Response of British in Europe and the3million to the third round of negotiations (week of August 28 2017)

Executive Summary

- **the3million** and **British in Europe** welcome, as before, the immediate post-negotiation round briefing on the outcome with us.
- We welcome the progress that has been made over matters such as the inclusion of frontier workers in the agenda, the aggregation of future social security contributions and the agreement on healthcare.
- However, besides these elements of progress, almost all the concerns expressed earlier remain including, in particular, as regards the UK's proposal of settled status and the EU's position not to grant free movement rights to UK citizens in the EU.
- Moreover, real additional concerns have arisen over:
    - The increasing and unnecessary complexity of the issue of Citizens' Rights, which could be solved by a very much simpler approach doing justice to the position of the people this chapter seeks to protect, namely by agreeing that all EU27inUK and UKinEU27 should continue to enjoy *all* their existing rights.
    - The EU's proposal that children and other family members should only be protected by the Withdrawal Agreement as long as they are dependents: the promise of lifetime protection has vanished into thin air.
    - The very narrow approach the EU continues to adopt as to the territorial extent of the rights being discussed, an approach which extends throughout the subjects under discussion in Round 3. As a result, the agreements on recognition of qualifications and economic rights do not go nearly far enough. This is linked to the issue of free movement and the points we made about this in our response to the second round.
    - The lack of clarity on what is being discussed in relation to frontier workers and healthcare.
- In addition, the recent erroneous sending of deportation letters by the Home Office to EU citizens in the UK has further increased anxiety among EU citizens and confirmed the absolute need to protect citizens' rights exhaustively in the Withdrawal Agreement, under protection of the jurisdiction of the CJEU
- Finally, due to the overall limited progress in the Brexit negotiations, we remain particularly concerned that the issue of ring-fencing the agreement on citizens' rights does not appear to have been discussed or to be tabled for future discussion.

Introduction

British in Europe and **the3million** welcome the consultation which has taken place with us, as representatives of the groups of citizens in both the UK and the EU27 directly affected, following this third round of the negotiations.

However, whilst David Davis says that the talks have been "productive" the view

on the other side of the table is less optimistic. Michel Barnier says that whilst there have been some "useful clarifications" on a lot of points, there has been no decisive progress on the main subjects. He was very concerned that he was far from being able to recommend to the EU Council that sufficient progress had been made for the talks to be able to proceed to the next stage. This is especially worrying for us partly because it highlights the risk of there being no agreement on citizens' rights and partly because, even if the parties can reach agreement on that, there is a real danger of no overall agreement. In spite of this, neither party has yet even begun to consider the ring-fencing of an agreement on citizens' rights.

In this response, we follow the pattern of our response to Round 2. We will not repeat our general position or the comments in that earlier response, but instead will focus on the issues which we are told have arisen during the second substantive round of discussions. In that respect, the table of the positions adopted by each side on a list of issues ("the Table") remains helpful but not always entirely clear[1].

We do also make a series of detailed points at the end of this response concerning administrative procedures in relation to the UK's proposal on settled status, which we would like to see taken into account during the next round.

A simpler, fairer solution

This round of the negotiations, whilst rightly described as technical, has concerned some issues of major importance to all those whom the3million and British in Europe represent. The Table now runs to 16 pages of detail, even though these pages incorporate by reference hundreds of pages of text of EU legislation and, in its latest revision, even case law. All this whilst each side is claiming to be concerned to protect the rights of affected citizens, with M. Barnier for the EU having said, "Brexit should not alter the nature of people's daily lives".

Quite apart from the sheer injustice of any other approach, would it not be so much more straightforward for everyone simply to adopt M. Barnier's statement and resolve the transitional problem created by Brexit by agreeing that all EU27inUK and UKinEU27 should continue to enjoy *all* their existing rights, and that their entitlement to this status should be evidenced by a simple card acknowledging these rights?

Preserving the existing rights of EU citizens in the UK and UK citizens in the EU should not be regarded as an immigration matter. We are a finite group of mortal people who are already integrated in and contributing to the countries in which we live. It is also worth recalling that the course we advocate was that adopted on the only other occasion when a territory left the EU (or rather its predecessor) – the case of Greenland.

[1] Indeed one of the major concerns in this paper, the EU position on children and family members, a Round 2 issue which we flagged up at the time as obscure but has now been explained.

Moreover, by virtue of rights associated with the Common Travel Area, UK and Irish citizens have reciprocal rights almost identical to their EU rights and residents of the North have the right to Irish, and thus EU, citizenship even if they have never set foot south of the border. The historic links of the UK with Eire are, of course, fully appreciated, but the UK also has a strong historic link, now 44 years old, with the European Union and its citizens. If Irish Citizens have such rights within the UK as a whole in perpetuity, then there is no reason why that finite group of EU Citizens from the other EU26 in the UK at Brexit should not be allowed to have the same rights, in exactly the same way, for the rest of their lives.

For all of us, then, both EUinUK and UKinEU, rather than turning our lives into bargaining chips of future trade negotiations, the easiest, fairest and economically most sound solution is to guarantee all our existing rights in the Withdrawal Agreement and ensure protection by the CJEU on its implementation.

EU proposal in relation to children and other family members[2]

In our joint response to the UK proposal, we noted that we were seeking clarification of how the two proposals differed as regards the rights of children and family members. Having clarified this, the EU's proposal for children and other family members is a radical departure not only from Michel Barnier's statement about not altering the nature of people's daily lives but also, in our view, from the Negotiating Directives. It has very worrying implications for UK families living in the EU27 and, because of reciprocity, for EU families in the UK.

Whilst the UK fairly proposes that children and other family members should have post-Brexit rights *as an independent right holder*, the EU says this should be *as a family member*. Clarification of this EU position has revealed the full impact of the EU's stance. Take the example of a child born to UK parents in Spain, raised there, at school there, completely fluent in Spanish, with Spanish friends and who has never lived in the UK. Once this child, who might attain the age of 18 only a few months after Brexit, ceases to be a dependent, s/he will have no protection whatsoever under the Withdrawal Agreement. Contrast this with the Negotiating Directives' promise that affected citizens' "rights should be protected as directly enforceable vested rights *for the life time* of those concerned."

So the EU appears to be proposing to take away the rights of a fully integrated young person whilst an adult who moves to Spain on the last flight out of the UK pre-Brexit would have fully protected rights for life. For those who say dual citizenship is the answer, this is not possible in Spain, Austria or the Netherlands. There urgently needs to be further clarity on each party's position on this critical issue and what the consequences for young people resident in another country in the EU 28 at the date of exit will be if this position is maintained.

[2] This is a Round 2 point which we flagged in our Response at that stage but did not comment as we wanted clarification. In the light of the clarification that has been provided we have to take very serious issue with it.

Overview of round 3

It is clear that politics have played a very important part in this, the most technical, round of the negotiations. The EU is concerned to prevent the UK from maintaining, at this stage of the negotiations at least, access to the same benefits as it enjoyed while still a member.

We suggest, with respect, that this concern is misplaced, and the EU has drawn an inappropriately early dividing line between present rights and future relationship. This part of the negotiation is about the rights enjoyed by *individual* UK citizens in the EU and *individual* EU citizens in the UK at Brexit. The litmus test for the relevance of any issue at this stage of the negotiation should be whether it affects these rights. If so, it should be discussed now. If not, it is a matter for future discussion.

The EU's and UK'S approach is, we assume, informed by the same thinking as that which led them in Round 2 to deny freedom of movement after Brexit to UK citizens in the EU and similar rights to EU citizens in the UK to circulate and return to the UK. In August British in Europe made detailed written representations on the topic by way of addendum to our second-round response, together with case studies which bring into clear focus the human dimension of what might appear a dry legal problem[3].

This approach to freedom of movement is intrinsically linked with the current deadlock on the two-year rule which relates to the way in which the primary right to move and reside freely across the territory of the EU Member States has been implemented in Directive 38/2004 to provide for a right of permanent residence attaching to a specific Member State where an EU citizen has resided continuously for five years. The primary right to move and reside freely across territory of Member States is a direct and individual right that all EU citizens have by virtue of Article 21 TFEU while the right of permanent residence is the implementation of that primary right in secondary legislation, the 2004 Directive, which attaches to one country. The current EU approach appears to be to guarantee simply those secondary rights of residence derived from the primary right to move and reside freely, and not the primary right they derive from, which cannot be legally correct. Also, the primary right is a composite right of freedom to move and reside, while the EU position is currently only to protect rights of residence under the 2004 Directive.

As we stated in our response to round 2, the logical way for both sides to deal with this issue is to say that those who have established and retain permanent residence at any time before Brexit (including those resident before Brexit but who only achieve 5 years' residence afterwards) should have a life-long right to

[3] https://britishineurope.org/wp-content/uploads/2017/08/BiE_Round-2-response_free-movement-cross-border_PUBLICATION-.pdf; https://britishineurope.org/wp-content/uploads/2017/08/British-in-Europe_Free-Movement_Master-Case-Studies_EC.pdf

return or that those who have exercised a right of free movement should continue to have that right. This would mean that EU citizens who have acquired, or are in the process of acquiring permanent residence pre-exit, can continue to have the right to circulate in the EU 27 or move outside the EU 27, even for more than two years, and still have a life-long right to return to the UK. UK citizens in the EU pre-exit would have similar rights to circulate freely across the EU 27 or elsewhere outside the EU 27, even for more than two years, and either return to the country of residence in the EU 27 or move and build up rights of permanent residence in another EU 27 country.

To avoid implementation issues and misunderstanding, it should also be specified in the Withdrawal Agreement that this means a life-long right to return is guaranteed to this finite group. Particularly for EU citizens in the UK it is important that such an unequivocal right to return is set out in the Withdrawal Agreement because the mere application of EU free movement law on future re-entry in the UK is likely to face implementation issues once the UK is out of the EU. A clear-cut commitment in the Withdrawal Agreement that citizens do not lose their right to return after any period of absence is therefore required in addition.

These are issues that flow from the discussions during Round 3 and which are related to issues like frontier workers, mutual recognition of qualifications and economic rights referred to below. These are important issues which affect both EUinUK and UKinEU. They will be key in the next round and we urge both sides to take a pragmatic and flexible approach to them to ensure that all citizens who have exercised their rights to move and reside freely in another EU country are not penalised for this in the final deal on citizens' rights.

General Problems with the Table

The first issue is one of definition. There are a number of points where concepts are defined in terms of EU Treaty provisions or secondary legislation or the relevant case law to these. This is not a helpful way of defining concepts in the Table. These concepts should be stated in terms that can be readily understood not only by lawyers specialising in EU law, but also the layperson who is entitled to know how s/he is affected so as to comply with the concept of transparency in the negotiations. In addition to this, there is potential for misunderstanding between the negotiating teams.

Related to this, there are also points where the UK has made precise lists while in others, the onus is on the EU to make a proposal. Again this leads to a lack of clarity and transparency. At the same time, the onus is on the UK to commit to a clear procedural solution to ensure that rights are properly protected. It is of little value to be more precise on the list of entitlements that are included if their implementation is lost in ambiguity about a mix of third country immigration status under UK law and vague commitments to setting out some elements in the Withdrawal Agreement.

A second issue is the areas which are listed in the table as green. Although there appears to be consensus in some of the green areas, the wording is very different

(e.g. family members as laid down in Dir2004/38 /rights of EU child vs 'independent rights holder', Conditions for acquiring PR vs 'Minimum' conditions etc.) These concepts and definitions need to be revisited and clarified, as they may be hiding different legal concepts, based on EU law in one case and UK immigration law in the other.

Finally, and of the utmost importance for transparency, we ask the negotiators to make it absolutely clear in the Table or otherwise *whenever the position they are adopting is a departure from that put forward in, for the EU, the Negotiating Directives of May 22nd and, for the UK, in their June proposals (Cm 9464)*. Otherwise there is a real risk that the public will fail to understand that an important change is hidden behind an obscure or legalistic reference in the Table. We therefore call on both sides to publish now, before the "crunch" September and October rounds of discussion, a list of all departures from their original proposals.

To give a concrete example, para. 31 of the UK's proposals said that children of EU citizens eligible for settled status would be eligible for that status whether born in the UK or overseas and whether they are born or arrive in the UK before or after the specified date. This is not repeated in the Table. We have assumed that children for whom settled status is proposed would have this regardless, but it would be helpful to have confirmation that proposals not mentioned in the table are unchanged.

Frontier workers

The position of frontier workers is very important to both our groups, but particularly to British in Europe, more of whose members are affected simply for reasons of geography. In an effort to assist on this question, which we were aware was due to be discussed in this round, British in Europe included a section on frontier workers in its August addendum and case studies (see link above).

As mentioned above in our section on general problems in the Table, the first issue is one of definition. In our addendum, we identified five categories of people who, on any common sense view, count as frontier workers but may not fall within the definition of Regulation 883/2004. The EU proposes that frontier workers should be those "as defined in case law concerning Articles 45 and 49 TFEU and Reg. 492/2011". This is not a helpful way of defining an important category of person covered by the Withdrawal Agreement, and we look forward to clarification. In particular, are our five categories to be covered? As we said above, if so this should be stated in terms that can be readily understood not only by lawyers specialising in EU law, but also the layperson who is entitled to know how s/he is affected.

Furthermore, to adopt in a negotiation a "definition" as vague as that in the Table is to give rise potentially to enormous misunderstanding. For example, one of the negotiating teams might understand it in one sense and the opposing team in quite another and their apparent agreement might be wholly wrong. It really is essential that any definition on which an agreement might be based is clearly set out so that there is no possibility of misunderstanding, and so that the people

affected can begin to move from their present limbo with a clear idea of where they are going.

The second issue is the extent of the rights which are proposed. Our reading of the EU position, which the UK says it will reciprocate, is that a frontier worker's right to reside in their country of residence will be protected but this will be confined to the country in which they are residing at "the specified date"[4]. Similarly, the right to work away from home will be confined to working in the country where they are working at "the specified date". For the reasons set out in our addendum document and apparent from our case studies, such an approach would be too narrow. If the rights of existing frontier workers to live as though Brexit had never happened are to be preserved, then they should continue to enjoy the freedom to work and to reside throughout the EU27 and, if they were working or residing in the UK, in that country too.

Posted workers

We understand that there was further discussion about posted workers, but that the EU continues to regard them as outside the scope of this negotiation. Once again this is an inappropriately narrow view of the proper subject of the discussions, and we regret that posted workers, who are as human as any other citizen whose rights are under discussion, continue to be excluded.

Social security and healthcare

We were of course very pleased to see that future as well as past social security contributions are now to be included, a point which we raised in our response to the UK's original proposal document.

On healthcare, we are similarly glad to see that both sides support the continuation of the arrangements under Regulations 883/2004 and 987/2009. As an aside, but a very important one, we feel compelled to point out that this is an example of the UK being prepared to continue to accept the application of EU law post-Brexit, which is of course perfectly sensible. It does not, however, stand well with their position that the continued application of the EU law of permanent residence for those who already have that status is somehow quite impossible.

We believe that negotiation on the healthcare issues, or at least the explanation of the result of that negotiation, has been bedevilled by a failure to distinguish between two quite distinct EU healthcare schemes, the S1 scheme and the EHIC scheme. Whilst the two schemes have in common that the country of the "competent institution" pays for the healthcare provided, the conditions of entitlement and the content of what is provided are quite distinct. In particular, the S1 scheme is an enduring[5] scheme which entitles a defined group of people

[4] We assume that this British term, appearing in a column of EU proposals, is simply a typo and should read "date of withdrawal". Otherwise it would be inconsistent with the general EU approach in these negotiations.

[5] At least in the case of the great majority of those covered – pensioners and those in receipt of exportable benefits.

to healthcare in their country of residence at the ultimate expense of the country which pays or will pay their pension, whilst the EHIC scheme is a scheme for temporary health care available to all EU citizens at present even if they have never before ventured beyond the boundary of their country of birth.

It seems from the remarks of David Davis in the closing press conference that UK pensioners in the EU will continue to be covered by the S1 scheme but will also, whilst travelling in other EU27 countries, be able to use an EHIC card for temporary health care[6]. As this right is reciprocal, both British in Europe and the3million welcome the continuation of both existing schemes for these people.

We do, though, need clarification from both sides on the issue of the personal scope proposed for both schemes and, so that we may pass on this explanation to those we represent, we ask that such clarification be in writing well before the September round of negotiations which we understand will be where the hard decisions on what is to be conceded and what not will be taken.

Our queries are as follows:

1. The language of the Table "on exit day" is very specific and, on a literal interpretation, could mean that a UK pensioner who resides in, say France, but is in England on exit day is no longer covered by the S1 scheme. We are sure that this is not the intention, but would welcome clarification as to precisely how this works.
2. Is it intended that entitlement to benefit or continue to benefit from the S1 scheme is unchanged for all those resident at Brexit away from the country of their competent authority?
3. The UK's position paper of June 2017 said that it intended to seek to protect the current EU healthcare arrangements "for UK nationals and EU citizens who benefit from these arrangements before the specified date" (para. 49). In our response, we pointed out that this potentially excluded those who have not yet retired before the cut-off date and those who currently depend on a retired spouse's S1 form and will only receive their own on retirement. We see no reference in the Table to the limitation proposed earlier and we assume that it has been dropped, precisely for the reasons we gave. In other words, a person who is at Brexit resident away from the country of the "competent authority" for their future pension will be entitled to benefit from these arrangements when their pension becomes payable. In view of the importance of this issue to many of those we represent we need confirmation that our understanding is correct.
4. The Table says that those who are protected "continue to be eligible for healthcare reimbursement, including under the EHIC scheme." Does that mean that only those who are covered by the S1 scheme are eligible for EHIC, or is there one group entitled to S1+EHIC and another entitled to only EHIC?
5. If the latter, who is entitled to only EHIC?

[6] D. Davis – remarks on conclusion of Round 3.

6. In particular, are all UKinEU and EUinUK at Brexit going to continue to be entitled to EHIC?
7. What is the position of a person who frequently works abroad, possibly falling outside the narrow definition of frontier worker, who happens to be in their home country, and thus not in a "cross-border situation" on Brexit day?
8. Is the intention that those entitled under these rules to the benefits of the EHIC scheme (which is clearly not the most important aspect of healthcare under the existing EU system) should continue to enjoy those benefits throughout the territory comprising the EU27 plus the UK?

Recognition of qualifications

The EU is proposing a very narrow approach here, no doubt for the political reasons to which we referred at the outset. In general, we agree with the broader approach of the UK. Having regard to the "litmus test" referred to above, it is our strong contention that the UK's approach does not step outside the proper boundaries for discussion of qualifications. Both sides are agreed that the personal scope of this section is "The rights of EU27 persons resident in the UK before the withdrawal date and vice versa as well as frontier workers". Thus the UK's proposal relates to the rights of individuals caught in the middle of Brexit.

We also support the UK's positions that the right to have a qualification recognised should not be tied to residency, that the right should not be limited to the recognising state but should apply across the UK and all 27 EU states, and that equal treatment with national professionals should not be confined to residents and frontier workers.

It is interesting to note that the EU's position on territorial scope is incomplete and inconsistent as it is stated that "the effects of grandfathered recognition decision limited to the issuing State…and not grandfathering of recognition decisions in States other than the State where the UK national is residing or working as a frontier worker". There is no mention of how this will apply to UK qualified EU citizens in the UK before exit (of which there will no doubt be many). It is thus not clear whether EU citizens who hold UK qualifications will have them recognised across the EU or whether the same limitation of territorial scope will apply to their qualifications, although they remain EU citizens post exit. This again goes back to our general point made above that this part of the negotiation is about the rights enjoyed by *individual* UK citizens in the EU and *individual* EU citizens in the UK at Brexit. It also picks up a point that we made in our very first joint response to the draft negotiating directives in May as to whether para. 22, dealing with continued recognition of qualifications, operated *in personam* or *in rem*. We were told the former – and yet this position seems to imply the latter.

As to the qualifications to be covered, we believe that the approach of both sides is too narrow. Briefly the EU is proposing to safeguard qualifications obtained in EU28 and either already recognised in another EU28 country or subject to application for such recognition at the date of Brexit. The UK proposes

additionally that qualifications which are in the course of being acquired at Brexit should be safeguarded.

The basis for the UK's broader approach is that it is unfair that a person who, pre-Brexit, has started a course with a view to becoming, a doctor, for example, should not have that qualification recognised. But it is just as unfair to draw the line at the course leading to the qualification in question. For example, a student who has started a course for a law degree will not be a qualified lawyer at the end of it. They will have to undertake further courses before achieving a professional qualification.

Economic rights

As we understand the position, both sides propose that the same rights are safeguarded for the same groups of people but, whilst the EU proposes that these rights are safeguarded only in the country of residence or frontier working at Brexit, the UK argues that safeguarding should be available for UK nationals across all the EU27. Of course, EU citizens in the UK would have such rights by virtue of their continued EU citizenship.

Once again, we strongly support the UK's position. The argument here is very closely related to the difference of opinion over the continued right of freedom of movement for UK citizens in the EU. British in Europe's detailed representations on that topic, together with our case studies[7], show very clearly why this is both important and the UK is correct in law.

But there is a further argument related to lack of reciprocity. In concrete terms, this would mean that a French or German qualified lawyer permanently resident in the UK before Brexit and working out of the UK would continue to be able to enjoy economic rights across the EU 28, potentially even where that lawyer has set up a UK firm, whereas a UK lawyer based in an EU 27 country and working self-employed or with her/his own firm in that country would not.

Students

We understand that all topics which are to be discussed have now at least been touched on, but that there has been no discussion of the position of students in the Citizens' Rights negotiations. We have been told that the Erasmus+ scheme has been the subject of discussion elsewhere in the negotiations but we have not been told anything about progress on that subject, and it seems that there has been no discussion of fees and funding beyond the very short-term. Young people form an important group of the citizens whose rights are under discussion in this part of the negotiation, and we urge the parties both to press ahead with negotiations on the position of students beyond the right of those already studying to continue to do so. Thousands of EU27 pupils in the UK and UK pupils in the EU27 have to make decisions on future study by the end of 2017. Clarity on their rights is urgently required.

[7] See link referred to above.

Detailed Issues for September Round - Settled Status – administrative procedures

Given the points that we have made in our previous submissions – our joint responses to the UK proposal of 26 June and to round 2 – it remains our clear view that holders of PR and those living de facto legally in the UK should have their rights protected for life by means of a simple declaratory document. Preferably, no fees should be required for any relevant EU citizen, and if applied, should be in line with average current fees for similar documents across the EU 27, not those imposed on nationals for issuing similar documents, given that nationals will not be issued with similar documents. In short, the position should be that advocated by the EU – that documents are declaratory of rights, and a cheap, accessible local procedure should be instituted, in line with similar procedures in other EU countries (e.g. Germany). We also remain strongly opposed to systematic criminal checks based on UK immigration law and we reiterate the points that we made about deportations in our response to the UK proposal and in our letter of 28 August concerning 100 erroneous deportation letters sent recently to EU citizens. Finally, we hope to see clarity from the negotiating parties that CSI is covered by the NHS in the UK and that neither the CSI or the minimum income threshold requirement is valid.

6 September 2017

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