BRITISH IN EUROPE
THE COALITION OF UK CITIZENS IN EUROPE

No Deal Brexit preparedness – why the Commission's proposal does not work

The European Commission, which has refused for over a year to discuss what happens to citizens' rights if there is no EU/UK Withdrawal Agreement, has finally come up with a suggested solution. As a great poet of the original European Union[1] said 2000 years ago, "The mountains give birth and a ridiculous little mouse is born."

The ridiculous little mouse with which the Commission would like to replace all the EU rights of UK citizens living in the EU27 in the No-Deal scenario is "third country national" (TCN) status. In its Contingency Action Plan Communication (the "Communication") issued on 13 November[2], the Commission proposed that, in order to prepare for a No-Deal Brexit, the EU27 countries should start accepting early applications by UK citizens for TCN status.

As British in Europe has argued since as early as August 2017, if all we are left with is TCN status, most of us will be illegal immigrants (and thus wholly without rights) on 30 March next year. Thus, with this Communication, the Commission falls very far short of the standard it set itself, namely that "*it has always been the European Union's intention that citizens should not pay the price of Brexit*". We therefore presume that this Communication is simply the first step in an ongoing process of preparedness in case of a No Deal and that, in the event that No Deal were to become a reality, the Commission is planning more detailed measures to ensure that our status is secured.

Much more robust action is required to see that we do not pay the price of Brexit. The simplest and safest solution is to ring-fence the citizens' rights agreement already reached. In the absence of that, only legislative action in the EU27 Member States will work.

Why will we be stripped of our rights on 30 March?

There are four reasons why TCN status does not fill the gaping hole left by the removal of our rights as EU citizens:

I. The first is that – unlike EU citizenship – no form of TCN status is automatic. It is necessary to submit an application in each and every case, and the approval process takes time.
II. The second is that, in order to have TCN rights at all, a person has to be "legally resident" in the State in question. This is, therefore, a chicken-and-egg situation, because our problem is that unless there is some additional intervention we will not be "legally resident" on 30 March.
III. The third is that a very large number of UK citizens[3] currently residing legally in the EU27 countries will – as things stand – not satisfy the conditions required for any of the various EU schemes for TCNs.
IV. The fourth is that the rights conferred on those who succeed in an application under one of these schemes still fall well short of the rights which they currently have as EU citizens.

These four reasons are dealt with in greater detail below.

[1] The Roman, Horace
[2] https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/communication-preparing-withdrawal-brexit-preparedness-13-11-2018.pdf
[3] Estimated informally as about a third in a country such as France.

I. **TCNs have to apply for rights**

a) We are often told, "Don't worry. After Brexit you will have the all the rights of TCNs". Such statements are absolutely meaningless. "TCN" in EU law is simply the term used to describe any person who is not an EU citizen. In terms of legal status it merely describes the rights we DO NOT have. It does not describe a set of rights we all DO have.

b) The rights which some TCNs can apply for are set out in a patchwork of EU laws governing a series of different situations. We consider these further below.

c) Almost the only thing which this patchwork of laws have in common is that the rights they confer are only obtainable on application. Applications, by their very nature, take time to process. In the period after 29 March, while our applications are being decided, we will be illegal immigrants.

d) The Commission seeks to overcome this problem by encouraging States to accept applications now, before we become TCNs. However, British in Europe's experience to date of trying to talk to any government about what will happen if there is No Deal is to be told, "but we are all hoping there will be a deal and talk of no deal is simply a distraction." The great likelihood is that many States will continue in this mindset at least until all hope of the Withdrawal Agreement being ratified has finally gone, not least because they will not want to commit resources to processing applications which may prove futile[4]. Some States may take the legalistic view that they cannot, as a matter of law, entertain our TCN applications before 30 March.

e) In any event, the Commission's exhortation comes far too late, even if it were to be accepted by the Member States. The time for processing an application depends on which right is being applied for. The most comprehensive TCN scheme is the Long Term Residence Directive, Dir. 2003/109, Art. 7.2 of which gives States up to 6 months to decide such an application. The Commission's suggestion came less than 5 months before Brexit, and already less than 4 months remain. British in Europe is not aware of any Member State yet having complied with this suggestion and this is very unlikely as long as ratification of the deal remains possible.

f) Even in countries where national law requires an application to be decided in less than 6 months, there is often no sanction for breach of the time limit, and our state of limbo is likely to continue. Even in the most organised countries, the spike in the applications which the Commission is encouraging will be hard to process. The delays already experienced by UK citizens in analogous bureaucratic processes, such as getting permanent residence, *cartes de séjour* or citizenship, most apparent in the spike between referendum and Brexit, show clearly that only a small proportion of these applications is likely to be processed before 30 March.

[4] Indeed at a public meeting in Rome on November 26th a representative of the Italian government said nobody should try to register at the local authority now: instructions would be issued after the UK vote in the event that the WA is rejected.

II. **TCNs must be legally resident**

a) The only other thing these laws have in common is that only TCNs who are "legally resident" can apply to be recognised as such and be accorded any associated rights.

b) If the TCN laws are to be the solution to the problem created by Brexit, *something* would have to be done in advance to render our residence legal immediately following Brexit, while ensuring the continuation of all other related and essential rights, such as to work, education, health, social security, pension contributions etc[5].

c) In theory there are three ways of achieving this.

i) The first is for all Member States to succeed, before March 30th, in processing applications by all British nationals for the TCN rights envisaged by the Commission. For the reasons given this is unlikely.

ii) The second is for all those British nationals who have made a TCN application which will clearly not have been determined in time to make a further interim application for some sort of legal status such as a visa or temporary residence permit. Such duplication of the application process required would create a bureaucratic nightmare which nobody could seriously wish for.

iii) The above two solutions, though impractical, would not require legislation in Member States. An alternative would require legislation in Member States but would be more practical. This would be for States to legislate for a No Deal Transition Period during which all those of our existing EU rights which are capable of being extended by national legislation are, for a period long enough to ensure that all applications which might be made have been processed.

d) In any event, these solutions are only a temporary sticking plaster for many British nationals, since they still have to be eligible for the rights which the Commission suggests as the answer to our problems.

III. Many UK citizens will not be eligible to apply

a) Each TCN scheme has its own set of eligibility criteria. Many UK citizens currently living legally in the EU27 ("UKinEU") will – as things stand – meet none of them.

b) *The Long Term Residence Directive, 2003/109*. This is the most comprehensive of the TCN Directives, in the sense that it is not confined to any particular group of workers, students etc. The following UKinEU will be ineligible:

i) Anyone who on 29 March has not been resident for at least the preceding 5 years in the Member State in which they are living.

This includes not only those who left the UK during the previous 5 years but also those who left many years ago but have moved from one State to another, as their Treaty rights encouraged them to do, and so will have spent less than 5 years in their present home State at Brexit. A very substantial number of UKinEU will be unable to meet this criterion on one or other of these grounds.

[5] Footnote 11 of the Commission's Communication seems to accept that this is the case without mentioning the administrative burden it would entail.

ii) Anyone who is unable to meet the adequate resources requirements laid down by national law pursuant to the Directive.

These vary from country to country but three examples from different countries show how great the problem is. The annual figure required in Spain for pensioners is €25 816, in Luxembourg it is €24 582 for the economically inactive and in France for anyone the figure is €17 982. These figures are prohibitive for the very large number of UK pensioners living in the EU27 on their UK state pension, even where they have a further modest income. The UK state pension at present is worth £8 546 a year, currently €9 649[6], just over a third of the amount required to be allowed to stay in Spain.

iii) Anyone who is unable to obtain sickness insurance in respect of all risks normally covered by the nationals of the State in question.

This inability could be because insurers simply refuse to insure at all, or refuse to cover some required risks, because of a pre-existing medical condition. Alternatively, it could be because the applicant is unable to afford the premiums, a particular risk where the insurer does not refuse cover altogether but instead loads the premium. It might be objected that States will accept the UK S1 form as equivalent to insurance for pensioners and others with exportable benefits from the UK: but these rights will lapse on 30 March, 2019 unless previously replaced by, at the very least, a series of 27 bilateral agreements to continue the S1 arrangement. There is no prospect whatever of this happening before Brexit.

iv) Anyone who cannot comply with the "integration conditions" which the Directive authorises States to require.

These usually involve language tests and/or tests of knowledge of the host country's culture and history. Such tests are not required of EU citizens exercising their rights of free movement, and many who have done so would not be able to pass them. For some, particularly the elderly, there is no prospect of their ever being able to do so. Others who are unable to do so immediately will require time to complete courses of study and further time to attend a test. Changing in so fundamental a way the basis on which a person can live in the country they call home is not something which can be achieved in 4 months.

v) To require compliance with the conditions at (ii)-(iv) above will penalise any British national who on March 29 2019 has, or is entitled to, Permanent Residence as an EU citizen.

To be entitled to Permanent Residence under Dir. 2004/38 one has to show that during the previous 5 years s/he has resided legally in the State in question (Art. 16(1)). 'Legal residence' requires that during those 5 years the person has either had 'adequate resources' and health insurance or has worked (ie achieved the same result by working).

[6] Exchange rate on 22.11.18.

After 5 years of complying with these requirements, a person is entitled to Permanent Residence and no longer has to satisfy them (Art.16(1)). So a British national who has lived in an EU27 country for decades has, in effect, been lulled into a false sense of security. For years they have not been obliged to maintain health insurance as a condition of residence, nor to have a particular level of income. Had they known that similar requirements were going to be imposed later in their lives, they might well have maintained both. But now they are to be required to do so when it is too late for many to be able to do anything about it.

In this way those who have lived in EU27 countries for longest are severely penalised, compared with those who are still in their first 5 years of residence and aware that they need to comply with such requirements.

c) *Meaning of the Commission's suggestion*

i) The Commission's suggestion is as follows. "The Commission considers that periods of legal residence of UK citizens in an EU27 Member State before the withdrawal date should be considered as periods of legal residence in a Member State of the European Union in accordance with Directive 2003/109/EC concerning the status of third country nationals."

ii) We take it that this means that periods of residence as an EU citizen should automatically satisfy the TCN residence requirement of Art. 4 of the Long Term Residence Directive without any further qualification. In other words if someone had resided for at least 5 years as an EU citizen no questions would be asked as to whether during that period the person also met the more restrictive criteria of the Long Term Residence Directive, particularly whether s/he breached the more restrictive rules on permitted absences.

iii) It has been suggested that the Commission's proposal is intended to go further than just providing a way for British nationals to satisfy the residence criterion, and that it is suggesting that those of us with or entitled to Permanent Residence as EU citizens can simply swap that certificate/status for a TCN long term residence permit with no further questions being asked. We have the following comments on this interpretation:

(1) Whilst this interpretation of the Commission's suggestion would be very welcome to those British nationals entitled to Permanent Residence, it will not be helpful unless it is legally unchallengeable. The last thing we want is for a superficially attractive solution to be nodded through now, when there is still time to take alternative steps to protect our rights, only for it to be set aside after Brexit with chaotic consequences.

(2) If this is what the Commission is in fact recommending, it should be stated, as the wording of the Communication is not clear. The Communication says, "This will help UK citizens who are resident in the EU27 to obtain long term resident status in the Member State in which they reside *if they fulfil the necessary conditions."* (our emphasis). This could be a reference to Art. 5 of the Long Term Residence Directive which is headed "Conditions for acquiring long term resident status". The conditions are those referred to above at (b)(ii)-(iv) – the adequate resources condition, the health insurance condition

and the integration condition. Alternatively, it could be a reference to the less onerous conditions set out in Directive 2004/38.

(3) In any event the Commission has no power to declare EU law: only the Court of Justice has such power, and there is no time before Brexit to test such an interpretation.

(4) With these points in mind we suggest a reading of Art. 5 of the Long Term Residence Directive which might enable this interpretation of the Commission's suggestion to stand up in law. The analysis is as follows:

(a) The Long Term Residence Directive is a Directive, and as such Member States have a degree of freedom as to how it is to be transposed into national law.

(b) Interpretation of the Directive also has to satisfy the general EU law principle of proportionality.

(c) A person who has, or is entitled to, permanent residence as an EU citizen has, at the time that entitlement arose, satisfied the conditions of Directive 2004/38 as to adequate resources and health insurance either directly or by working – see Art. 7(1)(a)-(c) of that Directive. Although the conditions of the two Directives are not identical they are similar and it would be disproportionate and unfair to those who have lived settled lives in a country on the basis of having satisfied the conditions of the 2004 Directive to require them to meet the conditions of the 2003 Directive which they might not be able to meet now. This is particularly true when they have in effect been lulled into a false sense of security by the 2004 Directive (and the legitimate expectation that their rights were irrevocable) which provides that after 5 years legal residence an EU citizen no longer has to meet the conditions of working, having adequate resources or health insurance (see Art. 16(1)), whether or not they have obtained a certificate of permanent residence (Arts. 19(1) and 25(1)).

(d) The requirement for integration measures is in any event optional for Member States and it would be disproportionate and unfair to people settled in a country as EU citizens to require them to demonstrate compliance now and in effect retrospectively: particularly if they are elderly.

(5) British in Europe calls upon the Commission to state *explicitly and urgently*:

(i) Whether its intention is that both the legal residence requirement *and* the conditions of Art. 5 of Dir. 2003/109 should be deemed to be satisfied by any British national who has or is entitled to Permanent Residence as an EU citizen at Brexit.

(ii) If so by what clear legal means can British nationals be guaranteed *now* that this will be the case in each of the EU27 States as a Communication setting out what the Commission considers in terms as unclear as these is not sufficient and is unlikely even to be considered clear enough to constitute soft law as regards this issue.

iv) Member States do have the power to grant long term residence status to TCNs who do not satisfy the conditions of the Long Term Residence Directive – see Art. 13. However, such status only applies in the Member State in question, and deprives the person in question of the rights under Chapter III of the Directive

which gives TCNs some limited rights to move and reside for longer than 3 months in other Member States.

v) Moreover all Member States have national laws implementing the Directive, some of which will be more rigid than others. If those national laws already preclude either a generous interpretation along the lines the Commission might be suggesting, or more generous conditions for long term residence permits in accordance with Art. 13 of the Long Term Residence Directive, then legislation in the Member States would be required before March 29, 2019.

d) *Workers: the Single Permit Directive (2011/98) and the Blue Card Directive (2009/50):* These two Directives regulate aspects of applications for the rights of TCNs to work in a Member State (unless covered by the long term residence Directive considered above).

i) The Blue Card Directive sets out criteria for admission of workers who have a contract or binding job offer for work as a highly-qualified worker. A visa or long-term residence permit may still be required by national law, and Member States can limit the number of workers admitted under the scheme. It does not apply to the self-employed. Furthermore the operation of the Blue Card Directive has been criticised by the Commission as fragmentary and ineffective, and it has been proposed that it be repealed and replaced with a more effective measure. Negotiations on the revised proposal now appear to be blocked.

ii) The Single Permit Directive lays down certain procedures, but *entitlement* to be admitted to work in a State is a matter for national immigration law. It too does not apply to the self-employed.

So, British nationals who are working but are not eligible to apply for long-term residence status will have to regularise their position by an application under the national law of the country in which they reside and/or work. In any event, the self-employed are not covered by any of these provisions.

e) *Residence for the purpose of research, studies, training etc:*
There is also a Directive (2016/801) which confers certain rights of entry and residence on TCNs for research, studies, training and related purposes. Because this only covers a very limited demographic, it is not considered further here. It clearly does not fill the gaps left by the Long-Term Residence Directive.

f) *Other specific Directives*
There are also specific directives dealing with TCN intra-corporate transfers and seasonal workers, but again these are not going to solve the problems of the majority of UKinEU.

ii. *The Family Reunification Directive (2003/86)* does confer rights of entry and residence for families of TCNs. However, the prior condition is that there be a TCN "sponsor" lawfully residing in the country under a residence permit for a year or more with a reasonable prospect of obtaining a right of permanent residence. Since at least one member of the family has to acquire residence rights as a TCN to be the sponsor, this

Directive does not solve the initial problem of getting those rights, but only confers dependent rights on that person's family members.

Summary of the scope of these TCN Directives

In short, whilst some of the Directives might, in the medium term, legitimise the residence and work rights of some UKinEU, their coverage is patchy and it is clear that a very significant percentage of British citizens will be unable to rely upon them. The Commission's proposal leaves all these as illegal immigrants.

IV. Limited rights conferred on TCNs

a) *Family reunion*

The range of family members with rights recognised by the Directive on TCN family reunification is more limited than that for EU citizens, which leaves open the question as to what would happen to relations living with a TCN who has succeeded in an application for residence rights but where such relations fall outside the scope of the Directive.

b) *Inter-State mobility*

The rights of TCNs to move to another Member State are dramatically more limited than our existing EU right of free movement. As the purpose of this Communication is to consider the position if there is No Deal compared to the position if the Withdrawal Agreement is ratified, we do not dwell on that point, as we have no right of free movement under the Withdrawal Agreement in any event.

c) *Equal treatment*

The Long Term Residence Directive confers a right to equal treatment with nationals of the State of residence across a range of areas, but the State can restrict this in several important areas, viz: access to employment or self-employment in areas where this is restricted by national or Union law to nationals[7], EU or EEA citizens; they may require language proficiency in relation to access to study or training; social assistance and protection may be limited to core benefits.

There are more extensive derogations for those workers who are covered by the Single Permit Directive.

The equal treatment rights of family members pursuant to the Family Reunification Directive are even more restricted and include a power for States to set a time limit of up to 12 months to carry out a review of their labour markets, during which period family members cannot work at all.

Shortcomings of the TCN acquis

We also note the 2011 EU Commission report into the transposition/implementation of the Long Term Residence Directive which described the situation, five years after it entered into force, as "deplorable." Several of the Member States that are home to the largest communities of UK citizens in the EU were found to be in contravention of key provisions of the Directive, including definition of status, refusal of status, giving long-term residents the

[7] Already evident in the French proposals for British nationals employed in the public administration, most commonly as language teachers.

right to choose between a permit under national immigration law or EU law, costs of applying for a permit, higher fees for tertiary education than are charged to EEA nationals, and quotas on work permits for long-term residents moving from one EU member state to another[8]. Under its Fitness Check, the EU is currently reviewing the workings of this Directive, but it could be some years before any reform is made.

Denmark

In addition to the above, of course, Denmark does not apply the EU's TCN acquis, so British nationals in Denmark are completely unprotected by the Commission's proposal.

What is to be done?

What the Commission is proposing is too little, too late. At the heart of the problem facing UKinEU27 in the event of No Deal is that we will become illegal immigrants at midnight on 29 March 2019 – i.e. in 4 months' time. No solution requiring 1.2m people *to apply* before then for individual permission to reside/work etc. is feasible, because there is simply not time for such applications to be processed.

Given the Commission's self-stated aim that "*citizens should not pay the price of Brexit"*, and given the need for urgent action, the obvious solution is for the EU to propose to the UK that the section of the Withdrawal Agreement dealing with citizens' rights be implemented as the only agreement which has been possible under Art. 50. The work has been done, there is time for this to happen and it is the only solution which avoids the need for legislation in 27 countries and the only solution which deals with the interlocking issues such as pension contributions and healthcare that cannot be dealt with unilaterally.

If the EU is not prepared to make this offer, then the only remaining solution is that there be legislation in all 27 countries to legalise our position by unilaterally granting such of the rights set out in the Withdrawal Agreement as can be conferred unilaterally. Such a solution would completely fail to address the problem of the interlocking issues and, lacking the force of an international Treaty, would be open to change at any time by national lawmakers. It would be very much the worst solution, but it would be better than simply asserting that we can all apply for such TCN rights as we might be able to get.

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[8] Report from the Commission to the European Parliament and Council on the Implementation of Directive 2003/109/EC COM (2011) 585 final: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/http%3A//ec.europa.euwhat-we-do/policies/pdf//1_en_act_part1_v62_en.pdf