ANALYSIS PAPER 2:

Comments on the Withdrawal Agreement's implementation and enforcement

The3million have provided an overview of key concerns with the proposed text of Part II of the Withdrawal Agreement (WA) in a separate paper (Analysis Paper 1). In this second paper we provide further comments in relation to the implementation and enforcement provisions as covered by Part I and Part VI of the WA and applicable to Part II of the Agreement.

We believe that there are two main weaknesses in the implementation and enforcement framework provided by the WA, namely:

1) Lack of detail on how the UK should translate the WA into national law
2) The weak institutional framework for enforcement of Part II, particularly the Independent Authority

1) Legal implementation of the WA in the UK: Article 4.

Article 4 is considerably weaker than the December Joint Report in guaranteeing that the UK will properly implement Part two of the WA.

Article 4(1) second paragraph, complies with paragraph 35 of the Joint Report which said that:

> "The provision in the Agreement should enable citizens to rely directly on their rights as set out in the citizens' rights Part of the Agreement and should specify that inconsistent or incompatible rules and provisions will be disapplied".

However, the WA is considerably less detailed on how the UK should guarantee this. It only states in Article 4(2):

> "The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities, through domestic primary legislation."

This can be compared unfavourably with much more detailed provision of the Joint Report Paragraph 36 which states that :

> "The UK Government will bring forward a Bill, the Withdrawal Agreement & Implementation Bill, specifically to implement the Agreement. This Bill will make express reference to the Agreement and will fully incorporate the citizens' rights Part into UK law. Once this Bill has been adopted, the provisions of the citizens' rights Part will have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future."

The mere reference to 'primary legislation' is not a sufficient guarantee to ensure the WA is properly implemented in the UK. This is particularly the case as the UK Government has repeatedly made comments that undermine the concept of direct effect. David Davis referred to the incorporation of the WA into national law as 'direct effect, if you like', as if such incorporation on its own would be sufficient to guarantee direct effect. During

repeated contacts with the Home Office and DExEU we have not obtained any confirmation that the UK intends to include any specific provision to ensure direct effect.

The problem is twofold. First, there remains a risk that part of the status of EU citizens would be set out in secondary rather than primary legislation. From the national perspective, the Withdrawal Bill (at its current state of debate in the House of Lords) still leaves scope for the WA to be implemented partially by executive action (due to the Henry VIII powers provided in the Withdrawal Bill), as long as Parliament has given its assent to the WA. There are no specific guarantees that this would not happen in relation to citizens' rights (Part 2 of the WA).

Secondly, direct effect will not be ensured by the WA on its own. National law will have to accept it. While this was previously done by the European Communities Act, the Withdrawal Bill repeals the European Communities Act, and does not provide any mechanism to ensure direct effect for the WA citizens' provisions. Such a provision of primary legislation thus still need to be provided, either via an amendment of the Withdrawal Bill (which at this stage of its discussion in Parliament becomes unlikely) or via the primary legislative act that will implement the WA. Particularly as the UK Government appears to hold the conviction that the mere incorporation of the WA into national law equals direct effect of its provisions domestically, it is important that the WA is explicit on how primary legislation should ensure direct effect.

We, therefore, propose the following amendment to Article 4(2):

> "The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities, through an Act of domestic primary legislation. Such Act shall integrate fully Part Two of this Agreement. It will include a provision that states that Union citizens and United Kingdom nationals shall be able to rely directly on the provisions contained or referred to in Part Two and that any provisions inconsistent or incompatible with that Part shall be disapplied, unless the entire Act is explicitly repealed by Parliament."

Explanation:

- We have included the additional sentence to 'fully integrate' in order to ensure that Part 2 is completely covered by primary legislation
- Our amended text refers to 'an Act of domestic primary legislation' in the singular. We believe this is important. We fear that, in addition to the risk of part of our status being set out by executive action, there is also a risk that our status is dispersed in several acts of primary legislation. Most particularly, there is a risk that part of our status would be covered in a new Immigration Bill.
- It is important that our status is covered fully in one Act implementing the WA. This will not only facilitate that courts and administrations have easy access to our full status, it equally facilitates recognition of our status as protected by the WA.
- Although the third sentence might appear redundant compared to a combined reading of Article 4(1) second paragraph and(2), we believe this specification is really needed, given the UK's Government failure so far to commit to a mechanism in national law that will properly guarantee respect of direct effect.

2) Strengthening the Independent Authority: Article 152.

In relation to citizens' rights, the WA provides part of the enforcement tools traditionally provided by EU law, namely direct effect (Article 4), and the opportunity for preliminary references (Article 151), although the latter is limited in time.
There are, though, considerable limitations to these instruments when applied in the context of a country that is no longer a Member State. To start with, as explained above, there is some doubt about whether the UK will enshrine properly the principle of direct effect into national law. Even if it does so, it remains to be seen to what extent administrations, courts and legislator will apply direct effect in practice, and whether courts will make use of the preliminary reference procedure if they do no longer perceive themselves as part of the EU's judicial system.

As 'bottom-up enforcement' might thus be a problem, 'top-down enforcement' would be even more important. Unfortunately, the WA does not provide continuation of the infringement procedure. We understand that is politically not a realistic option. The traditional international law mechanism via a Joint Committee can obviously only very partially compensate that, although we appreciate it includes a further option for dispute settlement via the CJEU, and the extra sanction mechanism of Article 165 during transition.
However, given the traditional (high level) political nature of the joint committee system (before triggering further judicial action) there is likely to be a wide gap between daily practices and challenges faced by individuals on the one hand, and the more sporadic political deliberation of joint committees.

Article 152 appears to intend to address this particular implementation void in the UK by requiring the latter to set up an Independent Authority. However, the way this Independent Authority is defined is very weak, and can hardly be said to compensate for the potential problems with bottom-up enforcement as indicated above and the absence of the infringement procedure. Put differently, in terms of reciprocity between EU citizens in the UK and British citizens in the EU, EU citizens will have far less protection than British citizens, who can still rely on the normal judicial protection of the EU.

Article 152 simply leaves monitoring and enforcement entirely in the hands of the UK. There is no guarantee at all that the 'independent authority' will at any stage operate independently. There are enough examples of UK 'independent authorities' which have not been able to operate independently, either by way of appointments or restrictions in resources. Given the political context, it is highly unlikely there is any chance this independent authority will be allowed to operate independently if the UK Government has entire freedom to define the parameters of setting up such an authority. The UK is asked here to monitor itself on rules it has signed up to because of international bargaining, not because of belief in a particular policy for which it is convinced that an independent authority would provide the best outcome. The political priority of lowering immigration means it has mainly an incentive to make the independent authority as weak as possible and closely under control of the Government. As Article 152 is framed now, it is most likely that appointees to the 'independent' authority will share Government views and operate under Government control, while the Authority will most likely be badly resourced.

We believe it makes little sense to leave monitoring of an international agreement to the sole initiative of the party that has least interest to ensure such monitoring. It is highly unlikely 'independence' can be organised under this condition. We believe that if the Independent Authority is to realistically pick up at least part of the enforcement lacuna left

by lack of infringement procedure and no longer being part of the EU judicial system more broadly, it will need to be an independent authority that is institutionally embedded within the international commitments of the WA. This means that the creation of the Independent Authority cannot just be left over to the UK, but has to be a joined EU-UK institution.

On this basis, we propose the following framework for the Independent Authority:

> **Composition:** to ensure the independence of the authority and its link to the international guarantees provided by the WA, we propose an organisational design that is not merely national. The way European agencies are set up can be of inspiration here. We propose a structure based on a Board, Director and administration. The Board of the Independent Authority should be composed of independent experts appointed on the basis of their expertise, half of which appointed by the UK, half by the EU. We propose that the Board also includes civil society organisations operating in the field (as is the case for several European agencies). The Board will set out the general policy of the Independent Authority and appoint its Director. This appointment procedure will ensure that the Director can operate independently from the Government. The Director will be responsible for the daily running of the Authority, and will be supported by an administration (many of whom with legal training). Administrative staff is appointed by the Director on the basis of their expertise.
>
> **Budget:** the only way to ensure that the Authority would have a proper budget to play its role is by requiring co-financing UK-EU on an equal basis.
>
> **Powers**: we agree with the power to receive and investigate complaints from Union citizens and their family members, and to conduct inquiries on its own initiative. However, Article 152 only mentions breaches by administrative authorities. It is not clear whether this includes (directly or indirectly) issues where legislation breaches the WA.
> In case it does not cover legislative action, Article 152 leaves a big lacuna, compared to infringement procedure within the EU. To address this, the Independent Authority should be able to monitor also whether legislation respects the WA.
>
> **Procedure:** the WA should be more prescriptive on how authorities should take into account decisions of the Independent Authority. However, we agree that it is ultimately a gateway to judicial action in national court, as described in Article 152, if the authority does not comply. So if authorities do not comply with decisions by the Independent Authority, the latter will take the issue to court. An appropriate legal remedy needs to be available for that.

However, we also think that there needs to be a closer link between the monitoring by the Independent Authority, and the political monitoring system provided by the Joint Committees. Article 152 should explicitly provide the opportunity for the Independent Authority to trigger a meeting of the Joint Committee or special committee on citizens' rights. This is important to create a direct link between operation on the ground and possibility to trigger political action for serious systematic breaches via the Joint Committee. This is particularly the case for legislative action not respecting the WA.

We also suggest that Article 17(1)c be amended by an additional sentence providing that the Independent Authority can inquire on whether an extension of the grace period is required due to technical problems, and ask for the matter to be decided by the Joint Committee provided by Article 157.

Hence, the Independent Authority has to be created by the WA, as a UK-EU body under the WA. Article 152 cannot simply be left as an 'invitation' to the UK to monitor itself. Article 152 needs thus considerable reconsideration and rewriting. This is particularly essential given the overall weaknesses of enforcement mechanisms as a country is no longer part of the EU (even if, formally, direct effect and preliminary procedure are supposed to apply).

Our suggestions made here in relation to the Independent Authority are an invitation to provide a more profound reflection and revision of the WA on the features of this authority. Given how central this is to ensuring there is any chance of the WA being properly implemented in practice, we would welcome the possibility to be further involved in further reflection and drafting of the design of this authority and implementation issues more broadly.