

The last mile on citizens' rights

Less than two months from the projected end of the negotiations on the UK's withdrawal from the EU, **the3million** and **British in Europe** remain deeply concerned that citizens' rights are still far from being truly 'safeguarded'. More will need to be done in the final phase of the negotiations in order to protect citizens' rights under the draft Withdrawal Agreement (WA) published in March 2018.

However, this will all be in vain in the event of a No Deal cliff-edge scenario, which would leave us without any legal status at all. Regrettably, there seems to be no contingency plan either in the EU or in the UK for this eventuality.

the3million and British in Europe have repeatedly called for the final agreement on citizens' rights to be **ring-fenced** from the rest of the WA so that it may come into force regardless of the outcome of the negotiations. Now more than ever, we ask the UK and the EU to support this as it is the only safety net that can save almost five million citizens from 'falling off the cliff' on 30 March 2019. As Michel Barnier likes to put it, "the clock is ticking" and citizens are not prepared to wait for their fate to be sealed at the eleventh hour. Therefore, taking into account the timeframe set for the negotiations, we urge the UK and the EU to commit to signing a Citizens' Rights Treaty under Article 50 in case agreement on the full draft WA cannot be reached by the European Council meeting in October 2018.

Even if a deal *is* struck, however, we are concerned that the protection of our rights, as set out in the current draft of the WA, is insufficient and must be strengthened. Below, we outline our key outstanding preoccupations and our proposals for how these can be resolved.

Strengthen the legal text of the WA to confirm existing rights

- There are outstanding gaps in the draft WA that will result in the removal of existing rights such as **freedom of movement** and full **family reunification** for both protected groups. However, there seems to be no logical reason why some rights that we – UK citizens in the EU and EU citizens in the UK – have had can be confirmed in the WA, while others cannot.
- Under the draft WA, UK citizens in the EU will lose existing EU citizenship rights under EU law to move outside the State they are living in on 31.12.2020, to work outside the State they are living or working in on that day, and to provide cross-border services whether by physically travelling cross-border or by providing a remote service (e.g. consultancy over the internet). This will have disastrous repercussions for all UK citizens who moved to the EU with the reasonable expectation that they would not be confined to one country but would be able freely to move, work and provide services across national boundaries.
- Similarly, EU nationals who may decide to move away from the UK in order to take up study or work opportunities abroad, or simply to look after an elderly relative in their country of origin, have no guaranteed right of return to the UK beyond a period of absence of five years, regardless of how long they may have lived in the UK.

- The permanent, or ‘settled’, status provided by the WA is in fact far from ‘settled’, unlike permanent residence under the Citizens’ Directive. It is most concerning that host countries are not bound by the Citizens’ Directive regarding the grounds on which people can be deported in the future for reasons of criminality. Even people with permanent residence will risk losing their status and being deported for very minor offences, based on domestic rather than EU criminality thresholds.
- The exclusion of **future partners** from the WA is another example of how our existing rights will be eroded. This will disproportionately discriminate against young people, especially those living in the UK where domestic family reunification legislation is particularly restrictive.
- Moreover, there are still ambiguities on the status and the rights of some groups of citizens such as carers, students returning to their country of origin to study (e.g. international or home fees apply?) and children born in their host countries who are not considered to have exercised treaty rights.
- Neither side appears willing to guarantee the current rights of citizens returning to their country of origin with existing family members (whether EU or non-EU citizens) (Surinder Singh rights). This will have severe consequences for returning UK citizens with non-British family members, who will now find themselves retrospectively subject to strict UK immigration rules where previously these would not have applied.
- Ultimately, the ‘hybrid’ status the WA will create for our two protected groups of citizens is likely to lead to endless court cases as both the UK and the EU will grapple with the repercussions this will have on people’s lives.

As ‘nothing is agreed until everything is agreed’, we believe that there is still time for an understanding to be found between the UK and the EU on these limited outstanding issues and for the text of the WA to be amended accordingly. In particular, we ask for the UK officially to request and for the EU to accept continuing freedom of movement for UK citizens in the EU in exchange for a life-long right to return to the UK for EU nationals living in the UK before 31.12.2020.

Make UK unilateral commitments on citizens’ rights legally binding

- The Withdrawal Agreement is premised on the flawed assumption that by copying the criteria of the 2004/38/EC EU Directive (‘Citizens Directive’), EU citizens living in the UK will be guaranteed the same status as they hold today. This is wrong because the application of these criteria will operate very differently once the UK leaves the EU.
- The unique circumstances in the UK, as the only country leaving the EU and where EU nationals were never required to register, are not adequately acknowledged or covered in the WA. This leaves our future status, how we will be required to apply for it and how we may lose it in future, in the hands of the UK Government and its interpretation of the WA. The WA does not protect against the UK applying, at any moment in time, a similar registration procedure to its current permanent residence, which has a rejection rate of 28%.
- The UK-EU Joint Report adopted in December 2017 stated that the UK’s Withdrawal Agreement and Implementation Bill would ensure direct effect for the WA. At the same time, it required for the citizens’ rights provisions of the WA to be fully incorporated in that Bill. This provides a double guarantee, namely a supranational guarantee via direct

effect and protection via primary legislation. Unfortunately, the WA is far less clear in this regard.

- In its Statement of Intent on the Settlement Scheme and draft Immigration Rules published on 21 June 2018¹, the UK Government has confirmed that it will not rigidly apply the criteria of the Citizens Directive - such as Comprehensive Sickness Insurance and 'genuine and effective work' - and that it will instead introduce a simple registration system based on proof of identity, residence and criminality checks. Nothing in the WA precludes the UK from going back on this Statement, made at a time when the UK has an obvious self-interest in keeping the EU onside.
- The proposed Immigration Rules, however, are to be introduced via secondary - not primary - legislation. This means that citizens' post-Brexit status, their rights and the provisions setting out how they can access that status will be set in legislative acts that are easily amended, as is currently the case with UK immigration Rules. This provides EU citizens no legal certainty that the UK Government will not change its position at any time after Brexit and it makes monitoring future changes to the Rules very challenging. The3million have outlined their comments on the Statement of Intent in their response published in July 2018².

The3million has put forward a proposal for a **Citizens' Rights Protocol**³ to be annexed to the Withdrawal Agreement. This Protocol would ensure that commitments made by the UK Government with regard to how it will implement the Agreement, including provisions on citizens' rights, would be set out in primary legislation domestically as well as being codified in a legally binding text at the international level.

Implement streamlined and fair registration procedures in the UK and the EU27

- Less than a year from Brexit, the detail about the manner in which eligible citizens both in the UK and in the EU will be able to have their rights confirmed is far from clear. This raises particular concerns for those people who may be harder to reach or may find evidencing their eligibility more challenging and thus risk being left without a status.
- This will have particularly serious consequences under the constitutive settlement application system the UK wishes to implement and in the context of the 'hostile environment'⁴. But it is also potentially an issue if EU 27 Member States decide to apply the constitutive application system in their countries, particularly in France where there is no compulsory registration system for EU citizens.
- the3million has put 162 questions⁵ to the Home Office but these have only partly been answered by the UK's Statement of Intent on the Settlement Scheme. Similarly, EU Member States are currently deliberating on what systems they will use to register UK citizens residing in their countries. British in Europe see no reason for abandoning the declaratory system created by the Citizens Directive, which is working well, and provides

¹ <https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>

² <https://www.the3million.org.uk/publications>

³ <http://eulawanalysis.blogspot.com/2018/06/brexit-and-eu27-citizens-rights.html>

⁴ <https://www.the3million.org.uk/hostile-environment>

⁵ <https://www.the3million.org.uk/questions>

for the option of compulsory registration, and thus it calls on all Member States to support this, including France, which does not currently have such a registration system.

- In the UK, the3million are particularly concerned about the **immigration exemption to the Data Protection Act** adopted in the UK in May 2018, which we are now challenging in court. This exemption is contrary to the spirit of the GDPR and will impair the right of EU nationals to access data held on them by the UK Government, significantly limiting their chances of correcting errors or appealing against potential refusals.

Moreover, the3million and British in Europe fully support the asks regarding citizens' rights set out by the European Parliament in its 14 March resolution on the framework of the future EU-UK relationship ⁶. These include:

- the inclusion of the reference to future spouses
- the need to enable families to initiate obtaining status by means of a single form that is declaratory in nature and bases the burden of proof on the UK authorities
- the procedures should be simple, clear and free of charge
- future free movement rights across the whole EU for UK citizens currently resident in an EU27 Member State are guaranteed
- voting rights in local elections for all citizens covered by the Withdrawal Agreement
- lifelong right for EU citizens covered by the Withdrawal Agreement to return to the UK
- protection against the expulsion of disabled citizens and their carers
- protection of procedural rights related to expulsion as referred to in the Citizens Directive and of the rights of third-country nationals as established in EU law

We ask the EU Council to back these. However, the3million also remain strongly opposed to a lack of a physical document evidencing settled status in the UK and urgently call on the Home Office to review its decision as this could lead to widespread cases of discrimination against EU nationals in the UK's 'hostile environment'. Both groups also continue to oppose systemic criminality and security checks as well as self-declaration statements on criminal offences since these are illegal under EU law. Such checks are unnecessary since all member states and the UK are already able to identify citizens who are a "*genuine, present and sufficiently serious threat to the fundamental interests of UK [or other Member State] society*" and they are able to deport those people under EU law. These issues are likely to significantly affect a large number of citizens and should therefore not be overlooked by the European Parliament.

Strengthen governance and oversight provisions

- We are very concerned that an agreement still needs to be reached between the UK and the EU on governance and oversight provisions – including an effective dispute settlement mechanism - for the implementation of the WA.
- In the absence of the infringement procedure and the monitoring power of the Commission beyond transition, and with the preliminary reference procedure limited in

⁶ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0069+0+DOC+XML+V0//EN&language=EN>

time, much will depend on the role of the **Independent Monitoring Authority (IMA)** agreed to be implemented in the draft WA.

- However, the responsibility for the creation of the IMA has been left entirely to the UK, which makes any serious independent monitoring highly doubtful. We fear that a future IMA, being a UK body, will not be guaranteed a sufficient degree of independence and effective authority to guarantee the continued protection of EU citizens' rights under the WA. No detail regarding the functions of this body or the timeframe and process for establishing it has been included in the draft WA. This is a significant omission that must be remedied.
- Moreover, interim arrangements proposed by the UK Government whereby implementation of the citizens' rights part of the WA will be monitored by the Chief Inspector for Borders and Immigration (ICIBI) are also concerning. This is because the ICIBI is not sufficiently independent of the Home Office and it does not have the necessary powers, mechanisms and resources to effectively fulfil its role in line with the draft WA.
- Finally, in comparison with British citizens in the EU, who will be protected by supranational monitoring by the Commission and oversight by the CJEU, EU citizens in the UK will be subjected to far weaker monitoring arrangements in which the UK will largely be the guardian of its own implementation of the WA, and where a sunset clause of eight years will apply to CJEU oversight.

We call on the EU to ensure that the WA clearly establishes the Independent Monitoring Authority as a joint UK-EU body, equivalent to the European Commission in EU Member States. This will guarantee effective and independent oversight of the implementation of citizens' rights provisions under the WA by the UK. Discussion of the Independent Authority should be included as a matter of urgency in the final phase of the negotiations. We also ask both parties to reconsider the application of a sunset clause of eight years with regard to CJEU oversight as well as to the Independent Authority.