply protect free movement to/residence in a UK citizen's current country of residence, or post-Brexit will they continue to enjoy full freedom of movement throughout the EU 27? [The point does not arise for EU citizens in the UK, as they will remain full EU citizens in any event.]
2. The same point in relation to Directive 2004/38 and Regulation 492/2011 as regards the freedom to take up employment throughout the EU.
3. The same point in relation to the freedom to take up and pursue self-employment.
4. Pension aggregation - clearly all contributions *made pre-Brexit* will be aggregated, but it is not absolutely clear that all contributions made by the same people *post-Brexit* either in the same country or another will be subject to the same regime. We assume this will be the case but would welcome clarification.
5. We are unclear whether para. 22, which deals with continued recognition of qualifications, operates *in personam* or *in rem*. That is to say does it only benefit someone who, pre-Brexit, has exercised his/her right of free movement across the Channel, or does it apply to the qualification itself, thus protecting, e.g., an EU citizen who obtained such a qualification but had not gone to reside in the UK pre-Brexit? In addition, for the avoidance of doubt, we wish to clarify that the reference to "diplomas, certificates or other evidence of formal qualification obtained in any Union Member State before that date" also applies to those obtained in the United Kingdom as a Union Member State before the date of withdrawal.
6. Students:
 - a. Also under para. 22, will students who commence studies pre-Brexit (say in the 2017/18 academic year) but obtain their degrees post-Brexit have them recognised throughout the EU 28?
 - b. And under para. 21, will such students who commence studies pre-Brexit but continue them post-Brexit be subject to the same fees for the entire duration of their studies?
 - c. Any overall agreement on citizens' rights should explicitly include UK citizens born or normally resident in EU27 countries who are currently studying in the UK or outside their usual EU27 country of residence, and EU27 citizens born or normally resident in the UK who are currently studying in the EU27 or elsewhere. These students need to be able to return to their EU27/UK base once they finish, maintaining the same rights as their UK/EU27 citizen parents/relatives who have remained there.
 - d. This is a point, which we believe is covered by paras. 20 and 21(a) of the Annex, but in view of its importance we seek confirmation of that view. It is a matter of real concern to those who are, or about to start, studying.

Taking the example of those from UK families in the EU, many of these students, born and brought up in the EU, would like to safeguard their EU rights. Some would move back to EU27 countries now - and change universities - if they thought there was a danger of losing those rights for the rest of their lives. They need to be able to plan now on the basis of a clear statement of their position.

British in Europe

The Coalition of UK citizens' groups in Europe

the3million

8 May 2017