Proposal for a Citizens' Rights Protocol*

The reasons for a citizens' rights Protocol and how it would function.

The protection of EU citizens' rights in the UK post Brexit, set out in the draft Withdrawal Agreement (WA) agreed between the UK and EU, is built on a flawed premise. It assumes that by copying the criteria of the Directive 2004/38/C (the Citizens Directive) relating to the acquisition of residence rights, EU citizens 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.

After Brexit, EU citizens in the UK will no longer be protected by all of the judicial remedies provided under EU law (such as the infringement procedure).

Significantly, once the UK withdraws from the EU, the criteria of the Citizens Directive will be applied in a constitutive rather than a declaratory registration system. Under a constitutive system people have to successfully apply in order to obtain a residence status. In case of rejection, an applicant will have no document certifying their status; as a result they will lose all entitlements and ultimately face deportation. The consequences of not obtaining a 'settled status' document are thus far more serious than not obtaining a permanent residence card under EU law. In a declaratory system, absence of a document does not mean that you are not entitled. Even if your application is rejected you might still be able to stay on a temporary basis, or might be able to return under free movement provisions. The consequences of a constitutive registration system can be particularly dire if combined with the UK's so-called 'hostile environment' policy on immigration.

Applying the criteria of the Citizens Directive within a constitutive system is particularly problematic in the UK context because the country never registered EU citizens upon arrival. Requiring citizens who for example may have lived in the UK for decades to retrospectively prove their legal status may prove highly problematic in many cases. The recent Windrush scandal exemplifies the dramatic consequences of such an approach.

Finally, the sheer number of people to be registered within a short period of time makes a rigid application of the Citizens Directive practically impossible and undesirable, as also recognised by the UK Government. The UK's implementation of the EU permanent residence registration procedure has a current rejection rate of 28%. If a similar interpretation of the Directive criteria and registration was to be applied to more than three million EU citizens, this could have disastrous consequences.

The UK Government has stated that it would not rigidly apply the criteria of the Citizens Directive, such as Comprehensive Sickness Insurance and 'genuine and effective work', and that it would instead introduce a simple registration system based on proof of identity, residence and criminality checks. But, these are merely political statements. The Government can change its position at any time, possibly introducing a registration system not dissimilar from the current procedure for permanent residence applications, with that difference that after Brexit the procedure would be constitutive in nature. This could see

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thousands become liable to removal from the UK. Regrettably, the WA does not provide any protection against that.

The aim of the Citizens' Rights Protocol is to avoid such a disastrous eventuality, not by changing the WA, but by setting out legally the political promises the UK has made with regard to how it will implement the WA. The aim of adopting a Protocol is to make these unilateral commitments by the UK legally binding at the international level. This is because a Protocol has the same legally binding force as an international treaty like the WA. Protocols can set out further details, often signed by and applicable to only some parties to the main international treaty. Given the UK's unique position in leaving the EU, it makes sense to add a bespoke Protocol to the WA. It will finally give assurances to EU citizens and take away the anxiety created by Windrush and contradictory political statements. By setting out its political promises regarding the registration system into a Protocol, the UK is also likely to strengthen goodwill in the Brexit negotiations.

This document is a proposal for a Protocol, exemplifying what role it can play and how it could be written. There is no one single way in which such a Protocol could be drafted or used. The exact content will depend on how the UK intends to implement the Withdrawal Agreement, and the formulation of provisions will obviously need to be done by legal drafters. The aim of this proposal is to show what a Protocol could look like, how it would operate and what would be its main provisions. At the same time, our proposal is not an 'ideal type' solution, but is based on several intentions the UK Government has made clear:

1) The UK Government has committed to a procedure that will be simple and based on 'residence, identity, and criminality check'. It has repeatedly stated that it will neither require proof of Comprehensive Sickness Insurance, nor of 'genuine and effective work'. The latter implies that the UK will not apply any means testing in its registration procedure. Under EU law, means testing is only possible if one fails the test of 'genuine and effective work'. Hence, if the UK were to introduce means testing without a preceding test of 'genuine and effective work', it would be in breach of EU law and the commitments of the Withdrawal Agreement.
2) The UK Government has stated it will introduce a constitutive registration system. the3million has previously expressed its preference to keep a declaratory system, as is currently the case under EU law. We maintain that preference. However, as the WA allows the creation of a constitutive system and the UK has expressed its intention to adopt such a system, this proposal for a Protocol is based on that premise.
3) The UK Government has proposed an online registration system, through which people would apply and the Home Office will then check data making use of existing databases from the revenues collection and the work and pensions government departments (i.e. HMRC and DWP). The full details of this procedure have not yet been communicated. Neither are there yet any substantive details of how people can apply if they have no online access or they face other barriers that will make it harder for them to apply. On the basis of the available information, we suggest a registration procedure that allows either application online (as set out in Article 2(2) and (3) of the proposed Protocol) or application via post or contact with local services such as passport service (set out in Article 2(4))

As the exact way the UK intends to implement the UK is not yet clear, this proposal for a Protocol cannot be read as a full legal translation of the UK's intentions. Moreover, we have

included some provisions we deem necessary to protect our rights but that go beyond what the UK Government has promised in its political statements.

Equally, to ensure that EU citizens retain the same status as they have today, the WA will need to be amended on several points. Demands for revisions of the WA are set out in a separate document by the3million. A Protocol will solve some of the weaknesses of the WA, while amendments will solve others. Nevertheless, the adoption of a Citizens' Rights Protocol would address the single most important problem EU citizens still face, namely legal uncertainty about how the WA and the criteria of the Citizens Directive will be applied, which can range from a simple registration system with a low rejection rate to anything as complicated as the PR system, which would imply a rejection rate of 28% and above. Anything within this wide spectrum is possible and, despite political statements by the government, there is no legal certainty how the registration will be applied or changed over time.

Protocol on the implementation of the Withdrawal Agreement by the United Kingdom

Article 1

Implementation of Article 4 WA

The UK shall ensure compliance with Article 4(2) of the Withdrawal Agreement via the adoption of a Withdrawal Agreement and Implementation Bill. This act of primary legislation will:

a) include a provision ensuring the direct effect and supremacy of Part II of the WA as set out in Article 4(1) paragraph 2 of the WA
b) fully incorporate the provisions of Part II of the WA, and in particular the detailed provisions of the registration procedure as set out in Article 2 of this Protocol.

Explanation

The Joint Report promised that the Withdrawal Agreement and Implementation Bill will ensure direct effect, but at the same time it required for the citizens' rights provisions of the Withdrawal Agreement to be fully incorporated in that Bill. This provides a double guarantee; namely a supranational guarantee via direct effect and protection via primary legislation to avoid that citizens' rights provisions are set out in ever- changing and difficult-to-monitor acts of secondary legislation. Unfortunately, the WA is less clear in this regard. This Article 1 of the Protocol clarifies the interpretation of Article 4 WA, so it is in line with the promises made in the Joint Report.

As the UK will be no longer part of the EU judicial system, the tool of direct effect on its own, independent of other features of that system, will not be sufficient to guarantee EU citizens their rights. Hence, it is also necessary for their rights to be set out in primary legislation. In particular where the Withdrawal Agreement leaves discretion to the Host State (such as on the application of Article 17WA), the UK should make its key choices of implementation via primary legislation setting out the main applicable rules in the Withdrawal Agreement and Implementation Bill and not delegate this discretion to secondary legislation. This does not mean that certain administrative implementation measures cannot be delegated to affirmative secondary legislation, but the key features as set out in this Protocol should be set out in primary legislation.

Article 2

Implementation of Article 17 WA

The UK will implement Article 17 in the following way:

1. The United Kingdom will require EU nationals, their respective family members and other persons, residing in its territory in accordance with the conditions set out in Part II, Title II, to apply for residence status which confers the rights under this Title and a physical document evidencing such status.

The application procedure shall comply with the conditions set out in Article 17.

Explanation
This article commits to providing a physical document as proof of status. The WA allows for only a digital document. In light of the UK's 'hostile environment' to immigration (which requires private actors such as banks, employers and landlords to check on the status of immigrants) a digital document will not be sufficient protection for those benefiting from the WA. Ideally, we believe the WA itself needs to be amended on this issue, as it is equally a potential problem for British Citizens wishing to benefit from the WA in Europe.

2. EU citizens falling under Title 2 of Part II of the WA can apply via an online procedure, which requires:
a) proof of identity as required under Article 17, 1(i)
b) a statement that the applicant is resident prior to the end of transition for those applying for temporary residence; or resident for more than five years for those applying for settled status

Explanation
It is anticipated that most EU citizens will be able to apply online for their respective status. For many this procedure could be minimal. We understand that the Home Office seeks to establish a process where EU citizens can apply by:

1. providing evidence of identity, which can be done by scanning passport/ID; and
2. Making a statement on residence.

This will then prompt the Home Office to confirm the validity of the ID and check their and other government agencies existing databases that those applying meet the relevant residence criteria.

For many (potentially most) the process should be concluded at this stage. Only if the Home Office has no confirming information, it will ask for additional information, as set out in the next paragraph.

3. The Government will check the validity of the identity and then check the statement against existing databases. The Government can require that the applicant provides further proof regarding:
a) identity: by presentation of the identity card or passport. In respect of Article 17,1(i) the administration shall return that document upon application without delay and before the decision on the application is taken.
b) residence:

(i) For temporary residence application, one document showing residence in the last year before the application. As required by the WA the evidence must show residence by the last day of the transition period.

Examples of acceptable items of proof are:

- Letters or other documents from government departments or agencies, for example HM Revenue and Customs, Department for Work and Pensions, DVLA, TV Licensing.
- Letters or other documents from your GP, a hospital or other local health service about medical treatments, appointments, home visits or other medical matters
- Bank statements/letters
- Building society savings books/letters
- Council tax bills or statements
- Electricity and/or gas bills or statements
- Water rates bills or statements
- Mortgage statements/agreement
- Tenancy agreement(s)
- Contract of employment showing address
- Telephone bills or statements

Explanation
This list is just an example. The objective is not to set out an exhaustive list in the Protocol. However, ideally, a non-exhaustive list could be outlined in the Protocol and in the Withdrawal Agreement and Implementation Bill (WAIB), while a full list could be set out by delegated legislation (ideally with the affirmative procedure). Yet, the decision on such delegation would be taken in the WAIB and not in the Protocol.

(ii) Applicants applying for settled status relying on 5 years' continuous residence; one document from the list provided in 3(b)(i) above, for each year in any period of five successive years. The five documents can span a period of six years if the applicant has been absent for less than one full year.

(iii) Applicants falling under Article 17 Directive 2004/38/EC are required to present one document for each year of their shorter qualification period. Additionally, one has to provide one document of this list showing residence within the year preceding the application, and at the latest at the last day of the transition period, in order to prove continuity of residence. They have to provide evidence of being entitled to the shorter qualification period provided by Article 17 Directive 2004/38EC.

In respect of Article 7,1(j) supporting documents other than identity documents may be submitted in copy. Originals of supporting document can be required only in specific cases where there is a reasonable doubt as to the authenticity of the supporting documents submitted.

Explanation
This explains how the UK will apply criteria in relation to settled status, in respect of the WA and Directive 2004/38. Please note Article 16(3) of the Directive provides that permanent residence may not be obtained in the case of absence for an uninterrupted period of six months during the five years, but extends this to one year in some cases like pregnancy. The system we propose here in this Protocol allows maximum one year of absence during the five-year period. To avoid overload of the application procedure it does not require proof of continuity of residence other than proof of continuing residence short (one year) before application. There is no requirement to prove that one has not been absent for more than two years since building up the five years.

4. In alternative to the procedure provided under paragraph 2, the applicant can apply:
a) via presentation of the documents listed in paragraph 3, to a local passport service
b) via presentation of the documents listed in paragraph 3 via postal application

Explanation
This will particularly facilitate registration for those who do not have access to online registration.

5. Family members of EU citizens falling under Title 2 of Part 2 of the WA can apply, by providing evidence of:
a) identity, as defined in 3a) of this Protocol
b) relationship to EU citizen entitled under the WA, in respect of proof of documents as defined in Article 17 (l) and (m)
Such applications can be online, via passport service or via postal application. Applications can be made joint with the EU citizen to whom they are family member.

Explanation
The application for family members is by providing proof of identity and relationship to EU citizen who is entitled under the WA. Documents are those as accepted in Article 17 WA.

6. The UK Government can apply criminality checks at the time of application in respect of Article 17(1)(p) of the Withdrawal Agreement, and in respect of Directive 2004/38/EC as set out in Article 18(1) of the Withdrawal Agreement. EU citizens and their family members will not be asked to declare criminal convictions.

Explanation
Article 17(1)(p) allows host states to ask applicants for a self-declaration. However, this is hugely problematic and not required. Countries can check criminality anyway without applicants needing to make such declaration. Self-declaration can have very serious consequences for any applicant who wrongly declares their criminal past, deliberately or unknowingly, as they can be sanctioned and deported on this basis. Ideally Article 17(1) itself should be amended in this regard as this will then also protect British citizens living in the EU.

7. EU citizens and their family members who have not successfully applied by the end of the grace period will not be deprived of the rights Part II of the Withdrawal Agreement confers without being previously contacted by the UK authorities with a request to apply following the procedure set out in paragraphs 2 to 4 of this Protocol.

Explanation
Some vulnerable people might not have applied prior to the end of the grace period because they have not been properly informed or did not know how to apply. Not holding a document to ascertain their status is likely to cause these people problems in accessing services, particularly in the context of the hostile environment policy. However, these vulnerable people should be protected from being hit by all the punitive measures of the hostile environment. They should not be deprived of the rights they may hold under the WA, without been given a chance to prove their status at the moment their lack of registration emerges.

8. EU citizens who have obtained settled status hold this status for life, with exception of the situations provided in Articles 14(3) and 18 of the Withdrawal Agreement. People who have lost their document evidencing their status will be provided with a new document simply on the basis of proof of identity, with respect of conditions as set out in Article 17. They will not be asked to provide again the original documentation at the basis of their status. Neither will they be asked to provide new proof. The same applies in case the document confirming settled status is subject to renewal. Such renewal will neither require the original documentation nor new evidence, but will simply be delivered by proof of identity.

Explanation
the3million calls for an indefinite right to return instead of Article 14(3) which states that settled status can be lost after five years of absence. Equally it asks for a revision of Article 18 WA, which allows deportation for criminality on grounds beyond Directive 2004/38 for acts post transition. Only an indefinite right to return and deportation on grounds as defined by the Directive will ensure that EU citizens hold a status that equals their current status. However, independently of whether the WA is revised on this, it is important to make clear that loss of document or renewal of settled status document should not be abused as a way to undermine EU citizens' established rights. Unfortunately current UK immigration law practice provides multiple examples of situations where people are asked to provide evidence all over again when documents are due to be renewed or have been lost. If applied to settled status, this would mean that people are never certain of their status, and will remain in a permanent situation of having to prove their entitlement for the rest of their life.

9. Article 17 (1)(e) will be implemented in respect of the General Data Protection Regulation.

Explanation

Article 17(1)(e) requires a transparent procedure. The UK has just introduced an exemption on data protection in immigration related matters. This bluntly undermines the data protection rights provided by the GDPR and puts EU citizens at risk of not being able to fight judicially measures taken against them by the Home Office. The Minister of State for Immigration, Caroline Nokes, promised in an exchange with the European Parliament (letter of 25th April 2018), that the exemption is not a 'blanket exemption'. However, there is little in the legal text that would prevent the exemption from having far reaching implications on data protection rights of EU citizens, among others in the context of registration. We therefore ask the Government to commit more clearly to respecting the GDPR in the implementation of the WA.