

“DON’T THROW OUT THE BABY WITH THE BATH WATER”

A Q&A ON POSSIBLE OBJECTIONS TO RING-FENCING

In order to answer all possible objections to ring-fencing the Citizens’ Rights part of the Withdrawal Agreement (“WA”) if the Agreement is not ratified by the UK, we imagine a conversation between British in Europe / the3million (“BiE/t3m”) and a fictional person called “NRF” (No Ring- Fencing) who opposes the idea. NRF raises every objection that we can imagine or have ever heard, some but not all of which come from the Commission itself.

BiE/t3m:	<p>We should start by saying what it is that we are seeking at this stage. We are asking:</p> <ul style="list-style-type: none"> • That the EU make a political statement that, if and only when it is certain that the WA is not going to be ratified, it would agree to ring-fence the Citizens’ Rights part of the Agreement. • That the European Council should amend its negotiating guidelines to enable this to happen, and should instruct the Commission to prepare for this possibility. <p>But, NRF, we would like to hear your objections to this suggestion.</p>
NRF:	<p><i>“We will not negotiate mini deals, because negotiating such mini deals outside the withdrawal agreement would imply that the negotiations have failed.”¹</i></p>
BiE/t3m:	<p>We are not suggesting that a mini deal be negotiated at this stage, but unless the WA is ratified there will come a time when the negotiations <i>have</i> failed. At that time all we are suggesting is that the parties salvage that part of the WA which has already been negotiated, has never been controversial and was never the quid pro quo for something that was. The importance of the Citizens’ Rights (“CR”) parts of the WA to 5 million people is so great that it would be wholly disproportionate to refuse to ratify that part because of dissatisfaction that the rest could not be agreed.</p>
	<p>In any case, on your argument, making <i>any</i> plans for No Deal implies that the negotiations have failed. Both sides are rightly making such plans <i>in case</i> the negotiations fail. If Citizens’ Rights are, as has been said so often, the first priority, then it is simply incomprehensible that making the best possible contingency plan for them should be ruled out when other plans are being made.</p>
	<p>We are not asking for any ring-fenced agreement to be adopted <i>now</i>, but we are asking for a political commitment now to make the CR parts of the WA the only Art. 50 agreement if the UK refuses to ratify the whole and for preparations to be made already for ring-fencing in case that happens.</p>
NRF:	<p><i>If we reopen the CR part of the WA, then we open the door to all the rest of it being reopened, which we are not prepared to do.</i></p>
BiE/t3m:	<p>We are not asking that any part of the WA be reopened. On the contrary, we are trying to preserve it. All that we are asking is that a part which has been agreed is honoured. As we have said, unlike, say, the divorce bill the CR part was never the quid pro quo for anything else, so preserving that part does not require any other part to be reopened.</p>
NRF:	<p><i>We have been clear that the No Deal contingency planning “should not replicate the benefits of membership of the Union, nor the terms of any transition period, as provided for in the draft Withdrawal Agreement”.</i></p>
BiE/t3m:	<p>The target of the injunction not to replicate the benefits of membership of the Union is clearly the UK, because only the UK is leaving. But the largest group of citizens to be hit by the refusal to ring-fence are not UK citizens but those of the EU27. There are nearly 3 times as many EUinUK as UKinEU, so even if the aim is to target the UK by providing a worse deal for its</p>

¹ Commission spokesperson Mina Andreeva in response to the Costa amendment.

	citizens, the means of doing so completely misses the mark.
	Moreover, even if it were otherwise, it would be wholly unjust to punish UKinEU for their country's decision to leave the EU. More than 60% of them were deprived of a vote in the referendum by the rule that UK citizens lose voting rights after 15 years residence abroad.
	Further, if the intention is to use refusal to contemplate ring-fencing as leverage to make the UK more likely to ratify, it completely misunderstands the UK. The level of the UK's interest in protecting the rights of its citizens in the EU is clear from the refusal of the Prime Minister and all 3 Secretaries of State for Exiting the EU to even meet representatives of those citizens. Not a single UK Member of Parliament has ever said that s/he would vote for or against the Withdrawal Agreement because of the Citizens' Rights part. It would also not change the dynamics of the negotiations as the primary areas that matter to the UK are the transition phase and the future trade agreement.
NRF:	<i>It is not legally possible to make a separate agreement on Citizens' Rights under Article 50 if the WA is not ratified.</i>
BiE/t3m:	This objection is completely misconceived. Art. 50 mandates the Union to conclude an agreement, but it cannot guarantee that an agreement will be made because to do so requires agreement and ratification by both sides. If the only agreement which both sides are prepared to ratify is the Citizens' Rights section, then that becomes the only (residual) agreement under Art. 50. See Prof. Smismans' article "Ring-fencing Citizens' Rights in the Brexit negotiations" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3324156 . As this is the first time that Art. 50 has been engaged, there is no precedent to contradict the obvious sense of Prof. Smismans' argument. Further as the Wightman case shows, the CJEU is not afraid to take into account general principles of EU law and the context in which Article 50 was adopted to reach a pragmatic approach and indeed has already highlighted the importance of citizens' rights in that case.
NRF:	<i>The European Council's negotiating guidelines provide that "nothing is agreed until everything is agreed", so it is not legally possible to make a ring-fenced agreement on CR alone.</i>
BiE/t3m:	The content of the negotiating guidelines was a political decision, and the European Council remains free to change them at any time. If it wants to make a ring-fenced agreement, all it has to do is amend the guidelines. If, as some believe, the guidelines were discharged by the conclusion of the negotiations last November, all that is required is a new guideline. There is no legal barrier to doing this, it is a matter of political will.
NRF:	<i>The Costa amendment was simply a UK ploy to reopen the negotiations or make it easier for them to reject the Irish backstop.</i>
BiE/t3m:	The Costa amendment was opposed by Theresa May until she had no choice but to support it. She strongly opposed the amendment in her Statement to Parliament only the day before it was passed. It is therefore clear that it is not a ploy, but represents the one decent thing that the UK Parliament has achieved in the whole sorry Brexit saga. It did what it could to prevent 5 million citizens from being collateral damage of No Deal. And it did so against the Government's wishes. British in Europe and the3million stand by their counterparts, the citizens of Northern Ireland and the Republic, in their desire to avoid a hard border, and fully support the measures agreed to achieve this including the Irish backstop. The Costa amendment has no effect on the Irish backstop because those who oppose the backstop will continue to do so regardless. Not one has ever suggested that s/he would have supported the backstop in order to safeguard the CR part of the agreement but will oppose it if CR are ring-fenced. The opponents of the backstop, who are all in the DUP or the right wing of the Conservative Party, oppose it with a messianic zeal. To them it is a matter of principle, far outweighing the protection of citizens' rights.
NRF:	<i>Citizens will be adequately protected by the No Deal contingency plans, so there is no need for a ring-fenced agreement.</i>

BiE/t3m:	Neither EUinUK nor UKinEU will be adequately protected by the present, or any unilateral, contingency plans.
	Unilateral legal provision is incapable of giving adequate protection precisely because it is unilateral. Being unilateral, it is open to the country making the provision to change it at any time. This is already clear from the UK's Immigration and Social Security Coordination (EU Withdrawal) Bill - https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/18309.pdf . Section 1 repeals the statutory provisions which preserve the existing rights of EUinUK and Section 4 confers on ministers a Henry VIII power to substitute new rights. On the other side of the Channel, the uncertainty has caused France to respond by legislating that any rights conferred by its No Deal ordonnance may be suspended by decree if the UK does not afford reciprocal treatment to French citizens in the UK - https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038100655&categorieLi en=id Art. 19. Spain has adopted a similar provision. In short, there is no certainty for anyone in these provisions.
	Moreover unilateral provision is incapable of dealing satisfactorily with interlocking issues such as reciprocal healthcare, social security coordination (including aggregation of contributions) and mutual recognition of qualifications.
	Treatment of EUinUK under the UK's contingency plan, even if not changed under the Immigration etc Bill, is already worse than their treatment under the WA. In a No Deal scenario the UK has chosen to deny them appeal rights and to drastically curtail their right to family reunification: in addition of course if the WA is not ratified they lose the protections in terms of governance and CJEU oversight which that agreement contains. Considering the poor reputation of the UK Home Office and the recent Windrush scandal, EUinUK are rightly anxious to have such protections.
	Treatment of UKinEU under the Commission's contingency plan is not yet clear because most Member States have not yet published legislation. However, it is almost certain that a large number of UK citizens lawfully residing in the EU27 will lose essential rights and many will have to give up their homes if they are able to return to the UK, which in itself is extremely problematic. For an overview see the BiE paper, "No Deal preparedness – why the Commission's proposal does not work", December 2018 - https://britishineurope.org/wp-content/uploads/2019/02/BiE-response-to-Commissions-contingency-paper-final.pdf
NRF:	<i>If the CR part of the WA is to be ring-fenced, then so will those parts of the WA which deal with governance of and CJEU jurisdiction over Citizens' Rights.</i>
BiE/t3m:	We agree, but they have already been agreed in that context. It is noteworthy that this was not raised as an objection to the Costa amendment either by Theresa May in her Statement the day before or by any of the arch-Brexiter MPs.
NRF:	<i>We don't need to talk about this yet, let's wait until we know for sure that we are definitely heading for a no deal.</i>
BiE/t3m:	While this sounds sensible in the abstract, in practice it is not possible. The UK might make this process go right to the wire, playing a high-stakes game which might leave the UK leaving the EU by accident with only days' notice. A residual WA will need to be prepared, and pass through the correct procedural steps to be ratified by both the European Parliament and the UK Parliament, and adopted by the Council of the EU. Therefore at the very least we need to get agreement now for the Commission to do preparatory work to create a residual citizens' rights agreement in case negotiations fail and clarity about a timeline that would ensure the agreement will be in place at the moment the UK leaves the EU.
NRF:	<i>The Commission doesn't want to expend resource preparing such a residual agreement while negotiations are still ongoing.</i>
BiE/t3m:	It makes a lot more sense for the Commission to expend resource preparing such a residual agreement, than the more complicated Contingency Action Plan co-ordination work that is ongoing for citizens' rights.

NRF:	<i>Even if the WA is not ratified there will have to be negotiation at some point on the future relationship, and these issues can be dealt with then.</i>
BiE/t3m:	<p>It would be wholly unsatisfactory for either EUinUK or UKinEU to have to wait for unspecified provisions of a possible agreement at an indeterminate time in the future. Rights have to be guaranteed from the moment of Brexit and to be continuous thereafter.</p> <p>Moreover, after Brexit, outside of the Art.50 process, the EU may not have the competence to agree what has been agreed in the WA.</p> <p>Finally, if agreement is not made under Art. 50 before Brexit any further agreement will require to be agreed unanimously and ratified by all EU 27 parliaments (including, in some cases, regional parliaments) as well as by the UK parliament.</p>
NRF:	<i>"The Commission has consistently made clear that rights of EU citizens in the United Kingdom and UK nationals in the EU are our top priority, they should not pay the price for Brexit."</i>
BiE/t3m:	<p>Hypocritical and empty words if our rights are not ring-fenced in the event of No Deal. We, both UKinEU and EUinUK, are the Europeans who have most directly embraced the opportunities which the EU promised us and are 5 million of only around 17 million EU citizens who use their free movement rights. At this crucial time in the EU's history, its institutions should not make us the collateral damage of a negotiation which fails because of the inability of the UK Government to get the WA through Parliament. If the EU makes us collateral damage it will enable the UK to cast itself as "the good guys" and will give support to those who doubt the value of the Union itself. It would also send a message for the future to those who like us consider embracing the opportunities that EU citizenship brings.</p>