



Northern Ireland
Assembly

Committee for Communities

Report on the Legislative Consent Memorandum on the Immigration and Social Security Co-Ordination (EU Withdrawal) Bill

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Powers and Membership

Powers

1. The Committee for Communities is a Statutory Departmental Committee established in accordance with paragraphs 8 and 9 of Strand One of the Belfast Agreement and under Assembly Standing Order No 48. The Committee has a scrutiny, policy development and consultation role with respect to the Department for Communities and has a role in the initiation of legislation. The Committee has 9 members, including a Chairperson and Deputy Chairperson, and a quorum of 5.

2. The Committee has power to:
 - consider and advise on Departmental budgets and Annual Plans in the context of the overall budget allocation;
 - approve relevant secondary legislation and take the Committee Stage of relevant primary legislation;
 - call for persons and papers;
 - initiate enquiries and make reports; and
 - consider and advise on matters brought to the Committee by the Minister of Communities.

Membership

3. The Committee has 9 members, including a Chairperson and Deputy Chairperson, and a quorum of five members. The membership of the Committee is as follows:

Paula Bradley MLA (Chairperson)
Kellie Armstrong MLA (Deputy Chairperson)
Andy Allen MBE MLA
Jonathan Buckley MLA
Mark Durkan MLA
Sinéad Ennis MLA
Fra McCann MLA
Robin Newton MBE MLA
Carál Ní Chuilín MLA

Background

4. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill was originally introduced at Westminster in the 2017-2019 session but fell when Parliament was prorogued before the December 2019 General Election. It was subsequently re-introduced in the House of Commons on 5 March 2020 and the report stage and third reading of the Bill were held on Tuesday 30 June 2020. The amended Bill was introduced to the House of Lords on 1 July 2020.
5. There are three main measures in the Bill.
6. The primary purpose of the Bill is to end the EU's rules on free end of the movement of persons in respect of the UK at the end of the transition period (31 December 2020). These rules are currently retained in EU law by the EU (Withdrawal Act) 2018.
7. In practice this means that EU nationals who are not resident in the UK before the end of the Transition Period will be required to obtain permission for themselves and their family members to enter and remain in the UK under the UK immigration Act 1971.
8. On this specific issue it is important to emphasise that immigration and freedom of movement are excepted matters under *Schedule 2 of the Northern Ireland Act 1998* and come under the remit of the Home Office.
9. The Bill will therefore repeal the main retained EU law which relates to free movement thereby bringing EEA nationals and their family members under UK immigration control.
10. Secondly, the Bill will protect the status of Irish citizens in UK immigration law once their EU free movement rights end.
11. Thirdly, the Bill will introduce powers to enable the Westminster Government and devolved authorities to amend retained EU law governing social security co-ordination thereby enabling policy changes to be delivered post EU exit.

Part 2 of Bill: Social security co-ordination

Clause 5: Power to modify retained direct EU legislation relating to social security co-ordination

12. While the Bill extends to all of the UK, immigration is not a devolved matter and therefore not within the devolved competence of the Assembly.

13. However, social security is a devolved matter and the NI Assembly therefore does have a role to amend aspects of the social security co-ordination regulations.

14. Clause 5 (and consequently Schedules 2 and 3) of the Bill is therefore the key clause for consideration. It states that:

An appropriate authority may by regulations modify the retained direct EU legislation mentioned in subsection (2).

The retained direct EU legislation is –

(a) Regulation (EC) No 883/2004 of the European Parliament and of the Council on the co-ordination of social security systems;

(b) Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004;

(c) Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community;

(d) Regulation (EEC) No 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71;

(e) Regulation (EC) No 859/2003 extending Regulation (EEC) No 1408/71 to nationals of non-EU Member Countries.

15. In short, the clause (as introduced in the Bill) allows the UK government and/or, where appropriate, a devolved authority to make regulations in relation to new policies on social security co-ordination.

16. Any new policies will be subject to the outcome of negotiations with the EU.

17. As noted in the Explanatory Notes which accompanied the Bill subsection (3) sets out that such regulations can make different provision for different categories of person and for different purposes, as well as making supplementary, incidental, consequential, transitional, transitory or saving provision.

18. Subsection (4) states that consequential provision includes modification to provisions made by or under primary legislation or to retained direct EU legislation not listed in subsection (2).

19. Subsection (5) ensures any directly effective rights that will have been saved by section 4 of the EU Withdrawal Act 2018 at the end of the transition period, cease to apply insofar as they are inconsistent with, or are otherwise capable of affecting, the interpretation or application of provision made by regulations under clause 5.
20. Subsection (8) indicates further provision about the power of devolved authorities to make regulations under this clause is set out in Schedule 2. This refers, for example, to regulations being made within the competence of the devolved authority; the requirement of consent by the NI Secretary of State where, for example, a NI department acts alone in regulations under clause 5; where the consent of a Minister of the Crown is required.

Amendments to the Bill

21. The Home Secretary, Priti Patel, proposed 31 amendments to the Bill all of which were carried in the House of Commons on 30 June (Appendix 2).

22. The amendments stem from the decision of the Scottish Government not to proceed with an LCM. Therefore, the reference in the Bill to ‘Scottish Ministers’ acting jointly with Ministers of the Crown has been removed.

23. The relevant amendments are:

Clause 5, page 4, line 31, leave out “devolved authority” and insert “Northern Ireland department”

This amendment and amendment 2 remove the power conferred on Scottish Ministers (acting alone or acting jointly with a Minister of the Crown) to make regulations under clause 5.

Amendments 3, 4 and 6 to 31 are related consequential amendments.

Clause 5, page 4, line 32, leave out “devolved authority” and insert “Northern Ireland department”

Clause 5, page 4, line 33, leave out “of devolved authorities”

24. This means that under the amended Bill, Scottish Ministers will have no power to amend EU retained legislation relating to social security co-ordination either acting alone or jointly with a Minister of the Crown (amendments 1 and 2).

25. In the *amended Bill*, introduced to the House of Lords on 1 July, a Northern Ireland Department retains the power to amend EU retained law relating to social security legislation.

Committee Consideration of the Bill and Legislative Consent Motion

26. The Committee was briefed on the Bill and Legislative Consent Memorandum on 11 June 2020 (Appendix 3).
 27. The Committee was advised that the UK Ministers for Future Borders and Immigration and Disabled People Health and Work, asked Minister Hargey to agree that the Northern Ireland social security provisions remain in the Bill and to bring forward the necessary legislative consent motion.
 28. The Committee was also advised that the Executive had agreed to proceed with a Legislative Consent Motion on this issue.
 29. It is therefore the third aspect of the Bill referred to above which has specific relevance to the Legislative Consent Motion i.e. regulation in respect of social security co-ordination.
 30. The Committee was advised that the Bill makes provision for retained EU regulations, which relate to the current social security co-ordination scheme, to be amended by the Westminster Government and/or a devolved authority.
 31. These regulations are noted in paragraph 14, above.
 32. The Committee was advised that this provision in the Bill will allow any policy changes to be delivered at the end of the Transition Period depending on the outcome of negotiations with the EU on the future relationship.
 33. Members noted that despite the publication of the *UK government's vision of its future relationship with the EU* it was uncertain what the outcome of those negotiations would be.
 34. The Committee recognised that the retained regulations are a complex mix of excepted and devolved matters and that the joint approach to amending these regulations i.e. between a Minister of the Crown and the NI Assembly, offers the potential to amend the law in a coherent way.
 35. However, members were also concerned about the degree to which the future development of legislation would be a joint endeavour between UK ministers and the NI Assembly.
 36. Members were advised that devolved competence would be respected and require the approval of the Assembly before they were made.
 37. Members also questioned officials on the implications for the Assembly to take forward its own Bill e.g. any associated costs.
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38. Officials stated that they were working on the assumption that if an Assembly Bill made changes that resulted in additional costs for benefits, that did not apply to the rest of the UK, then the NI Executive would have to pay for those additional costs.
39. Members asked about the viability or advantage of taking forward an Assembly Bill on these matters. However, officials noted that what the LCM was actually doing was giving the Assembly the power to make regulations, as required, following a future agreement between the UK and EU and it was not making any changes to specific benefits.
40. Officials went on to note that the relevant and existing procedures, and therefore control, in respect of regulations would still be applicable. Therefore, any subsequent regulations would come before the Committee and/or the Assembly for consideration and approval.
41. Officials noted that in respect of regulations referred to in paragraph 14 above there are areas that fall under Schedule 2 of the NI Act 1998 (excepted matters) on which the Westminster government would not consult with the Assembly. However, they went on to say that they do work very closely with their counterparts on social security regulations and would continue to do so. In turn, the Committee would continue to play its role in the scrutiny of those regulations.
42. Members noted that the Assembly had deviated from GB on welfare reform and queried whether the Bill/LCM might somehow constrain similar mitigations in the future, and if perhaps an Assembly Bill would therefore be preferable. However, officials reiterated that whether it was this Bill or a bespoke Assembly Bill, both would simply seek to give powers to the Assembly to make regulations in respect of social security co-ordination.
43. Members also queried what the detrimental impact on people here would be if an Assembly Bill was the preferred option rather than supporting the LCM to allow Westminster to take forward the legislation. Officials noted that they could only speculate about this in the absence of an agreement between the EU and UK but again emphasised that the Bill was only giving the Assembly the power to make regulations on social security co-ordination.
44. Members recognised that the LCM did not deal with the specifics of social security benefits but rather gave the Assembly the powers to make regulations in respect of social security co-ordination. However, some members noted their general uneasiness with the use of an LCM rather than bespoke Assembly legislation.
45. The Committee noted a draft Legislative Consent Motion at its meeting of 1 July 2020 but recognised that as a result of the Bill being amended at 3rd reading, this motion would also change.

46. However, at its meeting of the 8th July the Committee agreed, in principle, to the extension to Northern Ireland of the provisions of the Immigration and Social Security Co-ordination Bill as contained in the amended clause 5 of, and Schedules 2 and 3 to, the Bill through an appropriate legislative consent motion.
47. The Committee agreed that it would give due consideration to any such motion brought by the Minister and that the department should continue to provide updates on any subsequent amendments to the Bill.

Appendix 1: Explanatory Notes

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the [Insert Bill/Act Title] Bill as introduced in the House of Commons on [Enter Publication Date Using Dropdown Menu] (Bill [Bill or Chapter Number]).

- These Explanatory Notes have been prepared by the [Enter text for Responsible Department, Member or Peer] in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament. The Department for Work and Pensions and Her Majesty's Revenue and Customs have contributed to the notes on clause 5 and Schedules 2 and 3 which relate to Social Security Co-ordination.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 The purpose of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (the Bill) is to end free movement of persons in UK law and make European Union (EU), other European Economic Area (EEA) and Swiss citizens, and their family members, subject to UK immigration controls. The Bill ends the EU’s rules on free movement that are retained in UK law by the European Union (Withdrawal) Act 2018 (“EUWA 2018”), as amended by the European Union (Withdrawal Agreement) Act 2020 (“EUWAA 2020”) and repeals section 7 of the Immigration Act 1988, which exempts EU citizens from requiring leave to enter or remain in the UK. The Government’s intention is at the end of the transition period, 31 December 2020, citizens of the EU, the EEA EFTA states of Iceland, Norway and Liechtenstein, and of Switzerland, and their family members, will require permission to enter and remain in the UK under the Immigration Act 1971. The Bill protects the immigration status of Irish citizens once free movement ends. It also contains provision for the Government (and/or, where appropriate, a devolved authority) to amend retained direct EU legislation relating to the social security co-ordination regime, which is retained in UK law by the EUWA 2018.
- 2 EU, other EEA EFTA and Swiss citizens are collectively referred to as “EEA citizens” in these Notes for brevity, others are referred to as “non-EEA citizens”. Unless the context requires otherwise, and/or it is stated otherwise, references to “EEA citizens” in these Notes exclude Irish citizens.
- 3 The Bill was first introduced in the Commons in the previous Parliament where, in the 2017-2019 session, it reached Report stage after completing a Public Bill Committee. The Bill fell when Parliament was prorogued before the December 2019 General Election. There have been no substantial changes to the content of the Bill since it was previously considered in the last Parliament. The only changes made are minor drafting clarifications in places, and updates to the list of retained EU law to be repealed to avoid duplication of changes already made through the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (2019/745) which come into force on 31 December 2020.
- 4 The measures in the Bill include:
 - repealing the main retained EU law relating to free movement and bringing EEA citizens and their family members under UK immigration control to enable the introduction of the global points-based immigration system;
 - protecting the status of Irish citizens in UK immigration law once their EU free movement rights end;
 - a power to amend, by regulations, legislation in consequence of, or in connection with the ending of free movement. This will enable the alignment of treatment for EEA and non-EEA citizens as part of the future immigration system, subject to saving certain provisions where appropriate and in accordance with the terms of the UK’s withdrawal from the EU; and
 - powers to amend, by regulations, retained EU law governing social security co-ordination, enabling policy changes to be delivered following the end of the transition period, and depending on the outcome of negotiations with the EU on the future relationship.

Policy background

- 5 There are currently two immigration systems in the UK: one governing the immigration arrangements for EEA citizens and their family members and one governing the arrangements for non-EEA citizens. Although the UK is no longer a member of the EU, the EU's rules on free movement of persons will remain in force until the end of the transition period (31 December 2020) and thereafter until the retained EU law on free movement is repealed.
- 6 The movement of people between EEA member states (EU member states and Iceland, Norway and Liechtenstein) is governed primarily by the EU Free Movement Directive 2004/38/EC. This sets out the rights of EEA citizens and their family members to move and reside freely within these territories. The Directive is primarily implemented in UK law through the Immigration (European Economic Area) Regulations 2016 ("EEA Regulations"). The EEA Regulations also extend to citizens of Switzerland and their family members whose free movement rights are governed by the EU/Swiss Agreement on the Free Movement of Persons. As the EEA Regulations extend to citizens of the EEA and Switzerland, measures in Part 1 of the Bill will extend to these nationalities as well, except clause 2 which relates only to Irish citizens.
- 7 Non-EEA citizens (other than those who are family members of EEA citizens) require permission to enter and stay in the UK under the Immigration Act 1971 ("the 1971 Act"). This permission is given, or refused, on a case-by-case basis according to the UK Immigration Rules. The detailed requirements a person must meet to be granted leave to enter and remain are set out in the Immigration Rules, which are laid before Parliament under the 1971 Act.
- 8 Following the UK's exit from the EU on 31 January 2020, the free movement of people continues to apply in UK law by virtue of the EUWA 2018, as amended by the EUWAA 2020, until the end of the transition period. The Government's intention is to repeal the free movement legislation at the end of the transition period so that from 2021, EEA citizens and their family members who come to the UK after that date will be subject to UK immigration laws and will be required to have permission to enter and remain under the 1971 Act.
- 9 The Government has legislated to protect resident EEA citizens and their family members through the EUWAA 2020, which protects the residence rights of EEA citizens and their family members who are resident in the UK by the end of the transition period. The Government fully opened the EU Settlement Scheme (EUSS) to all EEA citizens and their family members on 30 March 2019. The Scheme is set out in the Immigration Rules to enable EEA citizens and their family members to apply for UK immigration status, so their current rights continue, and their status is clear when the new global points-based immigration system begins. The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 made under the EUWAA 2020, provide individuals who apply under the EUSS or for an EUSS family permit or travel permit, after 31 January 2020, with a right of appeal against decisions affecting their entitlement to enter and remain in the UK under the EUSS, and against decisions in relation to applications for EUSS family permits or travel permits.
- 10 Those individuals who have a right to apply under the EUSS will have until 30 June 2021 to do so, provided they arrived in the UK by the end of 2020. This period of six months between the end of the transition period (31 December 2020) and 30 June 2021 is referred to as 'the grace period' and is a requirement of Articles 18(1)(b) and 18(2) of the UK-EU Withdrawal Agreement (and equivalent provisions in the EEA EFTA and Swiss citizens' rights agreements). Statutory instruments to be made under the powers in the EUWAA 2020 will protect EEA citizens and their family members' existing rights of residence, entry and exit until then. These savings will also extend to those with pending applications to the scheme and those with unresolved appeals. The Government will also bring forward a statutory instrument to ensure individuals who are in the UK as frontier workers by the end of the transition period can continue working from January 2021 onwards. Frontier workers are individuals who are resident outside the UK, but employed or self-employed in the UK.

- 11 The Government set out in its manifesto in 2019 that once free movement ends, it will deliver a new points-based immigration system to attract the brightest and best talent from around the world. The Government commissioned advice from the Migration Advisory Committee (MAC) on a points-based immigration system as well as on salary thresholds in the immigration system. The MAC published its report on both issues on 28 January 2020. The Government published its policy statement “The UK’s Points-Based Immigration System” on 19 February 2020 setting out further information on the new immigration system for EEA and non-EEA citizens. The future requirements which will apply to EEA citizens wishing to come to the UK from January 2021 (and who were not resident in the UK prior to that) will be set out in the Immigration Rules as is the case now for non-EEA citizens.
- 12 The Bill clarifies the status of Irish citizens in the UK once their EU free movement rights end. Since the 1920s British and Irish citizens have enjoyed a unique status in each other’s State, distinct from that later enjoyed as a consequence of EU citizenship. Section 2(1) of the Ireland Act 1949 declares that “notwithstanding that the Republic of Ireland is not part of His Majesty’s dominions; the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the UK”. The fundamental provisions for the immigration status of Irish citizens in UK domestic law are provided for in the Immigration Act 1971, however these provisions only cover Irish citizens who enter the UK from within the Common Travel Area (CTA). Irish citizens travelling from outside the CTA currently enter under the Free Movement Directive 2004/38/EC. The Bill will address this disparity and protect the status of Irish citizens; confirming their right to enter and remain without permission when free movement rights end, irrespective of from where they entered the UK, unless they are subject to a deportation order, exclusion order or an international travel ban.
- 13 The status for Irish citizens in the Bill supports the wider reciprocal rights enjoyed by Irish citizens when in the UK, mirrored by equivalent provision in Ireland for the treatment of British citizens who are resident there. The British Nationality Act 1948 and the Ireland Act 1949, as well as the Common Travel Area (CTA) legislation in the Immigration Act 1971, provide the legal basis for the rights of Irish citizens in the UK, with subsequent legislation and bilateral agreements also giving effect to these reciprocal arrangements. As a result of the historic arrangements between the UK and Ireland these rights include, in addition to the right to enter and reside as provided for by the Bill: the right to work and study; access to social welfare entitlements and benefits; access to health services; and voting rights. The UK Government and the Government of Ireland signed a Memorandum of Understanding on 8 May 2019 which reaffirmed both Governments’ commitment to the CTA and to maintaining the associated rights and privileges of Irish and British citizens under this longstanding reciprocal arrangement. This Bill does not amend or otherwise modify those historical pieces of legislation; it sets out the immigration status upon which some of these other rights depend.
- 14 The Bill also includes provision on social security co-ordination. The EU Social Security Co-ordination Regulations (“SSC Regulations”), as listed in clause 5(2), co-ordinate access to social security for individuals moving between EEA States (and Switzerland).
- 15 The SSC Regulations provide for a reciprocal framework and apply to EEA and UK citizens in the UK and in the EEA (respectively) and to some non-EEA citizens. Amongst other things, the SSC Regulations determine which member state’s social security legislation applies, ensure an individual is only subject to a single member state’s legislation at any one time, determine where contributions are due and which state is responsible for payment of certain types of benefit. The SSC Regulations provide for member states to consider periods of work, insurance or residence in another member state when determining entitlement to benefits, which is known as “aggregation”. The SSC Regulations also enable individuals, in certain circumstances, to receive certain benefits from the UK irrespective of where they, or the person they are claiming in respect of, reside in the EEA (i.e. UK nationals and EEA citizens can export benefits from the UK).

- 16 The SSC Regulations will be retained in UK law by the EUWA 2018, as amended by the EUWAA 2020, at the end of the transition period.
- 17 The UK-EU Withdrawal Agreement (and equivalent provisions in the EEA EFTA and Swiss citizens' rights agreements) establishes a cohort of citizens to whom the EU's SSC rules will continue to apply after the end of the transition period, no matter what the future relationship covers or whether a future relationship is agreed. This cohort primarily consists of EEA citizens living or working in the UK, and UK nationals living or working in the EEA, at the end of the transition period, as well as certain other groups. Changes to the rules on SSC made under this Bill will not be applied to this group for as long as they remain in scope of the Withdrawal Agreement. The EUWAA 2020 also protects the social security position of individuals who have lived and worked between the UK and the EEA by the end of the transition period.
- 18 The social security co-ordination clause in the Bill takes a power to modify the retained SSC Regulations and to make consequential provision to other legislation. This will enable DWP or HM Treasury (or where appropriate a devolved authority) to make changes to retained SSC arrangements whether the UK has a future agreement with the EU at the end of the transition period or not. It would also allow provisions to be made for persons who fall outside of the scope of any future reciprocal agreements, for example, but are within the scope of the Withdrawal Agreement or the equivalent arrangements with the EEA EFTA States or Switzerland.
- 19 In February 2019 the UK and Irish Governments signed a further Convention on Social Security. The Convention preserves the reciprocal social security rights established through the historic CTA arrangements which, in so far as they relate to social security contributions, pensions and benefits are currently provided under EU law. It ensured the position of British and Irish citizens who move, or have moved, between the UK and Ireland will not change following the UK's exit from the EU. It guarantees continued access to, and equality of treatment in relation to, social security provision for UK and Irish citizens and their qualifying family members in each country and thereby upholds the principles of equal treatment and reciprocity established since the 1920s. This Bill does not amend or affect the Convention on Social Security between the UK and Ireland.

Legal background

- 20 The relevant legal background is explained in the policy background section of these Notes.

Territorial extent and application

- 21 Clause 7 sets out the territorial extent of the Bill, that is the jurisdictions in which the Bill forms part of the law. The extent of a Bill can be different from its application. Application is about where the provisions of a Bill will have a practical impact when implemented.
- 22 The provisions of the Bill will extend to the whole of the United Kingdom.
- 23 The Bill includes provision for Part 1 and clauses 6 and 9 of Part 3 (to the extent relating to Part 1) to be extended to the Crown Dependencies and the British Overseas Territories by Order in Council. In addition, the power at clause 4 may be used to make provision extending to the Channel Islands, the Isle of Man and the British Overseas Territories where the legislation being amended by future regulations made under that power already extends directly to those territories.
- 24 The Bill will not make any changes to the Common Travel Area arrangements between the UK and Ireland and the Crown Dependencies.
- 25 As immigration policy is a reserved area, the Bill's immigration measures will not engage the legislative consent process in any of the devolved legislatures. However, clause 5 of the Bill, which relates to social security coordination, will engage the legislative consent processes in both the Scottish Parliament and Northern Ireland Assembly.
- 26 The Bill will have an impact in areas within the legislative competence of the Devolved Administrations in relation to certain aspects of social security co-ordination. The Scottish Parliament and Northern Ireland Assembly will have competence to amend limited elements of the retained SSC Regulations.
- 27 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding Legislative Consent Motions and matters relevant to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

Commentary on provisions of Bill

Part 1: Measures relating to ending free movement

Clause 1: Repeal of the main retained EU law relating to free movement etc

- 28 This clause introduces Schedule 1, which repeals legislation relating to free movement and other EU law relating to immigration, which is retained in UK law by the EUWA 2018. The details are set out under the Schedule 1 part of these Notes.

Clause 2: Irish citizens: entitlement to enter or remain without leave

- 29 The Bill protects the status of Irish citizens in the UK when free movement rights end, a status which existed prior to the UK's membership of the EU. Currently, due to the interplay between domestic legislation and EU free movement rights, a distinction exists between those Irish citizens who enter the UK from Ireland or the Crown Dependencies (the Common Travel Area (CTA)) and those who enter from a point of departure outside the CTA. Under the Immigration Act 1971, Irish citizens entering the UK from another part of the CTA do not require leave to enter or remain in the UK but otherwise are subject to immigration control, for example if travelling to the UK from outside the CTA. It is the EEA Regulations and section 7 of the Immigration Act 1988, which provide that Irish citizens arriving in the UK from outside the CTA do not require leave to enter or remain in the UK, due to their enforceable EU rights. As legislation relating to free movement and other EU law relating to immigration is being repealed, the Bill protects the rights of Irish citizens in the UK irrespective of where they have travelled from, providing the same immigration status to all Irish citizens that are currently only provided for in the Immigration Act 1971 for those travelling from within the CTA.
- 30 Clause 2 introduces new section 3ZA to the Immigration Act 1971 to confirm the status of Irish citizens. Irish citizens will not require leave to enter or remain in the UK and will therefore not be subject to immigration controls unless one of the exemptions set out in subsections (2), (3) and (4) applies. These exemptions are that the Irish citizen is subject to a deportation order, exclusion order or an international travel ban. This reflects current and long-standing practice. Irish citizens have been liable to deportation since the Commonwealth Immigrants Act 1962 and these powers, along with the powers to exclude or impose a travel ban on Irish citizens, exist in current legislation. The Government's approach to the deportation of Irish citizens since 2007 is to only deport Irish citizens where recommended by a court in sentencing or in exceptional circumstances where that deportation is in the public interest.
- 31 The Bill does not affect the CTA arrangements set out in section 1(3) of the Immigration Act 1971.
- 32 Subsection (3) of clause 2 amends section 9 of the 1971 Act, which relates to further provisions about the CTA, to ensure a consistent approach to how Irish citizens are treated for immigration purposes in line with section 3ZA.
- 33 Subsection (4) amends Schedule 4 of the 1971 Act, which deals with the integration of UK law and the immigration law of the Islands (Jersey, Guernsey and Isle of Man), to align the approach to Irish citizens as set out in section 3ZA.

Clause 3: Meaning of “the Immigration Acts” etc

- 34 Subsection (1) amends the UK Borders Act 2007 to ensure that Part 1 (and associated provisions in Part 3) of this Bill, when enacted, will be covered by any reference to “the Immigration Acts”.
- 35 Subsection (2) makes clear that Part 1 of the Bill is not retained EU law. This means that it is not part of the body of law that is saved in UK law by the EUWA 2018.

Clause 4: Consequential etc provision

- 36 Clause 4 allows the Secretary of State to make such regulations as she considers appropriate as

a consequence of, or in connection with, Part 1 of the Bill. Subsection (2) provides that such regulations may modify primary or secondary legislation, as well as direct EU legislation which is retained by the EUWA 2018 at the end of the transition period. Subsection (3) provides such regulations may make supplementary, incidental, transitional, transitory and saving provision and make different provision for different purposes.

- 37 Subsection (4) states regulations made under this clause may include provision in respect of persons who were not entitled to be in the UK under the EEA Regulations or under enforceable rights. For example, the provision could be used to make savings in relation to EEA citizens who are in the UK by the end of the transition period and who are treated for most purposes as though they were exercising Treaty rights, although they are not actually doing so. An example of such a person would be the EEA citizen spouse of a British citizen who does not have comprehensive sickness insurance and who is not otherwise exercising Treaty rights, such as the right to work, and who is therefore not technically exercising EU free movement rights. They can apply for leave under the EUSS and this provision ensures they can be treated under these regulations in the same way as other groups covered by the EUSS.
- 38 Subsection (5) provides that regulations made under this clause can amend legislation relating to fees and charges which are connected with the wider repeal of free movement law, for example removing reference to fees for EU residence documents.
- 39 Subsections (6) to (9) set out the Parliamentary scrutiny for regulations made under clause 4. Subsections (6) and (7) state any regulations made under clause 4 which amend existing primary legislation will be subject to the affirmative procedure, which means they must be approved by both Houses of Parliament. In the case of the first set of regulations made under clause 4, subsection (6) provides they will be subject to the made-affirmative procedure, which means they can be made and come into effect immediately, but must then be approved by both Houses within 40 days (excluding periods of dissolution and prorogation and adjournments of more than 4 days) to remain in force. Subsection (8) states any other regulations will be subject to the negative procedure. Subsection (9) specifies circumstances which will not count towards the scrutiny period set out in subsection (6) for the first regulations made under clause 4.
- 40 Subsection (10) states that if the first set of regulations made under clause 4 cease to apply because they are not approved by both Houses of Parliament within 40 days, where this is required, this will not affect anything which has already been done under those regulations or prevent further regulations from being made.

Part 2: Social security co-ordination

Clause 5: Power to modify retained direct EU legislation relating to social security co-ordination

- 41 Clause 5 provides a power for an appropriate authority (defined, in subsection (7) as the Secretary of State or the Treasury, a devolved authority, or a Minister of the Crown acting jointly with a devolved authority) to modify, by regulations, the retained direct EU legislation listed in subsection (2) (commonly known as the EU Social Security Co-ordination Regulations). These directly applicable EU regulations provide for social security co-ordination across the EEA (including Switzerland).
- 42 This clause allows the Government (and/or, where appropriate, a devolved authority) to make regulations to implement any new policies regarding co-ordination of social security. This clause is intended to be used to implement new policies subject to the outcome of future negotiations with the EU.
- 43 Subsection (3) sets out that such regulations can make different provision for different categories of person and for different purposes, as well as making supplementary, incidental, consequential, transitional, transitory or saving provision.

- 44 Subsection (4) states that consequential provision includes modification to provisions made by or under primary legislation or to retained direct EU legislation not listed in subsection (2).
- 45 Subsection (5) ensures any directly effective rights that will have been saved by section 4 of the EUWA 2018 at the end of the transition period cease to apply insofar as they are inconsistent with, or are otherwise capable of affecting, the interpretation or application of provision made by regulations under clause 5.
- 46 Subsection (6) provides for the interpretation of terms included in subsection (5).
- 47 Subsection (8) indicates further provision about the power of devolved authorities to make regulations under this clause is set out in Schedule 2.
- 48 Subsection (9) indicates further provision about the making of regulations under this clause is set out in Schedule 3.

Part 3: General

Clause 6: Interpretation

- 49 Clause 6 provides for the interpretation of terms included in the Bill.

Clause 7: Extent

- 50 The provisions of the Bill extend to the whole of the United Kingdom. The immigration matters to which the provisions of the Bill relate are not within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly. However, it is within the legislative competence of the Scottish Parliament and Northern Ireland Assembly to amend limited elements of the retained SSC Regulations. Therefore, a Legislative Consent Motion (LCM) will be sought from both the Scottish Parliament and Northern Ireland Assembly in respect of clause 5 of the Bill.
- 51 Subsections (2) to (4) enable the provisions of, and amendments made by, Part 1 and clauses 6 and 9 (to the extent relating to Part 1) of the Bill to be extended to the Channel Islands, the Isle of Man and the British Overseas Territories by Order in Council.
- 52 Subsection (5) provides provisions of regulations made under clause 4 of the Bill which amend legislation that already extends directly to any of those territories may have the same extent as the legislation being amended.

Clause 8: Commencement

- 53 Subsection (1) sets out Part 1 (i.e. clauses 1 to 4 and Schedule 1) will come into force on a day appointed by the Secretary of State by regulations.
- 54 Subsection (2) provides regulations commencing provisions of the Bill under subsection (1) may make different provision for different purposes.
- 55 Subsection (3) sets out that Part 2 (i.e. clauses 5 and Schedules 2 and 3) come into force on a day appointed by the Secretary of State or the Treasury by regulations.
- 56 Subsection (4) provides regulations commencing provisions of the Bill under subsection (3) may make different provision for different purposes or areas.
- 57 Subsection (5) sets out this clause comes into force on the day on which this Act is passed.
- 58 Subsection (6) provides commencement regulations under subsections (1) and (3) includes a power to appoint a time on a day, if considered necessary by the Secretary of State or the Treasury.

Clause 9: Short Title

- 59 This clause provides that the short title of the Bill when enacted will be the Immigration and

Social Security Co-ordination (EU Withdrawal) Act 2020.

Schedule 1: Repeal of the main retained EU law relating to free movement etc.

Part 1: EU-derived domestic legislation

- 60 Part 1 of Schedule 1 repeals EU-derived domestic legislation relating to free movement; it revokes the EEA Regulations, which implement the EU Free Movement Directive 2004/38/EC and omits section 7 of the Immigration Act 1988. This will have the effect of bringing EEA citizens and their family members under UK immigration control, which under the 1971 Act means they require leave to enter or remain in the UK.
- 61 Paragraph 2, sub-paragraph (1), omits the power in section 109 of the Nationality, Immigration and Asylum Act 2002 to make regulations to provide for, or make provisions about, an appeal against an immigration decision relating to free movement of persons. This reflects the position that free movement will have ended. Paragraph 2, sub-paragraph (3), makes further amendments to the 2002 Act to reflect the fact that section 109 has been omitted.
- 62 Paragraph 3 amends the Provision of Services Regulations 2009 which implement the Services Directive (2006/123/EC), that aims to simplify the establishment and movement of services within the Single Market. This paragraph inserts a new provision into regulation 5 (general exclusions and savings) so that nothing in those Regulations affects the operation of provisions made by or under the Immigration Acts. This is necessary to ensure free movement of persons is fully repealed.

Part 2: Retained direct EU legislation

- 63 Part 2 of Schedule 1 repeals direct EU legislation relating to Regulation (EU) No. 492/2011 on freedom of movement for workers within the Union (the “Workers Regulation”) which is saved in domestic law by the *EUWA 2018 at the end of the transition period*.
- 64 This regulation provides for the freedom of movement of workers in various ways, including through rights to residency, equal treatment and access to education.
- 65 Paragraph 4, sub-paragraph (1), revokes Article 1 of the Workers Regulation, which is specific to immigration and provides a right to be in the territory of another member state to pursue employment. Paragraph 4, sub-paragraph (2), ensures other provisions of the Workers Regulation, which are not specific to immigration, do not have ongoing effects for UK immigration law but continue to have effect for other purposes. For example, this will prevent an individual claiming they have a right of residence in the UK under Article 10 of the Workers Regulation on the basis their child is in education here; this does not prevent the resident child of an EEA citizen who is legally resident and employed in the UK from being able to rely on Article 10 to access UK education on the same conditions as a British citizen.

Part 3: EU-derived rights etc

- 66 *The EUWA 2018*, at the end of the transition period, saves as part of UK law directly effective rights that currently flow through section 2(1) of the European Communities Act 1972 (ECA). This includes rights set out in the Treaty on the European Union, the Treaty on the Functioning of the European Union (TFEU), the agreement with the European Economic Area (EEA) and in other international agreements, such as the Swiss Agreement on the Free Movement of Persons and the EU’s Association Agreement with Turkey. It also saves rights derived from Directives that have been recognised by the courts prior to the end of the transition period. A number of these rights could otherwise be relied upon in an immigration context.
- 67 Part 3 of Schedule 1 disapplies other retained EU law relating to free movement of persons. It deals with directly effective rights flowing from the Free Movement of Persons Agreement

between the EU and Switzerland which are saved as part of UK law by the *EUWA 2018*. It ensures the rights derived from the specific provisions listed in paragraph 5, sub-paragraph (1)(b), cease to be recognised and available in domestic law. As a result, Swiss citizens and their family members, like EEA citizens and their family members, will be subject to the immigration requirements set out in the 1971 Act.

- 68 Paragraph 6 ensures any directly effective rights that will have been saved by the *EUWA 2018 and would, in the absence of this paragraph, be retained*, cease to apply insofar as they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, immigration legislation or functions. For example, the residence rights that are derived from Articles 20 and 21¹ of the TFEU (rights of citizenship and free movement) will be retained EU law and, unless they are disapplied would provide a right to reside in the UK for certain groups, for example “Chen” carers who are primary carers of an EU citizen child who is in the UK and is self-sufficient. However, the rights derived from Articles 20 and 21 would continue to apply in non-immigration contexts unless disapplied.

1 See the rights deriving from the following lines of CJEU case law: Ruis Zambrano C-34/09, Surinder Singh C-370/90, Chen C-200/02, Ibrahim C-130/08 and Teixeira C-480/08
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799562/Derivative-rights-of-residence-v5.0ext.pdf

69 The following is a non-exhaustive list of the directly effective rights relevant to this Paragraph.

Title of Treaty	Relevant article	Subject area
Treaty on European Union	Article 9	Citizenship and equality
Treaty on the Functioning of the European Union	Article 18, paragraph 1	Non-discrimination
	Article 20(1) and (2)(a)	Citizenship
	Article 21(1)	Free movement
	Article 45(1), (2) and (3)	Free movement of workers
	Article 49	Freedom of establishment
	Article 56	Free movement of services
EEA Agreement	Article 4	Non-discrimination
	Article 28 (1), (2) and (3)	Freedom of movement for workers
	Article 31 (1)	Freedom of establishment
	Article 36 (1)	Free movement of services
Treaty establishing the European Atomic Energy Community	Article 96, paragraph 1	Abolish restrictions based on nationality regarding employment in the field of nuclear energy
	Article 97	Abolish restrictions based on nationality regarding constructions of nuclear installations
Additional Protocol to the Turkey ECAA	Article 41(1)	Standstill clause
Decision 1/80 of the Association Council established under the Turkey Association Agreement	Articles 6(1) (2)	Right to work
	Article 7	Rights of family members
	Article 13	Standstill clause
	Article 14	Limits on grounds of public policy, public security or public health
Swiss Agreement on Free Movement	Article 2	Non-discrimination
	Article 5	Persons providing services
	Article 11	Processing of appeals
	Article 13	Standstill
	Article 23	Acquired rights
	Article 1 of Annex 1 [Immigration only]	Entry and Exit
	Article 2 of Annex 1 [Immigration only]	Residence and economic activity
	Article 3 of Annex 1 [Immigration only]	Members of the family
	Articles 4 and 24 of Annex 1 [Immigration only]	Right to stay and Rules regarding residence
Article 5 of Annex 1 [Immigration only]	Public order	

Title of Treaty	Relevant article	Subject area
	Articles 6 and 12 of Annex 1 [Immigration only]	Rules regarding residence
	Articles 7 and 8 of Annex 1 [Immigration only]	Employed frontier workers
	Articles 17 and 20 of Annex 1	Persons providing services
	Article 23 of Annex 1 [Immigration only]	Persons receiving services

Schedule 2: Power of Devolved Authorities under clause 5

Part 1: Scope of the Power

- 70 *No power to make provision outside devolved competence* - Paragraph 1 states a devolved authority can only legislate alone if the provision is within its devolved competence. Paragraph 2 and 3 set out what is within devolved competence for the purposes of this Schedule.
- 71 *Requirement for consent where it would otherwise be required* - Paragraph 4 sets out that if a devolved authority is using the power in a way that would require consent if it were a provision in its own legislation, or where the devolved authority would normally require consent from the UK Government to make such a provision in secondary legislation, then that consent will still be required. This will not apply if the devolved authority has the power to make such provision without needing UK Government consent.
- 72 *Requirement for joint exercise where it would otherwise be required* - Paragraph 5 sets out that where a devolved authority would normally only be able to make legislation jointly with the UK Government, the devolved authority will still have to make such legislation jointly when exercising the power.
- 73 *Requirement for consultation where it would otherwise be required* - Paragraph 6 requires consultation with the UK Government on legislation made by a devolved authority in exercise of the power where the devolved authority would normally be required to consult the UK Government.

Part 2: Transitional Provision

- 74 *Transitional Provisions* - Paragraph 8 disapplies section 57(2) of the Scotland Act 1998 (restriction on acting incompatibly with EU law and Convention rights) and section 24(1)(b) of the Northern Ireland Act 1998 (restriction on acting incompatibly with EU law) so far as relating to EU law in relation to regulations made under clause 5.

Schedule 3: Regulations Under Clause 5

Part 1: Statutory Instruments

- 75 *Statutory instruments* - Paragraph 1 prescribes the power is to be exercised by statutory instrument.

Part 2: Scrutiny of Regulations under Clause 5

- 76 *Scrutiny where sole exercise* - Paragraph 3 provides that where the UK Government or a devolved authority solely exercises the clause 5 power the procedure for regulations will be the affirmative. This means in the case of the UK government, the regulations must be debated and approved by both Houses of Parliament before they have legal effect.
- 77 *Scrutiny where joint exercise* - Paragraph 4 provides that where the UK Government and a devolved authority exercise the power under clause 5 jointly, the affirmative procedure applies in both the UK Parliament and the devolved parliaments/assemblies.
- 78 *Combination of instruments* - Paragraph 5 permits other regulations subject to the negative procedure to be included in an instrument made under clause 5.

Commencement

- 79 The Bill provides for commencement on a day (which can include a time on a day) appointed by regulations (apart from clause 6 (interpretation) and clauses 7 to 9 (extent, commencement and short title) and clause 8 (commencement) which will come into force on the day on which the Bill receives Royal Assent).

Financial implications of the Bill

- 80 The Bill has financial implications in relation to both the ending of the free movement of persons (Part 1 of the Bill) and social security co-ordination (Part 2 of the Bill). Most of the cost to the public sector of ending free movement will relate to the administration of the system of immigration control that replaces free movement in relation to those who previously benefited from free movement. The new system is not set out in this Bill. It is therefore not possible to quantify precisely the costs that will result directly from the provisions in Part 1 of the Bill. The costs of moving to the new system are, however, expected to be more than merely notional.
- 81 It is possible regulations made under clause 4 of the Bill could alter the scope of existing provisions about charges or fees relating to immigration as a consequence of ending free movement.
- 82 The power to make regulations under Part 2 of the Bill has the potential to be used in a way that could change the cost to the public sector in terms of social security co-ordination. It is not possible to quantify precisely what those costs may be at this stage, but there is the potential for costs that are more than merely notional.

Parliamentary approval for financial costs or for charges imposed

- 83 A money resolution in relation to the Bill will be required to cover the potential increases in expenditure outlined above.
- 84 A 'ways and means' resolution will be required in relation to the Bill to cover any potential extension by regulations under clause 4 of the scope of existing provisions about charges or fees, as outlined above.

Compatibility with the European Convention on Human Rights

- 85 The Government considers the Immigration and Social Security Co-ordination (EU Withdrawal) Bill is compatible with the European Convention on Human Rights (“ECHR”). Accordingly, the Secretary of State for the Home Department has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

Related documents

- 86 The following documents are relevant to the Bill and can be read at the stated locations:

- Home Secretary *statement* to Parliament on the future points-based immigration system (24 February 2020)

<https://hansard.parliament.uk/commons/2020-02-24/debates/BFC9BA43-7D17-4A24-9C34-917C233FB056/Points-BasedImmigrationSystem>
- Government’s policy statement on the future immigration system: *The UK’s Points-Based Immigration System* (19 February 2020)

<https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement>
- The *Migration Advisory Committee’s Report* on a Points-Based System and Salary Thresholds for Immigration (28 January 2020):
<https://www.gov.uk/government/publications/migration-advisory-committee-mac-report-points-based-system-and-salary-thresholds>
- *Queen’s Speech, and background briefing document* (December 2019) which referenced the Immigration and Social Security Co-ordination (EU Withdrawal) Bill :
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf
- *European Union (Withdrawal Agreement) Act 2020*, with specific reference to Citizens’ Rights clauses:
<https://services.parliament.uk/Bills/2019-20/europeanunionwithdrawalagreement/documents.html>
- *Joint statement of 8 May 2019* between the UK Government and Government of Ireland on the Common Travel Area:
<https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta/joint-statement-of-8-may-2019-between-the-uk-government-and-government-of-ireland-on-the-common-travel-area>
- The Future Relationship with the EU: *The UK’s approach to negotiations*, paragraphs 17-18 “Mobility and Social Security Coordination” (27 February 2020):
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf
- The *UK-Ireland Convention on Social Security* published in February 2019:
<https://www.gov.uk/government/publications/cs-ireland-no12019-ukireland-convention-on-social-security>
- *Government policy statement on pensioners in the EU* published January 2020:
<https://www.gov.uk/government/news/boost-for-pensioners-in-the-eu>

- [Factsheets \(Bill page on Gov.uk\)](#)
- [Delegated Powers Memorandum \(Bill page on Gov.uk\)](#)
- [Policy Equality Impact Assessments \(Bill page on Gov.uk\)](#)

Annex A - Territorial extent and application in the United Kingdom

The provisions of the Bill extend to the whole of the United Kingdom. The Bill includes a clause to enable provisions of, and amendments made by, Part 1 of the Bill (and clauses 6 and 9 of Part 3, to the extent relating to Part 3) to be extended to the Crown Dependencies and British Overseas Territories by Order in Council. In addition, amendments of legislation made by regulations made under clause 4 may extend to the Channel Islands, the Isle of Man and the British Overseas Territories, where that legislation already extends directly to those territories.

The information provided is the view of the UK Government.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clauses 1 to 4, 6 to 9, and Schedule 1	Yes	Yes	Yes	Yes	No	No	No	No
Clause 5 and Schedules 2 and 3	Yes	Yes	Yes	Yes	No	Yes - the Scottish Parliament will have competence to amend limited elements of the retained Social Security Co-ordination Regulations.	Yes - the Northern Ireland Assembly will have competence to amend limited elements of the retained Social Security Co-ordination Regulations.	Yes

Annex B - Glossary

Term	Reference
1971 Act	Immigration Act 1971
2002 Act	Nationality, Immigration and Asylum Act 2002
EUWA 2018	European Union (Withdrawal) Act 2018
EUWAA 2020	European Union (Withdrawal Agreement) Act 2020
EEA	European Economic Area. Comprises all EU Member States, plus Iceland, Liechtenstein and Norway.

EFTA	European Free Trade Association. The EFTA Member States are Iceland, Liechtenstein, Norway and Switzerland.
Immigration Rules	Rules laid down by the Secretary of State pursuant to section 3(2) of the Immigration Act 1971
MAC	Migration Advisory Committee
Affirmative procedure	<p>A type of parliamentary procedure that applies to statutory instruments (SIs). Its name describes the form of scrutiny that the SI receives from Parliament.</p> <p>An SI laid under the affirmative procedure must be actively approved by both Houses of Parliament.</p>
Made affirmative procedure	<p>A type of parliamentary procedure that applies to statutory instruments (SIs). Its name describes the form of scrutiny that the SI receives from Parliament.</p> <p>An SI made under this procedure comes into effect immediately and Parliament has a set time to approve it (debates must be held in both Houses within 40 days of the SI being made). The SI will stop being law if Parliament does not approve the SI within that prescribed time.</p>
Negative procedure	<p>A type of parliamentary procedure that applies to statutory instruments (SIs). Its name describes the form of scrutiny that the SI receives from Parliament.</p> <p>An SI laid under the negative procedure becomes law on the day the Minister makes it and remains law unless a motion – or ‘prayer’ – to reject it is agreed by either House within 40 sitting days.</p>

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill as introduced in the House of Commons on 5 March 2020 (Bill No.104).

Ordered by the House of Commons to be printed, 5 March 2020

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Appendix 2: List of Amendments

PROPOSED AMENDMENTS TO THE IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL

1. The Secretary of State for the Home Office, Priti Patel MP, has proposed 31 amendments to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill. These amendments all relate to social security co-ordination and follow the decision of the Scottish Government not to proceed with a Legislative Consent Motion.
2. Amendments 1 and 2 remove the power conferred on Scottish Ministers (acting alone or acting jointly with a Minister of the Crown) to make regulations under clause 5. Scottish Ministers would have no power to amend retained EU law relating to social security co-ordination under the Bill.
3. Amendments 3, 4 and 6 to 31 are related consequential amendments. These are required to ensure that the Bill reads correctly following the removal of this power. For example, the definition of a “devolved authority” would be removed, and references to a “devolved authority” would be amended to a “Northern Ireland Department”, as a Northern Ireland Department would still retain the power to amend retained EU law relating to social security co-ordination.
4. Amendment 5 limits the scope of the power conferred on the Secretary of State and the Treasury, and on a Minister of the Crown acting jointly with a Northern Ireland Department, to modify retained direct EU legislation under clause 5 (retained direct EU legislation relating to social security legislation). No provision that is within the legislative competence of the Scottish Parliament may be made under the power unless incidental or consequential on provisions outside of the Scottish Parliament’s competence.

FULL LIST OF PROPOSED AMENDMENTS

1. Clause 5, page 4, line 31, leave out “devolved authority” and insert “Northern Ireland department”.
2. Clause 5, page 4, line 32, leave out “devolved authority” and insert “Northern Ireland department”.
3. Clause 5, page 4, line 33, leave out “of devolved authorities”.
4. Clause 6, page 4, leave out lines 41 and 42.
5. Schedule 2, page 9, line2, at end insert —

SCOPE OF THE POWER OF A MINISTER OF THE CROWN ACTING ALONE OR JOINTLY

A1 No provision that would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament may be made—

(a) by the Secretary of State or the Treasury acting alone, or

(b) by a Minister of the Crown acting jointly with a Northern Ireland department,

in regulations under section 5, unless that provision is merely incidental to, or consequential on, provision that would be outside that legislative competence.

A2 In considering, for the purposes of paragraph A1, whether a provision would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament, no account is to be taken of section 29(2)(d) of the Scotland Act 1998 so far as relating to EU law.”

6. Schedule 2, page 9, line 6, leave out “devolved authority” and insert “Northern Ireland department”.
7. Schedule 2, page 9, line 8, leave out “devolved authority” and insert “Northern Ireland department”.
8. Schedule 2, page 9, line 9, leave out paragraph 2.
9. Schedule 2, page 10, line 6, leave out “devolved authority” and insert “Northern Ireland department”.
10. Schedule 2, page 10, line 9, leave out “devolved authority” and insert “Northern Ireland department”.
11. Schedule 2, page 10, line 11, leave out from “by” to “a” in line 14.
12. Schedule 2, page 10, line 19, leave out from first “an” to end of line.
13. Schedule 2, page 10, line 22, leave out “devolved authority” and insert “Northern Ireland department”.
14. Schedule 2, page 10, line 23, leave out “another person” and insert “a Northern Ireland devolved authority”.
15. Schedule 2, page 10, line 27, leave out sub-paragraph (1).
16. Schedule 2, page 10, line 46, leave out “(1) or”.
17. Schedule 2, page 11, line 1, leave out from first “an” to second “Act”.
18. Schedule 2, page 11, line 5, leave out from “by” to “a” in line 8.
19. Schedule 2, page 11, line 11, leave out sub-paragraph (1).
20. Schedule 2, page 11, line 25, leave out “(1) or”.
21. Schedule 2, page 11, line 26, leave out from “an” to “Act” in line 27.
22. Schedule 2, page 11, line 30, leave out “(1) or”.

23. Schedule 2, page 11, line 32, leave out from “by” to “a” in line 35.
24. Schedule 2, page 12, line 4, leave out “Section 57(2) of the Scotland Act 1998 and”.
25. Schedule 2, page 12, line 5, leave out “, so far as relating to EU law, do” and insert “does”.
26. Schedule 3, page 12, line 14, leave out “devolved authority” and insert “Northern Ireland department”.
27. Schedule 3, page 12, line 21, leave out paragraph 2.
28. Schedule 3, page 12, line 31, leave out sub-paragraph (2).
29. Schedule 3, page 13, line 1, leave out paragraph 4 and insert —
“Scrutiny where joint exercise
 - 4 Regulations under section 5 of a Minister of the Crown acting jointly with a Northern Ireland department may not be made unless—
 - (a) a draft of the statutory instrument containing those regulations has been laid before, and approved by a resolution of, each House of Parliament, and
 - (b) a draft of the regulations has been laid before, and approved by a resolution of, the Northern Ireland Assembly.”
30. Schedule 3, page 14, line 3, leave out “the Scottish Parliament or”.
31. Schedule 3, page 14, line 7, leave out “the Scottish Parliament or, as the case may be,”.

Appendix 3: Legislative Consent Memorandum

LEGISLATIVE CONSENT MEMORANDUM

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL

Draft Legislative Consent Motion

1. The draft motion, which will be tabled by the Minister for Communities, is:

“That this Assembly endorses the principle of the extension to Northern Ireland of the provisions of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill dealing with social security co-ordination as contained in clause 5 of, and Schedules 2 and 3 to, the Bill as introduced in the House of Commons.”

Background

2. This memorandum has been laid before the Assembly by the Minister for Communities under Standing Order 42A(2). The Immigration and Social Security Co-ordination (EU Withdrawal) Bill was originally introduced at Westminster in the 2017-2019 session but fell when Parliament was prorogued before the December 2019 General Election. The Bill was re-introduced in the House of Commons on 5 March 2020. The latest version of the Bill can be found at:

<https://services.parliament.uk/Bills/2019-21/immigrationandsocialsecuritycoordinationeuwithdrawal.html>

Summary of the Bill and its policy objectives

3. The primary purpose of the Westminster Immigration and Social Security Co-ordination (EU Withdrawal) Bill is to end the EU’s rules on free movement

of persons in respect of the UK at the end of the transition period (31 December 2020). These are currently retained in UK law by the EU (Withdrawal) Act 2018. This will mean that EEA nationals not resident in the UK at the end of the transition period and their family members will require permission to enter and remain in the UK under the Immigration Act 1971. Immigration and Freedom of Movement within the EEA are excepted matters under Schedule 2 to the Northern Ireland Act 1998 and are the responsibility of the Home Office.

4. However, the Bill also makes provision for the Westminster Government or, where appropriate, a devolved authority to amend retained EU legislation relating to the social security co-ordination regime. The legislation in question is:

- Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the co-ordination of social security systems;
- Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004;
- Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community;
- Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community; and
- Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

5. In summary, the Bill:

- repeals the main retained EU law relating to free movement and brings EEA nationals and their family members under UK immigration control;
- protects the status of Irish citizens in UK immigration law once their EU free movement rights end; and
- introduces powers to enable the Westminster Government and devolved authorities to amend retained EU law governing social security co-ordination thereby enabling policy changes to be delivered post EU exit.

6. The provisions which deal with transferred matters relate to social security co-ordination. A power is being provided to an appropriate authority (which includes a devolved authority) to modify, by Regulations, the EU Social Security Co-ordination Regulations. The Social Security Co-ordination Regulations apply to EEA citizens and UK nationals in the UK and in the EEA, and to some non-EEA citizens. They determine which EEA state’s social security legislation applies: the rules ensure an individual is only subject to one EEA state’s legislation at any one time, determine where contributions are due and which state is responsible for payment of certain types of benefit including the State Pension, UK contributory benefits as well as some non-contributory benefits. The Social Security Co-ordination Regulations provide for equal treatment of those in scope and for EEA states to take into account periods of work, insurance or residence in another EEA state when determining entitlement to benefit, which is known as “aggregation”. The Regulations also enable individuals, in certain circumstances, to receive certain benefits from the UK irrespective of where they reside in the EEA (i.e. UK nationals and EEA citizens can export benefits from the UK).

Reasons for making the Provisions

7. The provisions in the Bill allow the UK Government (and/or, where appropriate, a devolved authority) to make Regulations to amend retained direct EU legislation relating to the social security co-ordination regime, which is retained in UK law by the EU (Withdrawal) Act 2018. This will enable policy changes to be delivered following the end of the transition period, depending on the outcome of negotiations with the EU on the future relationship.
8. The UK signed an *agreement* with Ireland in February 2019 which protects the social security rights of all UK and Irish citizens moving within the Common Travel Area.

Reasons for utilising the Bill rather than an Act of the Assembly

9. While Immigration and Freedom of Movement are excepted matters, aspects of the EU Social Security Co-ordination Regulations touch on devolved issues. The regulations are a somewhat complex web of excepted and devolved issues including:
 - determination of the State to which contributions should be paid;
 - competency for the award of benefits;

- aggregation of contributions and periods of residence for benefit entitlement etc;
 - provision for some benefits, such as Child Benefit, which are the responsibility of HMRC.
10. If NI provisions are omitted from the Westminster Bill, it would be necessary to bring forward a further Assembly Bill to ensure that the Department for Communities has the power necessary to amend retained EU law on social security co-ordination. Our working assumption is that such a Bill would mirror the social security co-ordination provisions of the Westminster Bill in conferring powers on NI Departments. However, clause 5 of the Westminster Bill also makes provision for regulations to be made by a Minister of the Crown and the devolved authority acting jointly. Given that the retained regulations are a somewhat complex web of excepted and devolved matters, the availability of the option of making regulations jointly may provide a useful way to amend the law in a coherent way. Devolved competence would be respected in that such regulations would require the approval of the Assembly before being made. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill provides a power to devolved authorities to amend, by Regulations, the EU Social Security Co-ordination Regulations. A devolved authority may only legislate alone if the provision is within its devolved competence.
11. It is anticipated that there will be very significant demands across Departments for Bills to be progressed through the Assembly before the end of the current mandate. Retaining the NI provisions in the Westminster Bill would help to relieve some of the expected pressure on the legislative programme. It would also have the advantage of ensuring that these essential new provisions can be enacted as soon as possible. Discussions between the EU and the UK on social security co-ordination are ongoing and retaining these provisions in the Bill will ensure that any necessary changes can be brought forward for NI at the same time as changes being taken forward in GB.

Consultation

12. The UK Government commissioned the Migration Advisory Committee (MAC) to examine how the UK economy makes use of and recruits European Economic Area (EEA) nationals, and the impacts of EU migration on the economy. The MAC is an independent non-departmental public body that provides transparent, independent and evidence-based advice to the UK Government on migration issues. In August 2017, the MAC published a Call for Evidence to gather views from stakeholders and develop its response to the UK Government. The MAC published its findings in September 2018.

13. The UK Government set out in its manifesto in 2019 that once free movement ends, it will deliver a new points-based immigration system. The Government again commissioned advice from the MAC on a points-based immigration system as well as on salary thresholds in the immigration system. The MAC published its report on both issues on 28 January 2020.

Human Rights and Equality

14. The provisions of the Westminster Bill are considered compatible with the Human Rights Act 1998.
15. An equality screening exercise has been carried out and the Department is satisfied that the proposed provision has no significant implications for equality of opportunity.

Financial Implications

16. No significant costs to the public purse are expected.

Summary of Regulatory Impact

17. No significant costs to businesses, community, voluntary, charitable and social enterprises/organisations are expected.

Engagement to date with the Committee for Communities

18. The Committee has been consulted as part of the Legislative Consent Motion process.

Conclusion

19. The view of the Minister for Communities is that, in the interests of good government, the provisions of the Bill dealing with devolution matters should remain in the Bill.

Department for Communities

Appendix 4: Hansard Official Report

Immigration and Social Security Co-ordination (EU Withdrawal) Bill - Legislative Consent Motion - Department for Communities 17 June 2020

Link: <http://data.niassembly.gov.uk/HansardXml/committee-22660.pdf>