BRITISH IN EUROPE

THE COALITION OF UK CITIZENS IN EUROPE

THE DRAFT WITHDRAWAL AGREEMENT – *BRITISH IN EUROPE'S* COMMENTS

Introduction

1. These are the detailed comments of **British in Europe** on the draft Withdrawal Agreement published by the Commission on February 28th. We were unaware until very recently of the timetable for negotiation of the Agreement, and have had to prepare these comments under great pressure of time. Whilst we have in the past usually presented submissions jointly with **the3million** we do not do so on this occasion because there simply has not been time to coordinate this together, though we have had general discussions with them on our responses. We have seen each other's proposals in draft and are generally supportive of the content. We continue to work closely together in our joint campaign for the preservation of the rights of all affected citizens.

Ring-fencing

2. In their initial comments on the draft agreement provided last week **the3million** reiterated the case which we have made many times for early ring-fencing of our rights. As they rightly say, as time goes by the prospect of No Deal gets greater, not less and it is essential that our rights are guaranteed, not merely put on hold while other intractable matters such as the Irish border are discussed. We therefore support **the3million's** proposal for a separate agreement on Citizens' Rights made under Article 50 TEU as part of the overall Withdrawal Agreement, which would then stand alone should the rest of the deal fail.

3. We turn now to the text of the draft Withdrawal Agreement.

Article 8
Definitions

"frontier workers", "State of work"

4. There are a number of issues that need to be clarified in the drafting to avoid more years of uncertainty for all those involved and the likelihood of test case litigation.
   a. What threshold does a person have to pass to show that s/he is exercising an economic activity in accordance with Art. 49 TFEU?
   b. In the definition, how frequent, regular or recent as at end of transition does the economic activity in each State of work have to be?
   c. How are status and state of work to be evidenced, in particular for self-employed frontier workers?
   d. 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 in that State or the host State.

Article 9
Personal scope

Future partners or spouses

5. We support the Commission's drafting of Art. 9(1)(e)(ii) whereby future partners/spouses are within the personal scope of the WA.

Dual citizens

6. In the case of *Lounes v Secretary of State* C-165/16 the CJEU held that the family member of a Union citizen who had exercised a right of free movement and later acquired dual nationality had a derived right of residence where it was necessary to enable the Union citizen to live a normal family life in the State to which she had moved. These are rights which will exist on the last day of the transition period and, as such, must be preserved. The case sets a clear principle that a dual citizen who has moved between Member States can invoke EU citizenship and free movement rights, even if now a citizen of the host state. As such, it is applicable by analogy to the position of dual citizens under the Withdrawal Agreement.

7. Accordingly, there should be a provision that the rights conferred by this Part on persons covered by Art. 9(1)(a) and (b) and members of their families are not to be diminished by the fact that the person who had exercised a right under Union law of free movement to the host State has subsequently become a national thereof.

Surinder Singh rights

8. In *R v IAT and Surinder Singh, ex p. Secretary of State for the Home Department* Case No. C-370/90, the Court of Justice held that an EU citizen who had exercised a right of free movement to go to another EU State and established a family there had a right, upon returning to her home State, to bring her family with her in accordance with EU law even if the provisions of the national law of her home State did not permit it. As with dual citizens considered above, this is an EU right which will exist on the last day of the transition period, and it must be continued.

9. Accordingly, there should be a provision that the rights conferred by this Part on family members apply to the family members of persons who are covered by Art. 9(1)(a) and (b) at the end of the transition period but subsequently return to their home State, and for that purpose, references to "host State" in Arts. 12-15 and 17-27 shall be treated as references to the home State of the Union citizen or UK national in question.

Zambrano carers

10. In *Ruiz Zambrano v Office national de l'emploi* C-34/09 the Court of Justice held that a Member State could not refuse a right of residence or work to the non-EU parent of a minor citizen of the country in question where the minor needed the care of a non-EU parent. Provision needs to be made in the WA to

ensure that this derived EU citizenship right of minors in the UK continues after the end of the transition period.

Article 10
Continuity of residence

Residence at end of transition period

11. Temporary absences are a problem which has to be dealt with. Article 10 provides for "continuity of residence" for the purpose of Articles 8 and 9. There remains, however, an element of uncertainty over the separate test which has to be satisfied of "exercising a right to reside in accordance with Union law before the end of the transition period". It is important to establish that a person who is temporarily absent at the end of the transition period is still to be counted as resident at that date. Accordingly, we suggest the insertion of the words, "Continuity of residence for the purposes of Articles 8 and 9, including as regards residence at the end of the transition period, shall not …" at the beginning of Article 10.

Article 12
Residence rights

12. The European Parliament's resolution of December 13th 2017 required that the burden of proof be placed on the UK authorities to challenge the declaration by the applicant as to his/her entitlement to rights under the Agreement. Although the resolution referred only to the UK, reciprocity clearly requires that it works both ways, particularly for any country that takes up the option of the new registration scheme. We support the Parliament's requirement, particularly as people who have lived in a country for many years as a matter of undisputed right often find it hard to produce documents from long ago establishing that right, especially if they are now elderly.

13. The Parliament's requirement can be met by adding at the end of paragraph 4 the words, "The burden of disproving any assertion of fact made by a person applying for or claiming to be entitled to rights under this Part shall lie on the State which denies it."

Article 17(2) Directive 2004/38

14. Paragraph 1 lists a series of provisions relevant to the right to reside of Union citizens and UK nationals, but this list does not include Art. 17(2) of Directive 2004/38. This provision makes it marginally easier for certain people to get permanent residence and there seems to be no good reason for it not to be included.

Article 13
Right of exit and entry

15. We make the point below that the presentation in Article 17 of a new, optional, procedure for registering rights under the WA risks displacing the existing, tried and tested procedure set out in Directive 2004/38 which the Joint Report specifically preserved. Nowhere is this risk more apparent than in Article 13(1)

where it is left open to States to require visas for anyone other than a holder of a residence document under the new procedure. No mention at all is made of residence documents issued under the existing EU law system. The authors of the draft appear to have entirely forgotten their agreement in December that the present system should continue.

16. The continued validity of the existing procedure should be confirmed by adding at the end of paragraph 1 the words, "or a registration certificate, residence card (whether permanent or not) or document certifying permanent residence issued in accordance with Directive 2004/38."

17. Article 13(2) appears to contradict paragraph 1 of the same Article in relation to a visa requirement. We would suggest redrafting to read, "Where the host State is entitled to require family members ….."

Article 14

Lifelong right of return

18. Article 14(4) incorporates the provision of the Joint Report that the right of permanent residence should be lost after an absence of 5 years. We strongly oppose a limited period, as **British in Europe** and **the3million** have consistently argued that the right of return should be lifelong for the following reasons:

    a. Brexit completely upsets the interrelated rights of residence under which we all moved to another Member State.
    b. Under the present system of free movement, a person whose absence causes a loss of permanent residence has an absolute right to return to that State and to rebuild a right of permanent residence.
    c. Under the WA, by contrast, a person who loses a right of permanent residence loses all right to reside in that State, regardless of whether they have a house there or family whose relationship to them does not entitle them to residence (eg non-dependent children).
    d. There are myriad reasons why a person might be absent from the State where they have established a permanent residence, and any time limit placed on periods of absence will cause hardship to someone.
    e. Allowing a life-long right of return cannot cause an influx of new migrants: the people in question all had the right to reside at one point, and the only question is whether they should lose it. In any event we are a finite number of mortal individuals.

Article 16

Family members ceasing to be dependent

19. Paragraph 1 of Article 16 provides welcome clarification but paragraph 2 potentially limits this. We propose that the words "as a result of taking up employment or self-employment in the host State" be deleted for the reasons which follow.

20. A family member covered by WA Article 9(1)(e)(ii) or (iii) is, by definition, a person who was not resident in the relevant State at Brexit. They can therefore never attain the status of a Union citizen or UK national within WA Art. 9(1)(a) or (b), because they had not "exercised their right to reside … in accordance with Union law before the end of the transition period". Their coverage by the WA will therefore always be as "family member", even when they cease to have the necessary relationship of dependency: this will be as true when they are 80 as it may be when they get a job at 21. By providing only for those who are independent through work, Article 16(2) fails to cater for those who are self-sufficient. To remove this lacuna it is necessary to delete the words suggested above.

Article 17

Overall presentation

21. This draft is supposed to implement the JR agreed last December, but you would not know this from reading Article 17. Paragraph 16 of the JR provided States with two options for registering residence rights: applying the existing system under Directive 2004/38 ("declaratory option") or requiring people to apply for a "status conferring … rights of residence.." ("constitutive option"). Article 17 of the draft WA is heavily biased towards the constitutive option, to the point that the declaratory option gets only a passing mention at para. 4. The draft provides over 3 pages of detailed explanation of the constitutive option, followed by a single paragraph merely acknowledging the existence of the declaratory option. The risk is that anyone reading the WA will see the constitutive option as the preferred, approved or only way of validating residence rights after the transition period. Indeed discussions we have had within Europe since the publication of the draft confirm that view.

22. In order to avoid this risk, the Article should start with a clear statement that there are two options and that States have a choice between them, followed by such detail of each as is necessary. The declaratory system should be presented first as it ought to be the default option in the EU27. It was the *only* option that the EU wanted at the outset of the negotiations, and it has the great advantage of having stood the test of time and legal consideration.

23. The explanation of the declaratory option should expressly refer to the procedures in Directive 2004/38, thereby simplifying the drafting in the WA. Among other things it should expressly confirm the continuing validity of registration certificates, residence cards (both permanent and otherwise) and documents certifying permanent residence issued under that Directive and state that any applications and renewals be dealt with in accordance with the Directive.

Article 17(1) "as a condition for the enjoyment of the rights"

24. The rights granted to an individual under an international treaty, such as this Withdrawal Agreement, should not be conditional on the issue of "new residence document" confirming the right granted. Indeed, this provision is

inconsistent with Article 25 of Directive 2004/38, which provides that the possession of such a document "may under no circumstances be made a precondition for the exercise of a right." The document should be evidence and confirmation of a status that exists by itself. Accordingly, the paragraph should begin, "The host State may require …. to apply for a new residence document as ~~as a condition for the enjoyment~~ *evidence* of the rights under this Title…"

Technical problems

25. Article 17(1)(c) extends the time for submitting applications under the constitutive option where technical problems prevent the host State from registering the application or issuing the certificate in question. The mechanism is that time is extended when the Union or the UK, as the case may be, notifies the other of the problem. Time is not extended in the absence of such notification.

26. There are two problems with this.

    a. The paragraph contemplates technical problems on a sufficiently wide scale to require inter-state notification. An individual applicant will only be concerned with the fate of his/her own application, regardless of how widespread the problem is. Indeed, the problem may be systems failure in a single office, when the rest of the State's systems are working perfectly. Accordingly, rather than requiring the existence of widespread technical problems, the vice which this paragraph aims at would be far better dealt with by a simple automatic extension of time in all cases where the State in question fails to issue a certificate within 7 days of the application being made.
    b. Moreover, the temptation not to extend time by not making the notification, even when technical problems exist, is going to be massive, particularly in countries where immigration is a big political issue. There will therefore be great pressure on ministers and civil servants to avoid notification if they possibly can. In order to avoid this, the extension of time should be automatic, as suggested above, and not dependent on notification.

Article 17(1)(h)

27. This paragraph covers the position of people who already have a valid permanent residence document or indefinite leave to remain. There is no good reason to submit any of these people to further tests, and we support the amendments suggested by Professor Peers, the two sets of square brackets being alternatives:

> *(h) persons who, before the end of the transition period, are holders of a valid permanent residence document issued under Article 19 or 20 of Directive 2004/38/EC or a valid domestic immigration document conferring a permanent right to reside in the host State, shall [be exempt from the*

provisions of this Article] [shall automatically be issued with a new residence document, upon application, free of charge]

Proof of entitlement

28. Article 17(1)(k) sets out a requirement for the production of supporting documents as referred to in Article 8(3) of Directive 2004/38 – proof of current employment, resources etc. However, this requirement proceeds on a misunderstanding of rights under the Directive.

29. The matters required to be proved by the documents referred to in Directive Article 8(3) are all matters which have to be established to give a person a right to reside in a State for a period between 3 months and 5 years. Once they have been resident for 5 years, they achieve a right under Directive Article 16 to unconditional permanent residence, whether or not they get a certificate to that effect. A considerable proportion of the people covered by the WA have lived in the State in question for well over 5 years and, as such, have a right of permanent residence which is *not* conditional on, for example, having sickness insurance. It is absolutely wrong in principle to require them to prove now circumstances which were only relevant to their position possibly decades ago.

30. The situation of people who happen to have a certificate of permanent residence is covered by WA Article 17(1)(h). Given that this was optional in the past, this should be extended to all those entitled to permanent residence, whether or not they have a certificate, in particular, so as not to discriminate between the two groups. Accordingly, anyone who has been resident in the State in question for 5 or more years at the end of the transition period should be covered by that provision and should not have to produce the evidence referred to in sub-paragraph (k).

31. This is especially as the drafting seems to assume a system (like the UK) where to date citizens have not been registered whereas in many EU countries citizens will have been registered, but have not formally been required to have permanent residence cards.

Practical assistance

32. Article 17(1)(o) obliges States to assist applicants, but no detail of how this is to be achieved is provided. If left in such general terms, it risks becoming no more than wishful thinking. Given the number of citizens potentially involved this substantial task requiring a major investment, but if that is to happen the obligations falling on the States need to be spelled out much more clearly.

Criminality and security checks

33. Article 17(1)(p) concerns the making of "criminality and security" checks. It provides that applicants may be required to declare past criminal convictions. We oppose this not because we wish to assist criminals but because auto-declarations are likely to become a trap for the unwary. Given that States maintain criminal records they will not need an auto-declaration to find out if an applicant has a serious criminal record. The effect of an auto-declaration

which fails to disclose a minor criminal offence (either because it had been forgotten or in the mistaken belief that it was 'spent' or even that to declare it would prejudice the application) will be to elevate a past minor criminal offence into a new failure to declare which will itself be grounds for deportation under WA Article 18(4).

34. The paragraph also refers to "the procedure set out in Article 27(3) of Directive 2004/38", a procedure for one State to make criminal records inquiry of another. The Directive makes it clear that this is only to find out whether "the person concerned represents a danger for public policy or public security", the high threshold for which is set out in paragraphs (1) and (2) of that Article. The WA should make clear that the procedure set out in Art. 27(3) of the Directive can only be used for the purposes set out in that Article.

Judicial redress

35. Article 17(3) provides for the preservation of an applicant's rights pending judgment in the case of judicial redress against any rejection of such application. In the UK (and possibly in some EU27 countries) there is a distinction between challenging the rejection of an application on the ground that it was defective (and thus not an 'application' at all) and the dismissal of an application on its merits. The wording should be revised to make it clear beyond doubt that both types of challenge are included. Whilst the wording of Article 17(1)(r) which provides for redress "against any decision refusing to grant the residence document" is less ambiguous, it would be wise for the avoidance of doubt to make it clear that judicial redress is available against the rejection of an application on the ground that it is invalid and thus not an application at all.

Article 17(4)

36. We set out at the beginning of our commentary on this Article the steps that need to be taken to preserve clearly the procedure under Directive 2004/38. To the extent that this paragraph survives that process the words "as a condition for" should be replaced by "as evidence of" for the reasons given earlier.

Article 18
Restrictions of the right of residence

37. Some redrafting of Articles 18 and 19 is required because at present they are unclear and, to an extent, self-contradictory. Article 19 says that the safeguards of Chapter VI of Directive 2004/38 apply in respect of any decision that restricts the residence rights of a person covered by the WA. Article 18(1) WA confirms that Chapter VI applies to conduct before the end of the transition period. Article 18(2), however, makes different provision for post-transition period conduct with the clear implication that the safeguards of Chapter VI do *not* apply: here the situation will be governed by "national legislation".

38. At the very least, the WA needs to make clear how much of the Chapter VI safeguards apply in the case of post-transition period conduct.

39. That, however, would not be enough. The rights we are considering here are the rights of people who arrived in their host State with the full protection of EU law, including the proportionality requirements of Articles 27.2 and 28 of Directive 2004/38 (both included within Chapter VI). Whatever provision "national legislation" makes now, it is entirely possible that it will be changed in future by a government with an anti-migration agenda (and this point is not confined to the UK). As a guard against deportation for very minor offences it is essential that the proportionality requirements of Articles 27.2 and 28 of the Directive should continue to apply and should be incapable of being overridden by national legislation. In this way the WA would ensure that people could only be deported for serious offences, and where the seriousness of the offence justified the interference with their right of residence and that of their family.

Article 22
Rights of Workers

Policy issues

1. Article 22(1)(a) sets out core primary Treaty rights to be enjoyed by workers and frontiers workers under the WA, while Article 22(1)(b) summarises key provisions of the secondary legislation on free movement of workers, Regulation 492/2011.

2. We would propose that 22(1)(b) be clarified. Currently it seems to be a non-exhaustive summary of the rights set out in Regulation 492/2011 and it is not entirely clear whether all of the rights and provisions relating to those rights set out in Chap I of the Regulation, as well as relevant recitals of the Regulation, would apply, given the use of the word "including" in the overarching clause of the Article. We suggest that this be clarified – and if all the rights and provisions are to apply, this should be spelt out, preferably by incorporating the whole Regulation, while removing the word including and the summary in the sub-paragraphs.

3. We have made a number of comments about the position of frontier workers above in relation to the definition section. We also note that, given Article 24, frontier workers must in practice apply for two documents: a residence document under Article 17 and the document provided for under Article 24. It would be preferable to streamline this system and provide for one set of documentation which confirms the rights of the relevant individual to reside in the host country and to work as a frontier worker in the State of work, although we recognise that this would require cooperation between the two states.

Drafting issues

4. We also have some specific comments in relation to the drafting of Article 22(1)(b).

5. In particular, while there is specific reference to Article 45(2) TFEU (no discrimination on the grounds of nationality) it would be preferable to preface the rights referred to in Article 22(1)(b) with the following drafting:

   22(1)(b) "the rights, *without discrimination on the grounds of nationality*, set out in Regulation…." This is because the list does not specifically refer to the principle of non-discrimination on the grounds of nationality.

6. Further, we would suggest that, in relation to each right listed, the relevant provisions of Regulation 492/2011 should be referred to, in order to leave no room for doubt as to whether all the provisions of the Regulation as regards a specific point apply or not:

   For example, Article 22(1)(b)(ii) "the right to assistance provided by the employment offices….as provided for in Article 5 of Regulation 492/2011."

7. Article 22(3) –The reference in this Article is back to Article 13 which can enable a visa to be required. As a visa system might be a way of discriminating against those covered by the WA, we propose that the drafting in both this article and Article 13 be made clearer by adding the following wording to each:

   Article 22(3) "and exit that State *without requirement of a visa* in accordance with Article 13(1)."

   Article 13(1), final sentence, should be amended to read "…a valid residence document issued in accordance with Article 17 or *a document identifying frontier workers' rights in accordance with Article* 24 of this Agreement."

8. This ties in with the document they may obtain under Article 24 but means that frontier workers must in practice apply for two documents: a residence document under Article 17 and the document under Article 24 (see our comments above on this).

9. Finally, it is not clear from the drafting of Article 22 whether a frontier worker who ceases their economic activity in the State of work would continue to have the right to work in the host State or state of residence. We presume that Article 16 on equal treatment would guarantee this but would welcome clarification of this point.

Article 23
Rights of self-employed persons

Policy issues

10. Article 23(1)(a) sets out core primary Treaty rights to be enjoyed by self-employed workers and self-employed frontier workers under the WA, while Article 23(1)(b) refers back to Article 22(1)(b), which summarises key rights of workers set out in the secondary legislation on free movement of workers, Regulation 492/2011.

11. As regards Article 23(1)(b), we reiterate the comments that we made above as regards Article 22(1)(b) and the need for clarification as to how the provisions of Regulation 492/2011 apply, with appropriate adjustments.

12. As regards Article 23(2), self-employed frontier workers are stated to have the same rights as employed frontier workers. We refer to our comments on the rights of frontier workers set out in relation to Article 22(3) above.

13. The primary rights covered are only those to take up and pursue activities as self-employed, as well as the right to set up and manage undertakings. However, the TFEU Article 49 right to set up agencies, branches, or subsidiaries in another Member State is not included. This leads to two concerns.

14. First, since this right is not expressly provided for in the WA, what is the position of EUinUK who have set up an undertaking in the UK? Does this mean that they are unable to set up agencies, branches and subsidiaries of that undertaking in another Member State, or indeed in their state of origin, which appears to be in direct contradiction with the right that such EU citizens will continue to enjoy under the TFEU? In addition, what would be the position of an EU citizen who already manages such an undertaking and has set up a branch or agency elsewhere? Would he/she be able to continue to do so?

15. Second, currently the EU position is not to grant free movement or freedom of establishment to UKinEU across the EU but only in the host state. Were this position to change (see our arguments on this below), Article 23(1)(a) would need to be amended to reflect this. In addition, in the event that this position does not change, what would be the position of a British person who has set up an undertaking or practice in their home state as well as agencies/subsidiaries elsewhere in the EU: would he or she be able to continue to run those those agencies or subsidiaries? In both cases, as regards UKinEU and EUinUK already running such businesses, property rights are also relevant.

16. This becomes all the more complicated in relation to a self-employed frontier worker. Would this mean that the self-employed frontier worker who has established an undertaking in the State of work would not be able to set up a branch or agency in the host state? And what are the rights of that self-employed frontier worker in the host state (or residence) if he/she ceases to be a frontier worker?

17. The scope of the rights of self-employed frontier workers is, just as we noted as regards frontier workers above, unclear, should the self-employed frontier worker cease working as self-employed in the State of work. It is not clear whether this self-employed worker would then have the right to work as self-employed in the host state or state of residence. However, as we suggested in relation to frontier workers above, we presume that Article 16 on equal treatment might cover this and would welcome clarification on that.

18. Further, the scope of the rights is subject to Article 32 currently. Since Article 32 is unclear, its impact on the scope of the rights of self-employed frontier workers is also unclear. A number of questions arise. Does the self-employed frontier worker only have rights of establishment and to manage undertakings in the State of work, or can he/she also do so in the host state? Linked to that,

would he or she be able to provide services on the territory of the host State or to persons in the host State? We presume the answer would be yes.

19. These are all points that require clarification and until they are, it would be difficult to make many drafting suggestions on this Article.

Drafting points

20. We also have some specific comments in relation to the drafting of Article 23(1)(b).

21. Just as we suggested in relation to Article 22(1)(b), it would be preferable to preface the rights referred to in Article 23(1)(b) with the following drafting:

    23(1)(b) "the rights, *without discrimination on the grounds of nationality*, set out in Regulation…"

Article 24
Issuance of document identifying frontier workers' rights

22. Frontier workers will have the right to have a document issued certifying their rights. There is however no detail here as to how they would go about showing that they are frontier workers (employed or self-employed). We have made a number of points above about this under the definitions section.

23. There is also no detail on the administrative procedures that would apply. This could be remedied by adding the following wording at the end of the article:

    "and for the purposes of this Article, sub-paragraphs 1(a)-(g), (i)-(j), (k)(i), (o) and (r) and paragraphs 2 and 3 of Article 17 shall apply with appropriate modifications."

24. It is also not entirely clear from the drafting that self-employed frontier workers are covered. While it initially may seem that they would be covered in accordance with Article 8 (definitions), the position is confused by use of the term self-employed frontier workers in this Chapter 2. The drafting should thus be tightened up to say "who have rights as *employed or self-employed* frontier workers….". This comment should be noted as regards any reference to frontier workers in the WA in order to ensure consistency and clarity throughout.

Article 25 – Recognised professional qualifications

Territorial scope of qualifications

25. As we have noted previously, recognition of qualifications is limited to the 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. If a German citizen returns to Germany post end of transition period with only a UK qualification and this qualification has not been previously recognised in Germany, (s)he will not have the right to work and practise her/his profession in Germany. In fact, (s)he would not be able to work and practise her/his profession anywhere else in the EU either.

26. Further, a German citizen who returns pre-end of transition would also face the same issue as a citizen returning post-end of transition. Even if that German citizen had a recognition decision of her/his UK qualification dating from pre-end transition, it would not maintain its effects in accordance with Article 25(1) because the German citizen would not fall within the personal scope of the WA as a German in Germany with a recognition from his/her state of origin not from his host state or State of work. Likewise, there would be no possibility of recognition anywhere else in the EU pursuant to the EU mutual recognition legislation.

27. A similar problem would arise for dual citizen British/Germans if the drafting of the WA were not amended in order to ensure that dual citizens may benefit from the protection of the WA, rather than being treated solely as citizens of their host state. And again, there would be no recognition of the qualification anywhere else in the EU.

28. This may raise an issue as to whether the persons in question have an an acquired right to continue to work on the basis of their qualification where they have already done so in the past in the relevant country. The answer to this question may differ from country to country but there is currently no clarity on it. And in each case, EU citizens will be deprived of the right to have their qualifications recognised and to pursue their profession.

29. This is in addition to the linked issue: that UKinEU will only have continued recognition of their qualifications (**if** those qualifications are actually covered by the WA, which not all are) and the right to pursue their profession in their host state or State of work, and not across the EU as they currently do.

Material scope of qualifications

30. We have already raised the rights of lawyers to establishment under their home title in the host state under Article 2 of Directive 5/98. 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.

31. However, we note that there is clarification needed to confirm whether there may be a further restriction on the recognition of the qualifications of lawyers, which also does not appear to be justifiable, given the general principle that the recognitions of qualifications should maintain their effects in the host State or the State of work post end of transition. This stems from the fact that only those practising under Articles 10(1) and 10(3) of the Lawyers Establishment Directive 5/98 are expressly referred to as covered by the WA. Article 10(2) of Directive 5/98, where a lawyer may apply to have her/his diploma recognised under Title III of Directive 36/2005 is not covered. It may be that the drafters considered that a reference to Title III of Directive 36/2005 was sufficient, as any recognition based on Article 10(2) would be under Articles 13 and 14 of that Title. If that is the case, this should be made clear - as otherwise a lawyer who has obtained a recognition decision may find this becomes worthless post

end transition. This would apply to both UK lawyers in the EU and EU 27 lawyers in the UK. And again, a question of acquired rights may arise if this right is not confirmed through the drafting in the WA.

32. We note that a series of different Directives and Regulations relating to EU-wide licenses are still not covered in this recognition of professional qualifications part of the draft. These cover the following: drivers of certain road vehicles for the carriage of goods or passengers; road transport operators, commercial pilots and air traffic controllers, maintenance engineers, aviation, train drivers, seafarers, slaughtermen, those transporting animals and those handling fluorinated gases. They relate mostly to EU-wide licenses and certificates, usually based on minimum requirements set at EU-level.

Drafting issues

33. We would suggest that it should be considered whether a reference to Titles IV and V of Directive 36/2005, especially Title IV in relation to detailed rules for pursuing the profession, should be added to Article 25.

34. Further, as we noted above, two issues must be addressed as regards the personal scope of professional qualifications: the position of those who have worked or studied in the UK but return to their state of origin or another EU Member State; and the position of dual citizens. We have already made general proposals concerning the coverage of the rights of dual citizens under the WA above.

35. As regards drafting on EU citizens who have worked or studied in the UK and thus have UK qualifications but do not fall within the personal scope, one approach to dealing with the situations raised above on territorial scope would be to widen the personal scope in relation to professional qualifications in the same way as has been done for social security. This would mean adding some additional wording to Article 26 and providing for the further case of procedures that will be decided in accordance with the relevant provisions listed in Article 26 post end of transition where EU citizens or UK citizens have studied, obtained qualifications and practised their profession in a country other than that of their state of origin. In other words, these cases would relate to

"….Union citizens or United Kingdom nationals who have studied and practised their profession in the United Kingdom or one or more Member States and who return to or live in their (or one of their) home countries.."

Article 28
Social security – persons covered

40. There is a doubt about the situation of someone who falls clearly within the scope of this Title at Brexit as, say, a UK citizen living in France but who then moves to another EU country, either because our claim for freedom of movement is recognised or because they secure admission to that country by some other lawful means. Our reading is that all the provisions of Title III

would continue to apply to them because, in the example, they fall within Article 28(1)(b) and because it is not stated that the Member State whose legislation they are or have been subject to is the State where they are living. However, for the avoidance of doubt it would be better if the WA made it clear that Title III applies even if a person's host State has changed since the end of the transition period.

41. We gratefully adopt Professor Peers' suggested amendment to this Article to make it clear that it captures those within the scope of Article 2(2) of Regulation 883/2004: survivors of non-EU citizens, where the survivors are EU citizens or refugees or stateless persons. His suggestion is the addition of a new Article 28(1)(fa) as follows: "*the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or the United Kingdom or stateless persons or refugees residing in one of the Member States or the United Kingdom*."

Article 29
Social Security coordination

Generally

42. There is an issue about the scope of para. 1. The general words appear to apply the whole Social Security acquis and are then followed by *"including in respect of.. a, b and c*", which specifically incorporate Arts. 4-10 and Titles II and V of Reg. 883/2004. Titles III and IV are not specifically included which raises a doubt as to their applicability. The same is true of Reg. 987/2009 which is not particularised at all.

43. The device of incorporating a Regulation in general terms and then adding "including" is a recipe for uncertainty. The word "including" leaves a doubt about all those aspects of the Regulation which do not follow the word "including": they are not clearly included, but equally they are not clearly excluded. Unless the drafting is changed we see a string of challenges going to the CJEU, which is the precise opposite of what needs to be achieved here.

44. The importance of this point cannot be overstated. Title III, which is not specifically included in the present draft, is the Title which sets out one by one the various types of benefit and healthcare cover included in the scheme. In a scheme which is designed to govern the future security, pension and healthcare benefits of some 5 million people, it is simply unacceptable that there should be any doubt as to coverage.

45. Paragraph 28 of the JR provided, to the considerable relief of hundreds of thousands of people, that "Social security coordination rules set out in Regulations (EC) No. 883/2004 and (EC) No. 987/2009 will apply." Given that "social security coordination" is a fair shorthand for what the Regulations in their entirety do, it was generally thought that the negotiators had agreed that the whole of the social security acquis, in so far as it touched those within personal scope, applied. In order to honour the December agreement, then,

and to overcome the loose drafting referred to above, Article 29(1) should apply the whole of the acquis, including the TFEU Articles referred to and the Decisions and Recommendations of the Administrative Commission referred to in the draft WA. The words after "shall apply" should be deleted.

46. If, for reasons which we cannot at present foretell, the negotiators refuse to incorporate the whole acquis as we suggest, then there is no alternative but to go through each and every head of Title III and make specific provision either including or excluding it.

Pensions uprating

47. Professor Peers makes a highly technical point, namely that Reg. 883/2004 draws a distinction between "pensions" in Article 1(w) which are uprated and "old-age benefits" in Art. 3(1)(d). If the existing wording of the draft is kept, in order that the WA should continue to apply to uprating of pensions, we would support Peers' suggested amendment, to add the words "and pensions as defined in Article 1(w) of that Regulation" after the words "referred to therein".

48. The next two drafting suggestions we make only apply if our suggestion of a comprehensive incorporation of the acquis is rejected. They do not solve the problem of loose drafting but simply pick up a couple of concerns that we have on the existing words.

"Social and medical assistance"

49. Overall the coverage of Art. 29 is for those "matters covered by those Regulations as set out in Art 3 of Reg. 883/2004". However, Art 3(4) excludes "social and medical assistance". Whilst we can understand that social assistance, in the form of support from what in the UK is known as "social services", is not included, we are not clear what provision is excluded by "medical assistance". There may well be good reason for the exclusion, but at this stage we simply flag it up for specialist consideration. The 5 million affected citizens will want to be reassured that they are as fully covered as possible.

"Export of benefits"

50. In para. 1(a) of Art. 29 we would prefer "waiving of residence rules" (the language of the Regulation) to "export of benefits" (the language of the draft). This is the vital provision of Art. 7 of the Regulation, which is the provision preventing the UK from refusing to pay pension increases to non-residents. "Export of benefits" is generally seen as, say, an EU worker resident in the UK sending child benefit back to his/her home State, rather than a UK pensioner (who may be British or EU 27 born) in the EU receiving a benefit for which s/he paid by working in the UK. Using the wording of the Regulation removes any possible doubt about meaning.

Directive 2011/24(EU)

51. No mention is made in the WA of the continued provision of cross-border medical care under Directive 2011/24 (EU), the Cross-border Healthcare

Directive. It is not clear whether the negotiators have considered this Directive generally or what is to happen to people who have started but, at the end of the transition period, not yet completed a course of treatment covered by it.

Article 29(3)

52. Article 29(3) provides for the completion of a course of planned health care treatment in a State other than the competent State. This suggests by implication that once that course has been completed the person in question has no right to further treatment. We do not understand that to be the intention where the course of treatment is being provided in the host State of the person in question – eg a UK pensioner living in Italy and being treated in Italy. If that is wrong, then the first and second paragraphs of box 47 of the Joint Technical Note of December 8th 2017 ("JTN") have not been respected. If if we are correct, then the draft needs to be amended to make this clear.

Article 29(4)

53. We understand that the reason for Article 29(4) is to meet a concern about the health care rights of eg a UK citizen not yet of pension age, living in France, whose taxes and contributions paid while working made the UK their competent state. The concern the paragraph was designed to meet was that when they retired they might not be entitled to health care in France paid for by the UK.

54. However, Professor Tamara Hervey, in an online article dated 3rd March, has argued that the use of the words "becomes competent" might suggest that those who have worked all their life in the UK and then retired to France might not be protected, because the UK would not then "become competent", having already been so. For the avoidance of such doubt we support her suggested amendment:

> "If, following the grant of a benefit based on the periods of insurance, employment, self-employment or residence in accordance with Article 28(3) of this Agreement, the United Kingdom or a Union Member State is competent for the healthcare cover of a Union citizen or a United Kingdom national, that Union citizen or United Kingdom national shall be entitled to healthcare cover as set out in Articles 24 to 30 of Regulation (EC) No 883/2004 and the corresponding reimbursement procedures shall apply between the United Kingdom and the Member State."

55. Professor Hervey also argues that whilst paragraph 1 of Article 29 probably intends to continue the EHIC scheme for those falling within the scope of Article 28, the draft WA does not do so clearly. Again for the avoidance of doubt we would adopt her suggested new paragraph 5:

> "A person referred to in Article 28 of this Agreement, and the members of his/her family staying in a Union Member State or the United Kingdom shall be entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and

the expected length of the stay. These benefits shall be provided on behalf of the competent institution by the institution of the place of stay, in accordance with the legislation it applies, as though the persons concerned were insured under the said legislation."

Article 31
Development of law and adaptations of Union acts

56. We can do no better than quote Professor Peers. "The obligation for the Joint Committee to match amendments to EU law does not correspond to the wording of the joint report, which refers to deciding jointly on this issue. Nor does it give the UK consultation rights when the proposal is being discussed. I suggest therefore an amendment, which would read:

> "The Joint Committee shall endeavour to revise [Part II of the Annex] to this Agreement and align it to any act amending or replacing Regulations (EC) No 883/2004 and (EC) No 987/2009 as soon as such an act is adopted by the Union. To that end, the Union shall, as soon as possible after adoption, inform the United Kingdom within the Joint Committee of any proposed or adopted act amending or replacing those Regulations. The United Kingdom may request consultations on a proposed act within the Joint Committee."

Article 32
Freedom of movement

57. We strongly disagree with the proposed termination of our existing EU right of free movement, together with the associated economic rights to work, run a business and provide services, and the associated territorial scope of rights to recognition of qualifications.

58. We maintain the view, shared by the European Parliament, that UKinEU should continue to enjoy their existing, established rights of free movement throughout the EU27.

59. We therefore urge the EU to reconsider its opposition to our continuing to have freedom of movement. In view of the vital importance of this issue to so many of us, we recap very briefly the arguments in favour of continued freedom of movement and answer the arguments which have been put up against it.

60. *Single indivisible right:* Article 21 TFEU confers a fundamental right to move and reside freely within the territory of the Member States. This is a single right, not two, and it covers the entire territory of the Union, not the territories of each State. Having exercised that right, we are entitled to maintain it – see the authorities cited in *Surinder Singh* and *Lounes* above, on the distinct position of those who have exercised free movement rights.

61. *Vital importance:* when we moved within the EU we moved within a single territory, not to a single State with borders. 79% of UK citizens in the EU27 are of working age or younger. Many of them have moved freely from one state to

another, and many of them moved precisely because by doing so they would be able to take full advantage of, and contribute to, the Single Market. We have produced case study after case study to demonstrate the practical importance to so many of us of being able to move and work cross-border and provide cross-border services.

62. *Not in accordance with EU law:* It is a general principle of EU law that a measure should be proportionate to its aim. We have not been told what is the purpose of this restriction of our right of free movement, nor how this blanket restriction is proportionate to that purpose, nor what other measures have been considered to achieve the same purpose in a less disproportionate manner. It seems instead that this is simply a blanket ban imposed for no apparent reason to the great harm of many of those covered by the WA, and, since we are integrated members of our host countries, contributing to their economies and tax systems, ultimately also to their detriment.

63. *Not reciprocal:* we have heard it argued that free movement for UK citizens in the EU would not meet the test of reciprocity. Reciprocity here is with the affected EU citizens in the UK. They will retain free movement throughout the EU27 as they will not be losing their EU citizenship. UK citizens will, of course, have the right as citizens to return to the UK and we have always advocated, as we do under Article 14 above, that EU citizens should have a life-long right of return to the UK, thus guaranteeing them freedom of movement throughout the EU 28. An offer to this effect was made by the UK during the negotiations but has not been picked up by the EU.

64. *Not a future life choice:* the EU argues that it should only be protecting our past life choices, and that a decision to move to another State would be a future life choice. Paradoxically, it is prepared to fight to the bitter end for the right of a child covered by the WA to bring to his/her host State a spouse or partner he might meet many years hence. This, apparently, is not ruled out as a future life choice. We have no problem with supporting that right, as we have commented above. What we cannot accept is that the right of a UK child in Germany to bring back his/her spouse in 50 years' time is a past life choice whilst the ability of his/her parents to move within the EU now to continue to support that child is a future life choice.

65. In any event, as we have argued, life choices are founded on rights not the other way round.

66. In order to preserve our rights we adopt Professor Peers' suggested amendment to Article 32 which is to replace it with the following:

"United Kingdom nationals and their family members covered by this Part shall retain their rights to free movement to the territory of another Member State, including the right of establishment in the territory of another Member State, and the right to provide services on the territory of another Member State or to persons established in other Member States. The European Union shall adopt

legislation to set out the modalities of exercising this right by the end of the transition period."

"and continue to reside there thereafter"

67. As Professor Steve Peers has pointed out, these words in Article 8(c) and (d) and Article 9(1) are inconsistent with freedom of movement. Accordingly, if we are accorded that right then appropriate amendments will have to be made to these Articles.

"…. or to persons established in other Member States."

68. The EU draft includes a wholly new provision to the effect that our rights under the WA shall not include a right to provide services to persons established in other Member States. We sought clarification of this provision and the Commission responded that it was not intended to preclude the provision of a service to a person from another Member State whilst that person is physically present in our host State/State of work, but would preclude the provision of a service in any other way – eg remotely by telephone or internet. As we pointed out in our brief Analysis of Draft Withdrawal Agreement dated March 6, this restriction wholly fails to recognise the ways in which services are provided in the twenty first century, is unfair to both service-provider and service-seeker and will create massive problems of enforcement. A UK citizen providing translations by e-mail in, say, Holland will not get equal treatment with a Dutch translator because the clients from whom the former can accept work are drastically limited compared with the latter.

69. If this provision does survive the current round of drafting, then it needs to be redrafted to make clear the point on which we had to seek clarification from the Commission.

70. Moreover, does it preclude a self-employed frontier worker established in another Member State from providing services to persons established in his/her own home State? It would be ludicrous if that were the case.

".. shall not include further free movement to the territory of another Member State."

71. In our Response to the December Joint Report we made clear that the concept of "third country national" is far from a simple or uniform concept in EU law. Different rights are given to different people in different contexts, and any assumption that once we are no longer EU citizens we fall back on a single set of consistent rights is simply mistaken. If, contrary to our strong contentions and contrary to the political promises made by both sides, we are deprived of our existing free movement and related rights, a great deal more thought will have to be given by the drafters of the WA to how the numerous EU statutes dealing with third country nationals will apply to us. At present they have not even begun to consider this.

Caveat

72. We end with a caveat. The draft agreement is designed to continue, amend or replace rights which we have hitherto enjoyed as EU citizens which are set out in an enormous volume of EU legislation, some of it extremely complex. With the best will in the world we do not have the specialist resources to ensure complete coverage of all these areas: we hope to have given some pointers above, but there is still a great deal of detailed checking to be done.

British in Europe

14 March 2018