

BREXIT – WHY THE UK SHOULD SUPPORT RING-FENCING CITIZENS’ RIGHTS IF THERE IS NO DEAL

EXECUTIVE SUMMARY

The problem

- If there is No Deal, unless something is done in the *next five months*:
 - 1.2m UK citizens in EU27 States will become illegal immigrants with no rights on 30 March 2019.
 - There would be nothing to stop a new UK administration from removing the rights of the 3.5m EU citizens living here at any time.
- Citizens’ Rights are different to all other issues being negotiated because:
 - They concern the lives of nearly 5 million human beings who exercised their EU right of free movement with the legitimate expectation that it was safe to do so;
 - Both sides have accepted this by making citizens’ rights the first priority in the negotiations.

The solution

- Different solutions have been put forward including unilateral action by the UK and individual Member States; coordinated action across the EU27; 27 bilateral agreements with the UK; and an EU-UK agreement to safeguard citizens’ rights either under Art. 50 (ring-fencing) or not.
- There is no doubt that **ring-fencing the Citizens Rights parts of the draft Withdrawal Agreement** is superior to all other solutions in that it is the only one which:
 - ✓ Guarantees that Citizens’ Rights will be enforceable;
 - ✓ Enables the continuation of interlocking mechanisms essential for such matters as aggregation of pension contributions and the provision of health care;
 - ✓ Avoids the need for further complex negotiations, for which there is simply no time;
 - ✓ By being made under Art. 50 TEU avoids the need for ratification by each and every Member State;
 - ✓ Goes at least some way to honouring both sides’ promises to treat those who had exercised their EU rights of free movement as their first priority;
 - ✓ Would finally, after over two years in limbo, enable those people to sleep at night.

What happens if there is no overall agreement under Art. 50?

If there is No Deal, then in the absence of legislative intervention, on March 30th 2019 the British in Europe will be illegal immigrants with no rights at all. Europeans in the UK will have rights under the European Union (Withdrawal) Act 2018, unless and until the UK decides to repeal all or some of these rights. In the absence of an international treaty it can do so at any time from March 30th.

The British in Europe

The British in Europe would not, as is frequently asserted, default to some EU law status of “Third Country National” (“TCN”). This is partly because there is no such thing as a defined status of TCN, merely a series of statutes¹ in which some TCNs get some rights, but the TCNs who get those rights and the rights which they get vary from one statute to another; not a single one of these statutes will apply to all UK citizens in the EU.

¹ For example, the long term residence directive, the family reunification directive, the single permit directive and the blue card directive - all of which only confer any rights upon application.

Significantly, the sole consistent feature of this TCN legislation is that it applies only to TCNs who are “legally resident” in their host state. Since the residence rights of the British in Europe are entirely dependent on the EU Citizenship Directive, those rights fall away on March 30th when UK citizens cease to be EU citizens. Their residence cards become worthless.

Thousands of people will lose not only their right of residence, but also their right to work, to provide services, to family reunification, to have their social security contributions in their host state aggregated with those made in other EU countries, to healthcare, to social security etc.² At a stroke, and as a result of a referendum in which most of them had no right to vote, they lose all the rights considered essential in a civilised society.

Waiting to see whether a Deal is done and passes the Westminster and European Parliaments is not an option. This is because legislation needs to be in place and effective on March 30th and the drafting and approval of such legislation takes time; secondly, the continued uncertainty is causing serious, and in many cases pathological, anxiety among the British in Europe; thirdly, if the solution to these problems involves agreement or discussion between the UK and the EU and/or the Member States, then time is very short indeed.

The EU27 nationals in the UK

Although the 2018 Act preserves most of the EU rights of EU27 nationals in the UK, this is a chimera because almost the only constitutional rule in the UK is that Parliament is sovereign: it is possible for Parliament to overturn any previous Act of Parliament. This is not to dispute the good faith of the present administration, but rather to state a constitutional reality and to acknowledge, as any sane follower of the UK scene must do, that nothing is predictable at the moment. So if there is No Deal this, or a future, Parliament could repeal, without difficulty, all or some of the citizens rights EU citizens hold thanks to the 2018 Act. Moreover, the 2018 Act gives sweeping powers to the Government, so EU citizens’ rights can quickly be undermined by government without intervention by the Parliament. The only safeguard against that is an international treaty, given that the UK customarily abides by those.

Moreover, a number of their rights, such as aggregation of pension contributions, mutual recognition of qualifications, health care and social security benefits, depend on interlocking EU-wide mechanisms. Unilateral UK legislation is incapable of continuing these, and without EU agreement fine words become devoid of any content³.

What are the possible solutions?

Ring-fencing the Citizens’ Rights part of the Withdrawal Agreement

The obvious solution is to ring-fence the Citizens’ Rights part of the Withdrawal Agreement (“WA”). In other words for the negotiators to agree, now, that even if they can agree nothing else, the agreement already made in draft on Citizens’ Rights will stand as the only agreement under Article 50.

² For example with aggregation of contributions: Italian law requires someone to have contributed for 20 years in Italy to be entitled to any pension. Without the aggregation system, a UK citizen who has worked for 15 years in the UK, 15 in Germany and then 15 in Italy would have no right at all to an Italian pension.

³ The new Healthcare (International Arrangements) Bill provides a good illustration of this. It enables the UK to make agreements with other countries or international organisations under which one side makes provision for healthcare and the other pays, thereby recognising that it cannot proceed unilaterally.

What is different about Citizens' Rights is that both sides have said from the outset that preserving them is their number one priority, to be dealt with quite apart from commercial considerations. On the assumption that this was said honestly, neither side has anything to gain from making the Citizens' Rights agreement conditional on any other. We are not bargaining chips.

The advantages:

1. *Simplicity* in an otherwise complex situation: the time-consuming work of reaching agreement on the detail has already been done, and both parties are content with what they have agreed⁴.
2. *Swift ratification*: As an agreement under Article 50, it would fall within the *exclusive competence of the Union* and would not require ratification by every national Parliament.
3. *Internationally legally binding*: As an international Treaty, it would not be open to any Member State or the UK to ignore it: the rights of nationals in the the EU and UK would be *genuinely protected*.
4. *Reciprocity*: The WA provides for the continuation of those *interlocking mechanisms* which are essential to vital elements of Citizens' Rights: most obviously the aggregation of social security contributions for people of working age (79% of UK citizens in the EU are of working age or younger), the reciprocal provisions for health care and payment of social security and other benefits, principally for pensioners.

There is nothing legally to prevent this. The principle that "*nothing is agreed until everything is agreed*" does not derive from Article 50, but exclusively from the EU's Negotiating Directives for Brexit – its source is political not legal.

It has been objected, "Why just ring-fence the Citizens' Rights chapter, when so much else has been agreed?" We would agree that as much of what has been agreed as can be ring-fenced and protected should be. We would have no problem with ring-fencing more than Citizens' Rights but there is a limit to how much is possible: realistically, the UK is not going to pay the divorce bill in the absence of a complete agreement. But the fact that you cannot ring-fence *all* that has been agreed is no argument for not ring-fencing *what you can*. And there is a strong moral argument for "*putting citizens before money and markets*", as Manfred Weber MEP said at the September plenary session of the European Parliament in Strasbourg.

An EU-UK agreement **not** under Art. 50

Lacking the "*exceptional horizontal competence* to cover all matters necessary to arrange the withdrawal"⁵, any treaty not made under Art. 50 will have to go through far more complex processes for agreement and ratification, requiring ratification by all national parliaments, which makes it highly unlikely to be possible in the time remaining.

Moreover, if the content is to be the same as that agreed in March, why not simply ring-fence that agreement? If it is to be different, then even more time will be required to argue about the content.

Further, prolonged renegotiation outside of Article 50, within a context of distrust between the UK and the EU as Brexit negotiations have failed, is likely to weaken the guarantees so far agreed upon in the draft Withdrawal Agreement.

⁴ Though improvement remains possible; eg giving back the free movement right of UK citizens in the EU in exchange for EU citizens with permanent residence in the UK having a life-long right to return.

⁵ EU Council Negotiating Directives 22/5/17 para. 5, summarising the unique power conferred by Article 50 TEU on the Union to conclude a treaty.

Bilateral agreements

It has been suggested that there might be a series of bilateral agreements between the UK and individual EU Member States. Such a course is far less advantageous to all concerned for the following reasons:

1. It would require *27 UK-MS bilateral agreements to be made in 5 months*: that is simply unrealistic given the limited resources of the UK negotiators, who would have to be engaged in each one of these negotiations, and the time required by all the national governments and Parliaments to approve and implement such agreements. Some states could possibly use emergency legislative powers, but this is not true of every single Member State. The solution must work fairly and effectively for *all* EU27 or it might lead to discrimination between EU nationals in the UK depending on their nationality and to British citizens living in different Member States.
2. *Enforcement of rights* is a vital part of any agreement for obvious reasons. Realistically the UK is not going to agree to continuing CJEU jurisdiction in 27 separate agreements, and the overall governance provisions which are likely to be possible in a EU-UK agreement will be much stronger than those available to either side under bilateral treaties.
3. Bilateral agreements would not be able to deal with the *interlocking issues* possible in a ring-fenced EU-UK agreement. They could not provide a mechanism for aggregating social security contributions for someone who has worked, in the case of a UK-Italy bilateral, also in France and Germany. Nor could they provide the solution to the provision of health care for a UK pensioner living in Italy who falls ill while on holiday in Germany.

Unilateral provision

The final logical possibility is for unilateral provision, by the UK on one side and either the EU27 as a whole or individual Member States on the other. This is the worst of all possible solutions⁶ for the following reasons:

1. It would be completely *unenforceable*. Either side could simply change its mind and go back on what it had said it would do. This is not a fanciful consideration in the current climate.
2. There would be *no fixed reciprocity*, with a continuing risk that the rights of each group in its host state would be reduced in retaliation for a reduction in corresponding rights on the other side of the Channel – in short, a race to the bottom.
3. None of the *interlocking mechanisms* for pension contributions or health care and social security benefits could be covered.

In conclusion

The optimum solution in the event of failure to achieve an overall Deal is a no-brainer. No other solution offers the advantages of ring-fencing the Citizens' Rights part of the WA under Article 50. All that is required is the political will to make this happen.

With only 5 months remaining, there is no time to delay any further, and a political agreement on ring-fencing as the default option should be made now. To adopt a well-known phrase, "If not now, when?"

British in Europe, the3million, October 2018

⁶ Doing nothing is worse still, but does not even purport to be a solution.