BREXIT – WHY THE NETHERLANDS SHOULD SUPPORT RING-FENCING CITIZENS' RIGHTS IF THERE IS NO DEAL

EXECUTIVE SUMMARY

The problem

- If there is No Deal, unless something is done in the *next five months*:
  - 1.2m UK citizens in EU27 States will become illegal immigrants with no rights on 30 March 2019.
  - The UK will be able to remove the rights of the 3.5m EU citizens living there at any time.
- Citizens' Rights are different to all other issues being negotiated because:
  - They concern the lives of nearly 5 million human beings who exercised their EU right of free movement with the legitimate expectation that it was safe to do so;
  - Both sides have accepted this by making citizens' rights the first priority in the negotiations.

The solution

- Different solutions have been put forward including unilateral action by the UK and individual Member States or coordinated action across the EU27; 27 bilateral agreements with the UK; and an EU-UK agreement to safeguard citizens' rights either under Art. 50 (ring-fencing) or not.
- There is no doubt that **ring-fencing the Citizens Rights parts of the draft Withdrawal Agreement** is superior to all other solutions in that it is the only one which:
  - ✓ Guarantees that Citizens' Rights will be enforceable;
  - ✓ Enables the continuation of interlocking mechanisms essential for such matters as aggregation of pension contributions and the provision of health care;
  - ✓ Avoids the need for further complex negotiations, for which there is simply no time;
  - ✓ By being made under Art. 50 TEU avoids the need for ratification by each and every Member State;
  - ✓ Goes at least some way to honouring both sides' promises to treat those who had exercised their EU rights of free movement as their first priority;
  - ✓ Would finally, after over two years in limbo, enable those people to sleep at night.

How many people are at risk?

- There are between 100,000 and 150,000 Dutch citizens living in the UK (represented by *the3million*);
- There are around 50,000 British citizens living in The Netherlands (represented by *British in the Netherlands*)

What happens if there is no overall agreement under Art. 50?

If there is No Deal, then in the absence of legislative intervention, on March 30th 2019 the British in the Netherlands will be illegal immigrants with no rights at all. The Dutch in the UK will have rights under the European Union (Withdrawal) Act 2018, unless and until the UK Government decides to repeal all or some of these rights. In the absence of an international treaty the UK can do so at any time from March 30th.

The British in the Netherlands

The British in the Netherlands would not, as is frequently asserted, default to some EU law status of "Third Country National" ("TCN"). This is partly because there is no such thing as a defined status of TCN, merely a series of statutes[1] in which some TCNs get some rights, but the TCNs who get those rights and the rights which they get vary from one statute to another; not a single one of these statutes will apply to all UK citizens in the EU.

[1] For example, the long term residence directive, the family reunification directive, the single permit directive and the blue card directive - all of which only confer any rights upon application.

Significantly, the sole consistent feature of this TCN legislation is that it applies only to TCNs who are "legally resident" in their host state. Since the residence rights of the British in the Netherlands are entirely dependent on the EU Citizenship Directive, those rights fall away on March 30th when UK citizens cease to be EU citizens.

Thousands of people will lose not only their right of residence, but also their right to work, to provide services, to family reunification, to have their social security contributions in The Netherlands aggregated with those made in other EU countries, to healthcare, to social security etc.[2] At a stroke, and as a result of a referendum in which most of them had no right to vote, they lose all the rights considered essential in a civilised society.

Foreign Secretary Stef Blok said in June: ,,We laten deze mensen niet in de steek, ook in een onverhoopt 'no-deal' scenario zullen wij zorgen voor een fatsoenlijke oplossing voor het verblijf van Britse burgers in ons land na 30 maart 2019''[3].
We have no reason to doubt that, but swift action must be taken. This is because legislation needs to be in place and effective on March 30th and the drafting and approval of such legislation takes time; secondly, the continued uncertainty is causing serious, and in many cases pathological, anxiety among the British in the Netherlands; thirdly, if the solution to these problems involves agreement or discussion with the UK and/or other EU states, then time is very short indeed.

Dutch nationals in the UK
Although the 2018 Act preserves most of the EU rights of the Dutch in the UK, this is a chimera because almost the only constitutional rule in the UK is that Parliament is sovereign: it is possible for Parliament to overturn any previous Act of Parliament. Therefore, if there is No Deal this, or a future Parliament, could repeal, without difficulty, all or some of the citizens' rights EU citizens hold thanks to the 2018 Act. Moreover, the 2018 Act gives sweeping powers to the Government, so EU citizens' rights can quickly be undermined by government without intervention by the Parliament. The only safeguard against that is an international treaty, given that the UK customarily abides by those.

Moreover, a number of their rights, such as aggregation of pension contributions, mutual recognition of qualifications, health care and social security benefits, depend on interlocking EU-wide mechanisms. Unilateral UK legislation is incapable of continuing these, and without EU agreement fine words become devoid of any content.

What are the possible solutions?
Ring-fencing the Citizens' Rights part of the Withdrawal Agreement
The obvious solution is to ring-fence the Citizens' Rights part of the Withdrawal Agreement ("WA"). In other words: for the negotiators to agree, now, that even if they can agree nothing else, the agreement already made in draft on Citizens' Rights will stand as the only agreement under Article 50.

What is different about Citizens' Rights is that both sides have said from the outset that preserving them is their number one priority, to be dealt with quite apart from commercial considerations. On the assumption that this was said honestly, neither side has anything to gain from making the Citizens' Rights agreement conditional on any other. We are not bargaining chips.

[2] For example with aggregation of contributions: Italian law requires someone to have contributed for 20 years in Italy to be entitled to any pension. Without the aggregation system, a UK citizen who has worked for 15 years in the UK, 15 in Germany and then 15 in Italy would have no right at all to an Italian pension.
[3] https://www.ad.nl/politiek/nederland-zorgt-voor-oplossing-britse-burgers-na-brexit~aec7688c/

The advantages:

1. *Simplicity* in an otherwise complex situation: the time-consuming work of reaching agreement on the detail has already been done, and both parties are content with what they have agreed[4].
2. *Swift ratification:* As an agreement under Article 50, it would fall within the *exclusive competence of the Union* and would not require ratification by every national Parliament.
3. *Internationally legally binding:* As an international Treaty, it would not be open to the UK (or any individual Member State) to ignore it: the rights of Dutch nationals in the UK would be *genuinely protected*.
4. *Reciprocity:* The WA provides for the continuation of those *interlocking mechanisms* which are essential to vital elements of Citizens' Rights: most obviously the aggregation of social security contributions for people of working age (79% of UK citizens in the EU are of working age or younger), the reciprocal provisions for health care and payment of social security and other benefits, principally for pensioners.

There is nothing legally to prevent this. The principle that *"nothing is agreed until everything is agreed"* do not derive from Article 50, but exclusively from the EU's Negotiating Directives for Brexit – their source is political not legal.

It has been objected, "Why just ring-fence the Citizens' Rights chapter, when so much else has been agreed?" We would agree that as much of what has been agreed as can be ring-fenced and protected should be. We would have no problem with ring-fencing more than Citizens' Rights but there is a limit to how much is possible: realistically, the UK is not going to pay the divorce bill in the absence of a complete agreement. But the fact that you cannot ring-fence *all* that has been agreed is no argument for not ring-fencing *what you can*. And there is a strong moral argument for *"putting citizens before money and markets"*, as Manfred Weber MEP said at the September plenary session of the EP in Strasbourg.

<u>An EU-UK agreement **not** under Art. 50</u>

Lacking the "*exceptional horizontal competence* to cover all matters necessary to arrange the withdrawal"[5], any treaty not made under Art. 50 will have to go through far more complex processes for agreement and ratification, requiring ratification by all national parliaments, which makes it highly unlikely to be possible in the time remaining.

Moreover, if the content is to be the same as that agreed in March, why not simply ring-fence that agreement? If it is to be different, then even more time will be required to argue about the content.

Further, prolonged renegotiation outside of Article 50, within a context of distrust between the UK and the EU as Brexit negotiations have failed, is likely to weaken the guarantees so far agreed upon in the draft Withdrawal Agreement.

<u>Bilateral agreements</u>

It has been suggested that there might be a series of bilateral agreements between the UK and individual EU Member States. Such a course is far less advantageous to all concerned for the following reasons:

1. It would require *27 UK-MS bilateral agreements to be made in 5 months*: that is simply unrealistic given the limited resources of the UK negotiators, who would have to be engaged in each one of these negotiations,

[4] Though improvement remains possible; e.g. giving back the free movement right of UK citizens in the EU in exchange for EU citizens with permanent residence in the UK having a life-long right to return.

[5] EU Council Negotiating Directives 22/5/17 para. 5, summarising the unique power conferred by Article 50 TEU on the Union to conclude a treaty.

and the time required by all the national governments and Parliaments to approve and implement such agreements. Italy could possibly implement this swiftly through a decreto, but this is not true of every single Member State. The solution must work fairly and effectively for *all* EU27 or it might lead to discrimination between EU nationals in the UK depending on their nationality and to British citizens living in different Member States.

2. *Enforcement* of rights, particularly for EU citizens in the UK whose "hostile environment" to immigration is well-documented, is a vital part of any agreement. The UK is not going to agree to continuing CJEU jurisdiction in 27 separate agreements, and the overall governance provisions which are likely to be possible in a EU-UK agreement will be much stronger than those available to single Member States under bilateral treaties.
3. Bilateral agreements would not be able to deal with the *interlocking issue*s possible in a ring-fenced EU-UK agreement. They could not provide a mechanism for aggregating social security contributions for someone who has worked, in the case of a UK-Italy bilateral, also in France and Germany. Nor could they provide the solution to the provision of health care for a UK pensioner living in Italy who falls ill while on holiday in Germany.

Unilateral provision

The final logical possibility is for unilateral provision, by the UK on one side and either the EU27 as a whole or individual Member States on the other. This is the worst of all possible solutions[6] for the following reasons:

1. It would be completely *unenforceable*. Either side could simply change its mind and go back on what it had said it would do. This is not a fanciful consideration in the current climate. It would be a particular concern to EU citizens living in the UK where an already toxic and politically charged atmosphere would be further poisoned by a breakdown in the negotiations.
2. There would be *no fixed reciprocity*, with a continuing risk that the rights of each group in its host state would be reduced in retaliation for a reduction in corresponding rights on the other side of the Channel – in short, a race to the bottom.
3. None of the *interlocking mechanisms* for pension contributions or health care and social security benefits could be covered.

In conclusion

The optimum solution in the event of failure to achieve an overall Deal is a no-brainer. No other solution offers the advantages of ring-fencing the Citizens' Rights part of the WA under Article 50. All that is required is the political will to make this happen. As Sophia in t Veld, Dutch MEP, said recently[7]: "Het Europees Parlement heeft de rechten van burgers in het Brexit-tumult bovenaan het prioriteitenlijstje gezet. Maar wij kunnen het niet alleen. De nationale regeringen moeten in beweging komen, en laten zien dat ze er niet alleen zijn voor bedrijven, maar ook en vooral voor mensen."

With only 5 months remaining, there is no time to delay any further, and a political agreement on ring-fencing as the default option should be made now. In the words of the Italian author Primo Levi, "If not now, when?"

British in the Netherlands, the3million, October 2018

[6] Doing nothing is worse still, but does not even purport to be a solution.

[7] https://www.sophieintveld.eu/brexit-hulp-voor-bedrijven-burgers-staan-alleen/