BRITISH IN EUROPE

THE COALITION OF UK CITIZENS IN EUROPE

British in Europe drafting comments on the draft Withdrawal Agreement of March 19th

1. The Withdrawal Agreement ("WA") published on March 19th is said to be agreed subject only to technical legal revisions. Further, we understand that recitals have yet to be agreed and that there is to be a joint explanatory memorandum setting out the parties' understanding of the meaning of certain provisions in the agreement.
2. This paper does not propose any amendments of substance, as we understand that they would simply be ignored. Our position on the points of substance is well known, and nothing in this paper should be read as a retraction of that position.
3. We write the paper in order to help the negotiating parties produce a text which is clear and unambiguous. As both M. Barnier and Mr. Davis said in the press conference announcing the agreement, both teams worked very long hours to produce an agreed text by March 19th. Given that the final EU draft had only been published on 15th, that was an immense task and, on any view, some error has crept in. Since the result, at least as far as citizens' rights are concerned, is intended to have direct legal effect and to govern the status and rights of well over 4 million people for their lifetimes, it is essential to get the drafting absolutely right and we hope that our views will help that process.
4. Whilst we understand the reasons for having a joint explanatory memorandum, we do signal a concern about that process. The memorandum will not form part of the Article 50 Treaty: accordingly its legal status be unclear, and the only way of providing legal certainty for those affected is by getting the WA itself clear and unambiguous. Of course if there is no room for legal doubt about the meaning of a provision in the WA, the memorandum may well be useful in explaining some of the more technical provisions.
5. All references below to an "Article" are to articles in the WA unless otherwise stated.
6. **Art. 8**: definition "frontier workers": in our comments on the 28 February draft WA we posed a number of questions which still need clarification. They were:

   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. Any such grace period, to be effective, would have to be included as a term of the WA itself: mere reference in the explanatory memorandum would be insufficient.

7. **Art. 9(1):** The preamble says that this Part applies to the categories listed in para. 1 "without prejudice to Title III". "Residence" is an important concept both in the overall application of Part 2 and in the special rules of Title III on Social Security. However, the "without prejudice" provision has the effect that "residence" may well mean different things for those two different purposes.

8. In the application of Art. 9 "residence" is a criterion with its own special rules. For example, Arts. 10 and 14 provide that it is not broken by an absence of up to 5 years.

9. Outside the WA, however, "residence" is determined without the benefit of such rules. It is usually achieved either on arrival in a place or shortly thereafter, and is more dependent on the state of mind of the person in question than any particular time limit[1]. It is possible to have a series of short residences and also to be resident in two different places at the same time.

10. The "without prejudice" provision of Art. 9(1) means that the tests of residence for Part 2 generally and for the Social Security Title can be different. Unless modified, this will create huge difficulties in practice. Say, for example, a person leaves the host State to study outside the EU or UK for 2 years. They will continue to be resident, or even permanently resident, in the host State for the purposes of Part 2 generally, but may not be resident for the purposes of Title III. Upon their return to their host State at the end of the period of study it is important that they should continue to have the full gamut of their Social Security and health rights. It must therefore be clearly provided that their "residence" for the purposes of Social Security is not broken, particularly in the light of Art. 28.2.

11. **Art. 9(1)(e)(ii)**: We understand from the Commission that the addition of the words "directly related to..." is not intended to exclude spouses, civil partners and their immediate relations. The phrase is, however, potentially ambiguous for two reasons. Firstly, although ordinary English usage does not mandate a blood relationship it tends to suggest one: that is enough to create ambiguity. Secondly, Art. 2 of Directive 2004/38 itself only uses the word "direct" in relation to descending and ascending blood relatives, and concepts of Union law are to be applied in the interpretation of the agreement. We suggest that ambiguity could be removed by referring instead to "family members within the meaning of Art. 8(a)(i)".

12. **Art. 9(1)(e)(iii):** The present draft excludes the future children of an existing couple where one parent is within 9(1)(a)-(d) but the other is neither a national of the host State nor within 9(1)(a)-(d), e.g. because a Third Country National ("TCN") or because an EU27/UK citizen not residing in the host State at the end of Transition. There seems to be no policy reason for this restriction, unless *any* reduction in numbers is a policy aim. It does not represent what was agreed in the Joint Report where, at para. 12, the reference was to children of parents either one of whom (if married to a national) or both (if not) were "protected by the Withdrawal Agreement". Given that the Withdrawal Agreement allows/accords residence rights to TCN spouses/civil partners within the host State at the end of Transition (Art. 9(1)(e)(i)) and to those who were in that relationship at that time but not living in the host State (Art.9(1)(e)(ii)), it is hard to see how these people are not "protected by the Withdrawal Agreement". The drafting needs to be changed to cover the missing class of future children and it would not be appropriate for this simply to be dealt with in the explanatory memorandum.

13. **Art. 10 – 2nd indent.** It has been explained to us that this provision was included in order to provide for the retrospective application of the five-year absence rule where, e.g., a citizen has acquired permanent residence prior to end of transition but is absent from

[1] See, in English law, *R v Barnet LBC ex p Nilish* Shah [1983] 2 AC 309; it is not thought that English law is exceptional in this regard.

the host state at end of transition, only returning after end of transition. This needs to be spelt out more clearly in Art. 10, second indent, which is otherwise unclear.

14. Part of the problem is that the draft WA nowhere states clearly that someone who has acquired permanent residence under the "old system" (i.e. the Directive) before the end of the transition period automatically falls within Art. 14(1). This should be stated with the proviso that for these purposes the provision of Art. 14(3) applies to anyone with permanent residence who has been absent for a period not exceeding 5 years, counting time both before and after the end of the transition period.

15. The provision also raises the question of how those who are absent at end of transition and post will be able to prove that they had acquired permanent residence under Directive 2004/38. This may be particularly problematic in the UK but equally in EU 27 states where there is no registration system in place for EU citizens, and in the event that the relevant person never possessed a document certifying permanent residence. The provision should clarify that permanent residence and continuity of residence sufficient to have achieved permanent residence will be evidenced in accordance with the provisions of the 2004 Directive and continuity of residence can be proved through any means provided for under the 2004 Directive, for example, as set out in Article 21.

16. **Art. 13(1)**. It has been explained to us that the second sub-paragraph was introduced at the UK's request and that the Commission is going to table a proposal that all EU27 countries should issue ICAO-compliant identity cards by the end of the Transition period. So that people understand the position, and in case there is any difficulty over the introduction of such a scheme, it would be helpful if the joint memorandum explained this.

17. **Art. 16(1).** The final sentence reads, "Persons who, at the end of the transition period, enjoy a right of residence in their capacity as family members of Union citizens or United Kingdom nationals cannot become persons referred to in points (a) to (d) of Article 9(1)." This is ambiguous because, under Union law, one can be both a family member and a person referred to in points (a) to (d). Under Art. 7(1)(d) of Directive 2004/38 a family member who is a Union citizen has a right of residence as a family member but then may go on to acquire a right of permanent residence after 5 years without this being subject to the conditions in Chapter III of the Directive (including Article 7(1)). They therefore already fall within WA Art. 9(1)(a) or (b) as appropriate.

18. The WA is intended to implement the Joint Technical Report ("JTN") of December 2017. By box 3a the personal scope included those EU and UK nationals resident in accordance with Art. 16(1) of the Directive. Article 16(1) confers a right of permanent residence on all Union citizens who have resided in a MS for a continuous period of 5 years (whether or not they have obtained a certificate to that effect – Art. 25 Directive). This includes *all* family members who are Union citizens and thus before exit also UK citizens. So the WA must be amended to make clear that the final sentence of Art. 16(1) does not apply to any family member who is a UK or Union citizen and has a right of permanent residence (whether certified or not) at the end of the transition period.

19. The first sentence of Article 16(1) states that "the right of Union citizens, UK citizens and their respective family members to rely directly on this Part shall not be affected when they change status, for example between student, worker, self-employed person and economically active person". If that is correct, we presume that this means that family members who e.g. were students at end of transition and then become workers, may

rely directly on the provisions of Article 22, and if self-employed workers, may rely directly on the provisions of Article 23. On the assumption that this is correct, it would be of assistance if the recitals or the explanatory memorandum were to make this clear.

20. **Art. 17(3):** in our comments on the 28 February draft WA we drew attention at para. 35 to the potential problems which can arise if an application is treated as a "nullity" on the grounds that it is formally defective and how, in the UK at least[2], such an application is deemed never to have been made and therefore to be incapable of being "rejected". It should be made clear that the protection of Art. 17(3) applies when judicial redress is sought not only against a refusal of an application on the merits but also against a rejection for being formally defective.

21. **Article 17a.** The article deals with the situation where the application for status under Article 17(1) is refused but not the possibility that an application for a residence document might be refused. Presumably the conditions of Directive 2004/38 would apply but this should be made clear in the Article. Article 17a(4) and (5) deal with an application being refused but appear to relate only to an application for status under Article 17(1) – if that is the case, this also needs to be specified.

22. **Art 23(1):** Article 23(1)(a) gives the right to work as self-employed or manage undertakings on the same conditions as laid down for nationals of the host state. This appears to mean that if host state self-employed people or undertakings can provide cross-border services, so can a British self-employed person/manager of undertaking, subject to the restriction that s/he will have to have a Schengen or other visa in order to travel to provide services cross-border and that in the case of Schengen visas this will be limited to 90 in every 180 days? If so this should be made clear in the recitals or explanatory memorandum.

23. **Art. 23(3):** delete the reference to Art. 32.

24. **Art. 25:** in para. 26 of our comments on the 28 February draft we pointed out that the WA does not cover a EU national who obtained a qualification in the UK but returned to their State of origin and had their qualification recognised before the end of the Transition Period (and vice-versa). There can be no reason for such a qualification not to continue to be recognised and this should be made clear in either the recitals or by amendment to the draft WA.

25. For the same reason there is an issue over dual nationals – see para. 27 of our earlier comments. This also needs to be stated clearly.

26. **Art. 28:** This Title of the draft WA creates different rules for nationalities of respectively the Union and the UK in different situations. It thus gives greater importance to the question of nationality than does Reg. 883/2004, which simply covers in the same way all nationals of any Member State. The question of dual nationality has raised issues of some complexity in the area of immigration law and as regards the right of free movement, and it is vital to ensure that similar issues are not raised in the context of social security as a result of the extension *by* the WA of the importance of nationality as a concept in this area.

27. Take the example of a UK/Italian citizen living and working in Italy at the end of the Transition period. As a UK citizen she is covered by Art. 28(1)(b). As an Italian citizen she

[2] We are also aware anecdotally of such an approach being adopted in Italy.

is not covered at all by Article 28. It is important that the WA be clear as to the rights which such a person will have.

28. **Art. 28(1)(e)** – the reference to Title II in these sub-paras. is confusing. Reg. 883/2004 itself has rules, contained in Title II thereof, determining which legislation applies. Were it not for the reference in (e) to Title II, it would be natural to read Title II of Reg 883/2004 as laying down the test for which legislation applies for the purposes of the entire Article. If the principle "expressio unius est exclusio alterius" applies, then the reference to Title II in (e) means it does not apply to (a) to (d). So what does govern (a) to (d)? Better by far to say that the words "subject to the legislation of" in WA Art 28 are to be interpreted by reference to Reg. 883/2004. Something similar appeared in the first draft.

29. **Art 28(2)**: "in one of the situations set out in para. 1" is ambiguous. It could mean they have to remain in the *same* situation, or it could mean that they must be without interruption in *any one* of the situations in para. 1 – i.e. still covered if switching from one to another. This should be clarified.

30. See also our comments on this provision under Art. 9(1) above.

31. **EHIC:** There has been some doubt expressed, including by respected academics, about the future of the EHIC scheme. The authors of this paper understand the situation to be as follows.

32. EHIC will continue for those who are within the scope of Art. 28 – say a UK pensioner living in Spain (Art. 28(1)(d)). This is because it is a benefit covered by Reg. 883/2004 (Art. 27 for pensioners; Art. 19 for non-pensioners), and therefore within the scope of Art 29 of the WA. So our UK pensioner in Spain would be covered by EHIC for a visit to Germany, as their trip to Germany would not interrupt their being subject to the legislation of the UK and resident in Spain so as to take them out of the scope of Art. 28(2). Similarly, a Dutch person residing and working in the UK would be covered for a trip to Estonia, as they would be covered by Art.28(1)(a).

33. On the other hand, for those who are not within the scope of Art.28, e.g. UK pensioners resident in the UK at the end of Transition, EHIC is intended to come to an end, though Art.29a(1)(c) provides that they will continue to be covered if, at the end of Transition, they are in another EU27 country until the end of their stay. There are also other potential but less clearly stated rights to EHIC under Article 29a(2), where UK pensioners in the UK had in the past been subject to the legislation of an EU 27 country, and vice-versa.

34. The doubt expressed by others about this view comes principally from the fact that Art. 29(1)(c) might be read as an exhaustive statement of EHIC rights for everyone.

35. We would therefore like the position to be clarified. If our view is wrong, we would like to know for obvious reasons. If, on the other hand our interpretation is correct, it would help if this could be stated in the joint explanatory memorandum since many people will be unclear as to their rights in this important area. We would add that we have reached this interpretation as lawyers: other lawyers have been unsure. A layperson would have no chance at all of understanding the scope of Title III, and the case for these provisions to be clearly explained in layman's language in the explanatory memorandum is overwhelming.

36. There is a further issue as to EHIC for those who will continue to be entitled to use it. Our understanding is that at present a UK pensioner living in the EU27 can use his/her EHIC card to obtain emergency treatment for themselves or their family whilst visiting the UK, which is the country of their competent institution (and vice-versa for an EU27 pensioner residing in the UK and visiting their home state). On the assumption that we are correct, the explanatory memorandum should explain this.

37. **Dual citizens and citizens returning to their home State with family:** The position of dual citizens has been a source of controversy for many years, and the case law should be dealt with in the explanatory memorandum. We take it that any decisions of the CJEU after the transition period on the effect of dual citizenship on EU citizens' rights will apply equally to the interpretation of analogous rights created or acknowledged by the WA.

38. Art. 4(5) requires the UK's courts and administrative authorities to have due regard to such decisions, but is silent as to the EU27 courts and administrative authorities. We take it that this is because the point is considered too obvious to require to be stated, but this is an instance where clarity is more important than elegance of drafting and the point should be spelled out. Similarly, the jurisdiction of the CJEU as regards Part Two across the EU 27 for as long as the Withdrawal Agreement is in force but given the fact that the current drafting only refers to certain specific areas of CJEU jurisdiction e.g. Articles 151, 153, this could leave room for doubt.

British in Europe,
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