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The Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19

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Summary

The *Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19* is due to have its second reading in the House of Commons on Monday 28 January 2019. The Bill as introduced is in three parts. The provisions are as follows:

Part 1 – Measures relating to ending free movement

Clause 1 would establish Schedule 1 of the Bill. Schedule 1 makes provision to end the law of free movement in the UK.

Clause 2 would amend the *Immigration Act 1971* to confirm that the rights of Irish citizens prevail, regardless of the repeal of free movement law. It would provide that Irish citizens do not require leave to enter or remain in the UK.

Clause 3 would amend section 61 of the *UK Borders and Immigration Act 2007* to ensure that the Bill is included in any references to "the Immigration Acts" across legislation.

Clause 4 sets out the consequential provisions of the Bill. It is a Henry VIII clause which allows the Government to amend primary and secondary legislation by statutory instrument. The provisions made by statutory instrument must be considered by the Secretary of State as 'appropriate in consequence of, or in connection with' any provision in Part 1 of the Bill.

Part 2 – Social security co-ordination

Part 2 of the Bill consists of **Clause 5 and Schedules 2 and 3.** It would allow the Government (and/or where appropriate, a devolved authority) by regulations to modify retained EU legislation on social security co-ordination. The Government states that this power would be necessary to enable it to deliver a range of options from EU exit day, and specifically to implement its preferred approach to social security co-ordination in a 'no deal' scenario. Any regulations would be subject to the affirmative procedure.

Part 3 – General

Clause 6 is an interpretive provision, defining terms used in the Bill.

Clause 7 would set out the Bill's commencement and extent. The Bill would apply to all parts of the UK. The clause enables Her Majesty, by Order in Council, to extend its operation to any of the Channel Islands, the Isle of Man and any of the British overseas territories. Except for clauses 6 and 7, the Bill would come into force on a day appointed by regulations.

1. Introduction

1.1 The government's immigration policy objectives

There are two distinct immigration systems in the UK. EU law of free movement regulates immigration of EU citizens to the UK. Free movement law is set out in EU Directive 2004/38/EU, as transposed into UK law by the *European Immigration (European Economic Area) Regulations 2016*. Non-EEA nationals are regulated by UK domestic immigration law and the majority of this law is set out in the Immigration Rules. The Immigration Rules are quasi-legislative rules which are made by the Secretary of State for the Home Office under the power of section 3 of the *Immigration Act 1971*.

In the Queen's Speech to Parliament in 2017 Her Majesty outlined the introduction of an Immigration Bill to facilitate the introduction of new national immigration policies. The purpose of the Bill was described in the background briefing as to:

> Allow the Government to end the EU's rules on free movement of EU nationals in the UK and make the migration of EU nationals and their family members subject to relevant UK law once the UK has left the EU, whilst still allowing the UK to attract the brightest and the best.[1]

The Prime Minister, Theresa May, confirmed her intention to end freedom of movement in her Mansion House speech on 2 March 2018.[2] The Prime Minister has maintained that free movement will end when the UK leaves the EU, regardless of the type of Brexit.

The *European Union (Withdrawal) Act 2018* ("the Withdrawal Act") will preserve EU law, including that providing for free movement, on exit. As such, to end free movement, it is necessary for Parliament to legislate.

The Home Office's overview fact sheet on the *Immigration and Social Security Co-ordination (EU Withdrawal) Bill* ("the Bill") explains:

> Following the result of the EU referendum in June 2016, the Queen's Speech on 21 June 2017 announced an Immigration Bill as one of the Bills needed to ensure the UK makes a success of the UK's withdrawal from the EU. Parliament passed the EU (Withdrawal) Act 2018, which ensures that, as far as possible, the same rules and laws will apply on the day after Exit as on the day before, including the EU's rules on free movement of persons. This is to avoid a cliff edge where the law is uncertain when the UK leaves the EU. Parliament must then decide what the future rules and law will be.
>
> The Bill will end the EU's rules on free movement of persons into the UK and make EEA and Swiss nationals and their family members subject to UK immigration controls. This means they will

1 The Queen's Speech and associated background briefing, on the occasion of the opening of Parliament on Wednesday 21 June 2017, 21.

2 PM speech on our future economic partnership with the European Union, 2 March 2018

> require permission to enter and remain in the UK (see Factsheet 2 for more detailed information).
>
> Without the Bill, EEA and Swiss nationals would be able to continue to live and work in the UK in accordance with retained EU law on free movement of people.
>
> By ending free movement of persons, the Bill will enable us to deliver the future immigration system. It does not set out the details of the future immigration system because those details, such as the requirements a person must meet to come to the UK as a worker, student or family member, will, as now, be set out in the Immigration Rules.

In a statement to the House of Commons on 19 December 2018, the Secretary of State for the Home Department, Sajid Javid, summarised the purpose of the Bill:

> First, free movement will come to an end. Tomorrow, we will introduce the immigration and social security co-ordination (EU withdrawal) Bill to implement this. It will make European economic area and Swiss nationals and their family members subject to UK immigration control, and it will protect the status of Irish nationals. This means that in the future everyone other than British and Irish citizens will need to get UK permission before they can come here.[3]

The Bill was introduced to the House of Commons on 20 December 2018 and is due for Second Reading on Wednesday 16 January 2019.

1.2 Social security co-ordination

The long-established EU Social Security Co-ordination Regulations provide a reciprocal framework to protect the social security rights of people moving between EEA states (and Switzerland). The regulations clarify which state a person is insured in, require equal treatment in access to benefits, allow periods of insurance in different countries to be aggregated, and enable certain benefits to be 'exported'. A well-established system of administrative co-operation underpins the rules.

The Withdrawal Agreement provides, broadly speaking, for social security co-ordination to continue to apply to people in cross-border situations at the end of the transition period (i.e. 31 December 2020). For people moving between the UK and the EU after then, the Political Declaration said that the UK and EU would address social security co-ordination in light of any future agreement on mobility. If however there is 'no deal', the Co-ordination Regulations would cease to apply from the moment the UK leaves the EU. In December the Government said that it was exploring the options to protect accrued social security rights and reciprocal healthcare arrangements in a 'no deal' scenario, and repeated assurances that EU citizens already resident in the UK would continue to have access to benefits. The European Commission has also called on Member States to take steps to protect social security entitlements acquired by those who exercised free movement rights prior to 30 March 2019. There is however continuing uncertainty about whether, and how rights would be protected.

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[3] HC Statement 19 December 2018 vol 651 cc805-806

The *European Union (Withdrawal) Act 2018* converts the Social Security Co-ordination Regulations into domestic law. The Department for Work and Pensions has already laid before Parliament regulations (under powers in the 2018 Act) to amend the retained Co-ordination Regulations to provide that, to the extent that the UK can do so unilaterally, social security co-ordination can continue to operate if there is 'no deal'. The Bill goes further. It allows the Government (and/or where appropriate, a devolved authority) by regulations to modify retained EU legislation on social security co-ordination. The Government states that this power is necessary to enable it to deliver a range of options from EU exit day, and specifically to implement its preferred approach to social security co-ordination in a 'no deal' scenario. The Government has not said what its preferred approach might involve.

1.3 The Bill

The Bill as introduced consists of seven clauses and three schedules. It would apply to the entire United Kingdom.[4] Its long title is:

> A Bill to make provision to end rights to free movement of persons under retained EU law and to repeal other retained EU law relating to immigration; to confer power to modify retained direct EU legislation relating to social security co-ordination; and for connected purposes.

The Bill would repeal free movement, and other related EU-derived rights in UK primary and secondary legislation, and bring EU citizens under domestic immigration law. It would also make provision for Irish citizens and amend retained direct EU legislation on social security.

The Bill does not set out the future immigration system for EU citizens who move to the UK after Brexit. The future immigration system will be set out in the immigration rules.

The Bill repeals free movement in UK law. It does not set up the future UK immigration system. This will be implemented in the immigration rules.

To end free movement, the Bill would amend or repeal the following:

- Section 7 of the *Immigration Act 1988*
- Sections 106(3)-(4), 107(3) and 109 of the *Nationality, Immigration and Asylum Act 2002*
- The *Immigration (European Economic Area) Regulations 2016*
- Regulation 5 of the *Provision of Services Regulations 2009*
- The domestic legal effect of Article 1 of the *Workers Regulation* (Regulation (EU) No 492/2011 of the European Parliament) as well as any provisions inconsistent with the UK Immigration Acts
- The Bill would also revoke the domestic legal effect of a range of Regulations and the domestic effect of some Commission and Committee Decisions which will be discussed in further detail in section 6 of this paper.

[4] The Bill's Explanatory Notes provide a comprehensive overview of the territorial extent and application of the Bill's provisions: *Immigration and Social Security Co-ordination (EU Withdrawal) Bill)* explanatory notes, Bill 309-EN 57/1, 48-55

The Bill, its accompanying Explanatory Notes and details of its passage through Parliament are available from the Bill's pages on the Parliament website.

A collection of documents related to the Bill is available from the GOV.UK webpage Immigration and Social Security Co-ordination (EU Withdrawal) Bill, including:

- An overarching impact assessment
- A delegated powers memorandum
- An ECHR memorandum
- Home Office factsheets:
  - Factsheet 1: overview
  - Factsheet 2: end of free movement
  - Factsheet 3: status of Irish citizens
  - Factsheet 4: consequential power (relating to ending free movement)
  - Factsheet 5: social security co-ordination
- Equality impact statements on immigration and on social security

1.4 The Immigration White Paper

On 19 December 2018 the Home Secretary set out the Government's detailed proposals for 'The UK's future skills-based immigration system'.[5] The Government intends to consult on the proposals for one year.

The future immigration system will be set out for the most part in the UK's Immigration Rules. By making provision to repeal free movement in the UK, the Immigration Bill sets up the legal framework for the Government to implement immigration rules for EU citizens. The White Paper's overview explains:

> As the UK leaves the European Union (EU) and we bring free movement to an end, different rules to the current ones must apply to migration here by EU citizens. We will take full control of migration by bringing all of it under UK law and institute a new border and immigration system, to serve the UK public and the economy, and to enable those who come to the UK to integrate and make a positive contribution. Everyone will be required to obtain a permission if they want to come to the UK and to work or study here.[6]

The Government is proposing a single, unified immigration system to apply to everyone who wants to come to the UK after Brexit. The system will be based on the current immigration rules for non-EU nationals, with many changes. The Government's position is that the

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5 Home Office, *The UK's future skills-based immigration system*, Cm 9722, December 2018

6 Home Office, *The UK's future skills-based immigration system*, Cm 9722, December 2018, 8

focus of the immigration system should be on skill and talent to ensure the UK can 'welcome talent from every corner of the globe and demonstrates the United Kingdom is open for business'.[7]

Some of the main proposals are:

- Expanding the Tier 2 (General) visa category to EU citizens. This is the main work visa for non-EU citizens. The annual cap on the number of restricted allocations (currently 20,700) and the resident labour market test will be abolished. The Government is reviewing the salary threshold for eligibility for the visa, which is currently set at £30,000. The skill level will be lowered from RFQ 6 to RFQ 3, allowing eligibility for intermediate skilled jobs.
- Introduction of a new low skilled work route. This route will be open to workers at any skill level for a temporary period of 12 months. The visa will only be available to citizens of specified 'low risk' countries.
- Expansion of the Tier 5 Youth Mobility Scheme which is currently only available to citizens of specified countries who are age 18-31.[8] This would be a reciprocal arrangement between the EU and the UK.
- Family visa for non-EEA nationals will be expanded for EU citizens (except those with settled status)

For a more detailed look at the work visa proposals see Annex 2 of this briefing.

7 Home Office, *The UK's future skills-based immigration system*, Cm 9722, December 2018, foreword by the Home Secretary

8 These are Australia, Canada, Japan, Monaco, New Zealand, Hong Kong, Republic of Korea and Taiwan. For more information on these visas, see the GOV.UK page 'Youth mobility scheme visa (Tier 5)'

2. Free movement statistics

Migration is measured in terms of flows (the number of people migrating to and from a country) and stocks (the number of people living in a country other than that of their nationality or birth).

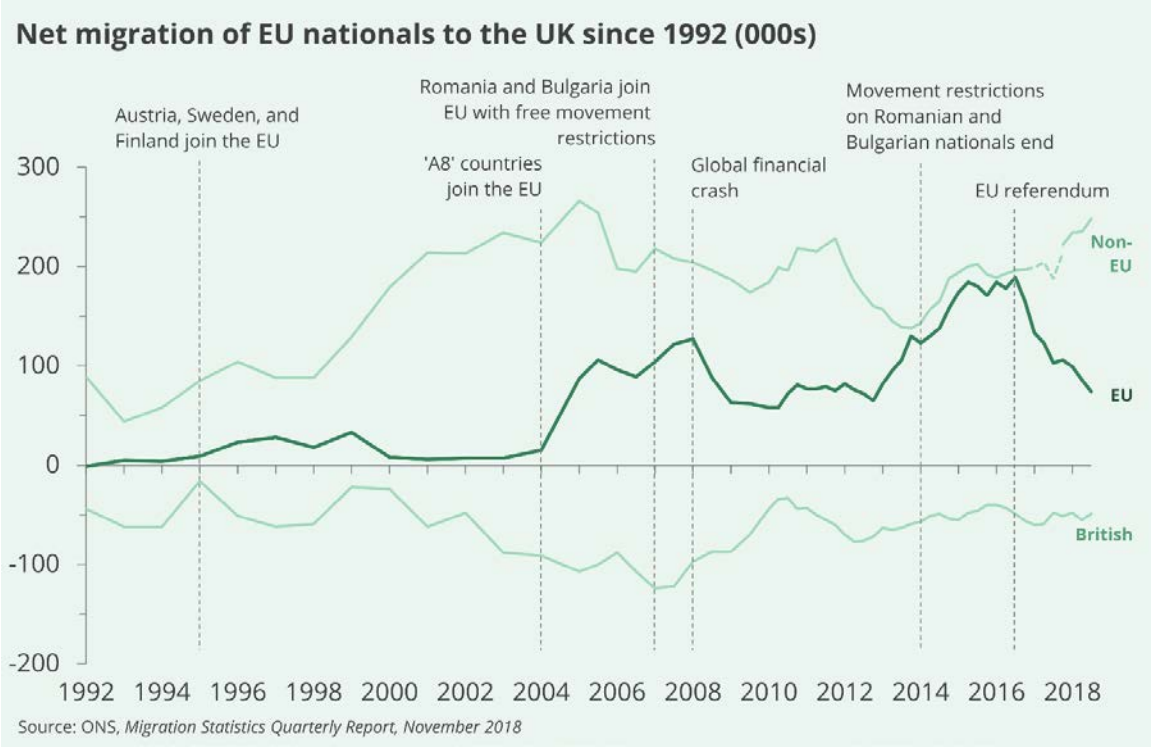
Migration flows are measured by the Office for National Statistics (ONS) and are estimates rather than a headcount. It is not a straightforward exercise to identify who is a 'migrant', since there are different definitions and all ways of measuring migration have their limitations. The ONS's approach is to use a survey at the UK border to capture long-term international migration, meaning people entering or leaving the country for 12 months or more.[9]

EU migration to the UK

In the year ending June 2018:

- Immigration of EU nationals was 219,000,
- Emigration of EU nationals was 145,000, and
- Net migration of EU nationals 74,000.

The chart below shows net migration of EU nationals to the UK, over time, and includes events which may have had an impact on migration flows. It also shows net migration for non-EU and British nationals, for context.



Link to source. **Notes:** The data in these charts does not reflect the revisions to net migration since the 2011 Census, so estimates of immigration and net migration of EU nationals in the period 2004 to 2008 are likely to be underestimates (see section 2.1 of the Migration statistics briefing paper). 'A8' countries are Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia. The estimates of non-EU migration in 2016-17 have been informally adjusted by the ONS.

[9] Read more about the 'International Passenger Survey' in the Library's Insight, 'Migration statistics: where do they come from?'

Between 1992 and 2004, net migration of EU nationals was 12,000 on average per year. It rose substantially after 2004, with the accession of Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia (the 'A8' countries). The UK did not impose any restrictions on the free movement of nationals of these countries to the UK.

Net migration rose again in 2007 with the accession of Bulgaria and Romania (although free movement restrictions were imposed and work permits were required for these nationals until 2014) but fell again in 2008 after the global financial crisis.

It rose in 2013 and again in 2014, this latter rise being partly as a result of the removal of free movement restrictions for Bulgarian and Romanian nationals.

In the year ending June 2016, net migration of EU nationals was at its peak of 189,000. It fell following the EU referendum and in the year ending June 2016, was around one third of what it had been two years previously.

Net migration of EU nationals has been positive since the start of 1992, adding around 60,000 to the population on average per year.

EU migrants living in the UK

The most recent estimates of the EU migrant population of the UK are available from the Labour Force Survey and are published in an ONS annual statistical release on 'Population by Country of Birth and Nationality'.[10]

In June 2018, there were **3.7 million EU nationals**, not including British nationals, living in the UK (6% of the population). The largest foreign EU nationality was Polish, with around 985,000 Poles living in the UK, followed by Romanian (433,000), Irish (337,000), Italian (292,000) and Portuguese (217,000).

The most recent Census results showed that **in March 2011 there were 2.7 million people born in other EU countries living in the UK**.[11] The Census is the most accurate source of data on the UK population, however it captures country of birth, rather than nationality, so they are not directly comparable with estimates by nationality.

British nationals living in the EU

The ONS estimates that **in 2011**, there were around **890,000 British nationals** living in other EU countries in 2011, and around **1.14 million people born in the UK** living in other EU countries in 2011.[12]

These figures are based on the 2010 to 2011 round of censuses in Europe and other data from European statistical offices.

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10 ONS, Population by Country of Birth and Nationality, June 2018

11 This estimate covers all countries that were EU member states in 2011, so it does not include a small number of people born in Croatia, which joined the EU in July 2013.

12 ONS, What information is there on British migrants living in Europe?: Jan 2017

In April 2018, the ONS produced updated estimates using Eurostat's European Labour Force Survey (ELFS).

These estimates do not include Ireland, which was excluded because

> "…citizenship is not a suitable definition and so the data would not be comparable. Irish and British citizenships are complex. There are many dual nationals and there are further, unknown, numbers of those who have rights to citizenship in both countries but have not yet exercised one of them. There have also been increases in applications for Irish citizenship of which it is not yet possible to take account in the available data." [13]

These figures show that **in 2017, 785,000 British nationals were living in other EU countries excluding Ireland**.[14] In a separate publication, the ONS estimated that there were 277,200 people born in the UK and resident in Ireland in 2016.[15]

Irish nationals in other EU countries

At the ONS's latest estimate, around 337,000 Irish nationals were living in the UK. [16]

There is no comprehensive dataset on Irish nationals living in other EU countries. The best indicator of where Irish people live in the EU is the UN's global migration database which estimates the number of people born in Ireland living in other countries. [17]

The UN estimates that, **in 2017, around 480,000 people born in Ireland were living in other EU countries** and a further 5,000 lived in non-EU EEA countries.[18] According to these estimates, 83% of these (402,000) were living in the UK.

After the UK, the highest number of Ireland-born were in Spain (15,000), Germany (11,000), France (9,000), and Poland (8,000).

The United Nations dataset is based on estimates from national censuses and population surveys, which have been rolled forward to account for population growth among migrant stocks in years since the last available data. This is supplemented with information from population registers and nationally representative surveys.

It is important to note that even though the number of Irish-born in the UK is higher than the number of Irish passport holders, it may well be the other way around in other countries. It is possible to acquire Irish citizenship without having lived in Ireland: for example, by having an Irish parent or an Irish grandparent who was born on the island of Ireland.

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13 ONS, Living abroad: dynamics of migration between the UK and Ireland
14 ONS, Living abroad: British residents living in the EU: April 2018
15 ONS, Living abroad: dynamics of migration between the UK and Ireland
16 ONS, Population by Country of Birth and Nationality, June 2018
17 United Nations Global Migration Database, International migrant stock by destination and origin. Note that although the majority of EU countries submit 'country of birth' data to the UN's database, some submit citizenship figures instead.
18 Iceland, Switzerland, Norway, and Liechtenstein.

3. Repealing free movement (Part 1 of the Bill)

3.1 Repeal of retained EU free movement law (Clause 1)

Background

For as long as the UK remains an EU Member State, it is subject to laws guaranteeing EU citizens the right to free movement throughout the Union. British citizens will continue to enjoy EU citizenship until the UK exits the EU.

EU 'Free movement' rights

The right to move and reside freely in another Member State is one of the rights enjoyed by all those with EU citizenship.[19] It is conferred directly on every EU citizen by Article 21 of the Treaty on the Functioning of the European Union (TFEU). It is also enjoyed by those non-EU citizens who hold Swiss citizenship or citizenship of states in the European Economic Area (Iceland, Norway and Liechtenstein).[20] For ease of reference all will be referred to as 'EU citizens' in this briefing.

The right entitles EU citizens to reside on the territory of another EU Member State for up to three months without any conditions other than the requirement to hold a valid identity card or passport.[21] After three months certain conditions apply, depending on the status of the EU citizen. In order to have an ongoing "right to reside" an EU citizen must fit into one of the following categories:

- a worker or self-employed person[22]
- a job-seeker (a person who is seeking employment and has a genuine chance of being employed)
- a self-sufficient person
- a student
- a family member accompanying or joining an EU citizen who fits into one of the above categories.[23]

There may also be certain administrative formalities to be met.[24]

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19 Any person who holds the nationality of an EU Member State is automatically also an EU citizen. EU citizenship is additional to nationality of a Member State and does not replace it.

20 The European Economic Area (EEA) allows Iceland, Liechtenstein and Norway to be part of the EU's single market. Switzerland is neither an EU nor EEA member but is part of the single market.

21 Directive 2004/38 of the European Parliament and of the Council, Article 6

22 In certain circumstances, a person who is no longer working can retain "worker" or "self-employed" status - for example, if temporarily unable to work due to illness or accident, or due to involuntary unemployment: Directive 2004/38/EC, Article 7(3)

23 A more limited range of relatives are eligible for a right of residence as the family member of a "student" than for the other categories: Directive 2004/38, Article 2(2), Article 7(4)

24 Directive 2004/38, Article 7

EU citizens who have resided legally for a continuous period of five years in another EU Member State acquire the right to permanent residence there.

As well as conferring the freedom to move and reside freely throughout the EU under EU citizenship provisions, the TFEU specifies the free movement rights of workers and the self-employed.[25] This fundamental principle is supported by protections against discrimination in employment on the grounds of nationality and provisions co-ordinating social security rules so that citizens do not lose entitlements when they exercise their free movement rights in order to work elsewhere.

In practice, free movement law means that EU citizens do not require a visa in order to come to the UK. Those coming to the UK are not subject to rules on English language proficiency. The exclusion of an EU citizen must be justified on the grounds of public policy, public security or public health.

Immigration controls for non-EU nationals

The comparable provisions for non-EU citizens, including those who are family members of British citizens, are specified in the UK's Immigration Rules and are significantly more restrictive.

The Immigration Rules impose significantly more restrictive conditions on non-EU migration

For example, opportunities for non-EU citizens to come to work in the UK under the points-based system are generally restricted to skilled migrants who already have a job offer. To secure a visa, non-EU citizen spouses of British citizens must satisfy various eligibility criteria, including a requirement their British partner has an annual income of at least £18,600 (or a higher amount in savings). Most non-EU visa categories require that applicants have some proficiency in the English language, and initially grant only a temporary permission to stay in the UK. The scope to extend the permission, to switch to a different immigration category or to stay in the UK permanently, varies depending on the visa category.

As the UK's Immigration Rules have become more restrictive the contrast between EU free movement rights and visa restrictions for non-EU citizens has become more striking.

The EU law right of permanent residence

EU citizens with five years of lawful residence in a host Member State do not need to apply for permanent residence

EU citizens who reside legally for a continuous period of five years in a Member State other than their own acquire the right of permanent residence in their host state. This right is acquired automatically. Citizens do not need to apply for it. Once acquired, the right of permanent residence is lost only through an absence from the host Member State for a period exceeding two consecutive years.[26]

Permanent residence is provided for by Directive 2004/38 - often referred to as the "Citizens Rights Directive" or the "Free Movement

[25] Articles 45-48 TFEU and Articles 49-53 TFEU respectively
[26] Directive 2004/38 of the European Parliament and of the Council, article 16

Directive" - and transposed into UK law by the *Immigration (European Economic Area) Regulations 2016*.[27]

UK law implementing free movement

Section 1 of the Withdrawal Act repeals the *European Communities Act 1972* on exit day. Section 2 converts and incorporates into domestic law EU law as it exists on exit day. To end free movement, the Immigration Bill needs to repeal or amend any EU laws preserved by the Withdrawal Act which would continue free movement.

The majority of EU law of free movement has been implemented in the UK through statutory instruments, made under section 2(2) of the *European Communities Act 1972*. Section 2(2) of the 1972 Act provides a power to make orders, rules, regulations or schemes which implement the UK's EU obligations. It is under this provision that the *Immigration (European Economic Area) Regulations 2006,*[28]as amended, ("the EEA Regulations") were made. The EEA Regulations came into effect on 30 April 2006. It is the EEA Regulations which set out the bulk of EU free movement rights, and transpose into national law Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Under section 7 of the *Immigration Act 1988* those entering the UK by exercise of enforceable EU law rights or any provisions made under section 2(2) of the *European Communities Act 1972* are exempt from the requirement to obtain immigration leave to enter or remain.

Section 109 of the *Nationality, Immigration and Asylum Act 2002* empowers the provision of regulations on appeal rights against immigration decisions made in respect of a person who claims a right under any of the Community Treaties.

The Bill

Clause 1 would make provision to end free movement in the UK by establishing Schedule 1. Schedule 1 would dismantle the provisions in UK law which enable free movement and EU-derived immigration rights.

Comment

Clause 1 would give the Secretary of State the power to repeal free movement law in the UK by amending primary and secondary legislation on a day appointed by regulations. This power could be exercised whether a Brexit deal is agreed or under a no-deal scenario. The Home Office's Impact Assessment states:

> The Bill will propose that provisions can be commenced by order to ensure UK law is flexible enough to cater for a deal or no deal outcome as free movement will end when the UK leaves the EU.[29]

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27 These Regulations revoked and replaced the *Immigration (European Economic Area) Regulations 2006* on 1 February 2017

28 SI 2006/1003

29 Impact Assessment for Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2018, HO0299 undated

If the Withdrawal Agreement is ratified, it could be expected that the Government would repeal free movement at the end of the implementation period. This is because, under the Withdrawal Agreement, free movement between the UK and the EU will continue until the end of the implementation period.[30] Repealing free movement at the end of the implementation period would then likely coincide with the introduction of new immigration rules for EU citizens.

The situation under a no-deal Brexit is less clear. The Department for Exiting the European Union's policy paper '*Citizens' Rights – EU citizens in the UK and UK nationals in the EU*', published on 6 December 2018, states that in a no-deal scenario, the cut off for eligibility for settled status will be 29 March 2019.[31] This means that unless there is a deal, EU citizens who arrive in the UK after 29 March 2019 would not be able to apply for settled status. Conversely, continuous residence rights are afforded under the Withdrawal Agreement to those who arrive up to the end of the implementation period. However, the policy paper also explains that 'the new UK immigration system would be implemented from 1 January 2021 as planned'.[32] This raises questions about when the Government would implement the Bill and repeal free movement.

The delegated powers memorandum to the Bill states 'given that the Bill may obtain Royal Assent close to Exit day but the intention (in a no deal scenario) is that the substantive provisions of Part 1 of the Bill will take effect from that date…' This suggests that under a no-deal scenario, the Government intends to repeal free movement from 29 March 2019. If the Bill comes into effect and free movement is repealed from 29 March 2019 and the new immigration rules are implemented from 1 January 2021, it is unclear which visa rules will EU citizens come to the UK under between 30 March 2019 and 1 January 2021. If the Bill does not come into effect soon after 29 March 2019, it is not clear whether those EU citizens who move to the UK after this date would do so under free movement laws and what their future status in the UK would be.

On his website Free Movement, prominent immigration lawyer Colin Yeo commented:

> It is worth observing that although the UK would unilaterally continue EU-type free movement rules in domestic law for EU citizens after a no deal Brexit because the government is simply not equipped or prepared to do otherwise, the same is not true in reverse. Unless each EU country legislates otherwise, British citizens travelling to EU countries would immediately be treated as third country nationals, meaning we would lose our free movement rights immediately.

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30 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Unions and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018, Article 10

31 Department for Exiting the European Union, *'Citizens' Rights – EU citizens in the UK and UK nationals in the EU: policy paper'*, 6 December 2018,, p4, para 11

32 Department for Exiting the European Union, *'Citizens' Rights – EU citizens in the UK and UK nationals in the EU: policy paper'*, 6 December 2018, p8, para 29

> Of course, none of this would not work if the new Immigration Bill mentioned at the outset has repealed the EEA Regulations. Schedule 1, part 1, section 2(2) specifically says that "the Immigration (European Economic Area) Regulations 2016… are revoked". If the Immigration Bill becomes law before Brexit day, the commencement of this provision would have to be delayed. Otherwise there would be no obvious legal basis for EU citizens already resident but not yet granted leave to remain lawfully or new EU citizens to enter after 29 March, meaning chaos at the borders.[33]

Schedule 1

Schedule 1 is established by **Clause 1** of the Bill. It has three parts:

- Part 1 – EU derived domestic legislation
- Part 2 – Retained direct EU legislation
- Part 3 – EU derived rights etc

Part 1 of Schedule 1 would repeal UK primary and secondary legislation which implements free movement. The explanatory notes summarise:

> 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 nationals and their family members within scope of the 1971 Act, thus requiring them to have leave to enter or remain in the UK.
>
> 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.
>
> 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 provision made by or under the Immigration Acts. This is necessary to ensure that free movement of persons is fully repealed.[34]

Part 2 of Schedule 1 would revoke or amend retained direct EU legislation which relates to free movement and is preserved by the Withdrawal Act. This includes

- revoking article 1 of Regulation (EU) No. 492/2011 (the "Workers Regulation") and ensuring that other provisions of the Workers Regulation which are inconsistent with the Immigration Acts cease to apply

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33 The legal status of new arrivals from the EU after a no-deal Brexit, *Free Movement*, 11 January 2019

34 *Immigration and Social Security Co-ordination (EU Withdrawal) Bill)* explanatory notes, Bill 309-EN 57/1, para 56-58

- revoking Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas
- revoking Council Regulation (EC) No 333/2002 of 18 February 2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognised by the Member State drawing up the form
- revoking Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network

Part 2 of Schedule 1 would also revoke several Commission and Council Decisions. A full list of these can be found in Schedule 1 Part 2 clauses 6 and 7. More detail on these revocations and amendments can be found in the Explanatory Notes.

Part 3 of Schedule 1 would revoke directly effective EU rights flowing from section 2(1) of the *European Communities Act 1972* that are retained by the Withdrawal Act. Some of these rights have implications for UK immigration law.

Part 3 of Schedule 1 identifies several specific rights to be revoked. It also contains a power to revoke any 'EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures' that are inconsistent with the Immigration Acts. The Explanatory Notes provide a non-exhaustive list of affected EU rights which is reproduced in Annex 1.

3.2 Irish citizens (Clause 2)

Background

The rights of Irish nationals in the UK will be protected in line with the Common Travel Area arrangements

British citizens and Irish nationals enjoy free movement between the Republic of Ireland and the UK under the Common Travel Area arrangements. Irish citizens have a special status in British immigration and nationality law which pre-dates British and Irish membership of the EU. The Common Travel Area between the UK and Ireland essentially allows British/Irish citizens to cross the border without routine passport checks and being subject to immigration controls.

Before 1949 Eire (the former Irish Free State) was within the Crown's Dominions and persons born there were British subjects. Ireland's *Republic of Ireland Act 1948* established the Republic of Ireland and broke its last link with the Commonwealth and Crown's dominions. It was implemented in the UK by the *Ireland Act 1949*.

Under the *British Nationality Act 1948* (which came into force in 1949), citizens of Eire were deemed to have ceased to be British subjects on 1 January 1949. Persons born in the Republic of Ireland on or after 1 January 1949 did not acquire British subject status or any other form of British nationality by birth.

However, the *British Nationality Act 1948* continued to treat Irish nationals as a special case: British law was to apply to Irish nationals in the same way as British subjects, and Ireland was equated with Commonwealth states, in that Irish nationals were not 'aliens' and Ireland was not classed as a 'foreign country'.

The statutory definition of Ireland as "not a foreign country" was influenced by a concern that immigration controls between the UK and Ireland (which were felt to be impractical and undesirable) might otherwise be needed. Under section 1(3) of the *Immigration Act 1971* journeys which commence and conclude within the Common Travel Area are not subject to immigration control.

For a more detailed overview of the Common Travel Area, see the Library briefing paper 'The Common Travel Area and the special status of Irish nationals in UK law'.

The Bill

Clause 2 of the Bill would inserts section 3ZA into the *Immigration Act 1971*. Section 3ZA provides that Irish citizens do not require leave to enter or remain in the UK. This provides an exception to the general rule under section 3 which requires immigration permission to enter or remain in the UK for non-British citizens.

This means Irish citizens do not require immigration permission to enter the UK. However, Irish citizens subject to a deportation order, exclusion order or international travel ban will require an exemption to section 3ZA, meaning that they are not entitled to enter without leave.

Clause 2(3) would amend section 9 of the *Immigration Act 1971* 'to ensure a consistent approach to how Irish citizens are treated for immigration purposes in line with s3ZA'.[35] **Clause 2(4)** would amend Schedule 4 of the *Immigration Act 1971*. Schedule 4 relates to measures integrating UK immigration law to the Islands.

Comment

The Bill's explanatory notes clarify:

> 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. The Bill protects the rights of Irish citizens in the UK irrespective of where they have travelled from, providing the same immigration rights to all Irish citizens that are currently only provided for in the Immigration Act 1971 for those travelling from within the CTA.

On his website Free Movement, prominent immigration lawyer Colin Yeo commented:

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35 *Immigration and Social Security Co-ordination (EU Withdrawal) Bill)* explanatory notes, Bill 309-EN 57/1, 29

> We also see a proper statutory footing for Irish citizens offered in clause 2 of the Bill, which is to be welcomed given the uncertainty in their strict legal position previously highlighted on this blog. Irish citizens will not require leave to enter or remain, no matter from where they enter the UK, but can be deported or excluded under UK immigration laws.
>
> As Bernard Ryan has written, the status of Irish citizens has been legally unclear for many years. It looks like clause 2 also makes clear that Irish citizens can qualify for naturalisation by virtue of not requiring leave to enter or remain, as they are not "subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom" (as required by the British Nationality Act 1981, Schedule 1, paragraph 2).[36]

In a Free Movement article that pre-dates the Bill being published, the author commented:

> Firstly, if there is no statutory exemption from immigration control then at least some Irish nationals would be vulnerable to a change in government policy. Secondly, if there are no amendments to the UK Borders Act 2007, the automatic deportation regime imposed by that act would apply to Irish citizens. That would force the government to deport Irish nationals who have committed a serious crime even if the Home Secretary did not wish to deport them.[37]

The Explanatory Notes state:

> 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. It is worth noting that the Government's approach to the deportation of Irish citizens since 2007 is to only deport Irish citizens where that deportation is in the public interest.[38]

3.3 Meaning of "the Immigration Acts" etc (Clause 3)

Clause 3 would amend section 61 of the *UK Borders Act 2007* to ensure that the Bill is covered by the Act's reference to "the Immigration Acts". This means that the Bill will be covered by any reference to "the Immigration Acts" across legislation. Clause 3(2) provides that the provisions of Part 1 of the Bill (clauses 1-4) do not form part of retained EU law under the *EU Withdrawal Act 2018*, and therefore cannot be amended by secondary legislation under that Act.

3.4 Consequential provisions (Clause 4)

The Bill

Clause 4 is a Henry VIII clause in respect of Part 1(repealing free movement) of the Bill. This is essentially a mechanism to allow the

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36 'Immigration Bill to end EU free movement finally published', *Free Movement*, 20 December 2018

37 'How will Brexit affect Irish citizens in the UK?', *Free Movement*, 23 July 2018

38 *Immigration and Social Security Co-ordination (EU Withdrawal) Bill)* explanatory notes, Bill 309-EN 57/1, 26

Government to tidy any remaining provisions which may facilitate free movement.

It would empower the Secretary of State to make provisions by statutory instrument which the Secretary of State deems appropriate in consequence of, or connection with, any provision in Part 1. This power may be exercised by amending primary legislation passed before or during the same session as this Bill including any retained direct EU legislation. Changes can also be made by regulation to fees and charges connected to repealing free movement law.[39] Regulations made in exercise of this power could also include supplementary, incidental, transitional, transitory or saving provisions. The Bill's delegated powers memorandum states:

> By way of example, this power will be used to amend section 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which (in summary) makes it an offence to attend a leave or asylum interview with an immigration officer or the Secretary of Statewithout a valid passport or equivalent document. The defences in subsections (4)(a) and (b) and (5)(a) and (b) that exempt from the offence EEA nationals, or EEA nationals exercising treaty (i.e. free movement) rights in the UK, will be repealed as they are no longer required as a consequence of the wider repeal of free movement law. The definition of "EEA National" in subsection (12) can then be repealed in connection with the repeal of the elements of the section which require the definition.[40]

Factsheet 4: consequential power (relating to ending of free movement) provides examples of how the power might be used:

- to ensure that people who have an EEA right of appeal pending when the Bill repeals section 109 of the Nationality, Immigration and Asylum Act 2002 do not lose that right of appeal
- to enable EEA nationals who are in the UK before Exit to continue to remain in the UK lawfully for a period of time before applying to the EU Settlement Scheme
- remove references to EU law, EU institutions etc to ensure that UK legislation is coherent once the UK has exited the EU.[41]

Clause 4(4) would allow the Secretary of State to make regulations in respect of individuals who were in the UK without permission under the EEA Regulations or any other enforceable right. The Explanatory Notes elaborate:

> Subsection (4) states that 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

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39 *Immigration and Social Security Co-ordination (EU Withdrawal) Bill)* explanatory notes, Bill 309-EN 57/1, 89

40 Memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee, undated, 9

41 Factsheet 4: consequential power (relating to ending free movement), Home Office, updated 21 December 2018

> in relation to EEA nationals who are in the UK before EU Exit and who are before Exit 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 spouse of an EEA national who does not have comprehensive sickness insurance and who is not otherwise exercising Treaty rights, such as the right to work, who is therefore not technically exercising EU rights of free movement.[42]

As discussed above, the EEA Regulations are the domestic instrument which establish free movement law in the UK. This clause is therefore concerned with those EU citizens or family members who are residing in the UK, perhaps under the belief that they are exercising EU treaty rights, but in fact have no lawful basis to be in the UK. Under **Clause 4** the Secretary of State has the power to make regulations related to repealing free movement in respect of EU citizens who were in the UK but not exercising treaty rights. The Explanatory Memorandum elaborates:

> Subsection (4) states that 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 nationals who are in the UK before EU Exit and who are before Exit 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 spouse of an EEA national who does not have comprehensive sickness insurance and who is not otherwise exercising Treaty rights, such as the right to work, who is therefore not technically exercising EU rights of free movement.[43]

This means that the Home Office would have the power to make regulations in respect of all EU citizens who are residing in the UK prior to Brexit without exercising treaty rights. This would cover those who are granted settled status as the UK will not be requiring proof that an EU citizen was exercising treaty rights for eligibility under the settled status scheme.

Clause 4(6)-(9) would set out the parliamentary scrutiny methods for regulations made under Part 1 of the Bill.

The first regulations made under this clause must be laid before Parliament for a period of 40 days and will require approval by a

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42 *Immigration and Social Security Co-ordination (EU Withdrawal) Bill)* explanatory notes, Bill 309-EN 57/1, 34

43 *Immigration and Social Security Co-ordination (EU Withdrawal) Bill)* explanatory notes, Bill 309-EN 57/1, 34. Students or economically inactive people exercising their rights of free movement under the *Treaty on the Functioning of the European Union* (TFEU) must hold comprehensive sickness insurance in their host state. **Article 18** of the Withdrawal Agreement permits the UK and EU Member States to require proof of this insurance when considering whether to issue residence documents after Brexit. However Minister of State for Immigration Caroline Nokes has confirmed the UK will not impose this requirement on those applying under the settled status scheme.

resolution of each House to remain in force. This is known as the made-affirmative procedure. The made affirmative procedure is used when changes to the law are required urgently. Statutory instruments made under this procedure take effect immediately but cease to have effect after 40 days if not approved by Parliament, although

> this will not affect anything which has already been done under those regulations or prevent further regulations from being made.[44]

Factsheet 4: consequential power (relating to ending of free movement) describes the purposes of this process as:

> To enable the power to be used to deliver a coherent statute book in what may be a short window between Royal Assent of the Bill and Exit day, the first set of regulations can be made and then subsequently approved within 40 sitting days by both Houses of Parliament.[45]

Any subsequent regulations which modify existing primary legislation must have a draft laid before Parliament and approved by resolution of each House (the affirmative procedure). Further regulations which do not amend primary legislation may be annulled by resolution of either House (the negative procedure).

The Explanatory Notes comment that 'it is possible that regulations made under clause 4 of the Bill could extend the scope of existing provisions about charges or fees relating to immigration as a consequence of ending free movement.'

Comment

Delegated powers that enable ministers to amend primary legislation via secondary legislation are referred to as "Henry VIII powers" and have sometimes (but not always) proved controversial – particularly if the powers are very wide-ranging. They are seen by their critics as transferring legislative power from Parliament to Government. The Delegated Powers and Regulatory Reform Committee in the House of Lords has noted that by long-established practice, Henry VIII powers are subject to the affirmative procedure, as they are in this Bill. As to why the Bill ascribes the made affirmative procedure to the first set of regulations which alter primary legislation, the delegated powers memorandum explains:

> Given that the Bill may obtain Royal Assent close to Exit day but the intention (in a no deal scenario) is that the substantive provisions of Part 1 of the Bill will take effect from that date, the first set of regulations made under this clause will be subject to the made affirmative procedure. This is to enable the policy intention of ending free movement on EU exit day to be given effect, whilst nonetheless ensuring an appropriate level of parliamentary scrutiny for this power.

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44 *Immigration and Social Security Co-ordination (EU Withdrawal) Bill)* explanatory notes, Bill 309-EN 57/1, 37

45 Factsheet 4: consequential power (relating to ending free movement), Home Office, 21 December 2018

It is worth noting that, in addition to being able to modify primary legislation, clause 4 (as with those in the *EU (Withdrawal) Act* itself) explicitly allows for the modification of "retained direct EU legislation".

Under section 7 of the 2018 Act, "retained direct principal EU legislation" cannot be modified by delegated legislation unless an Act of Parliament specifically authorises it to do so. "Retained direct principal EU legislation" includes EU Regulations. This effectively gives "retained" EU regulations a similar (but not identical) status to domestic primary legislation after exit.This explains why, for example, the revocation of various pieces of retained EU law is set out explicitly in the Schedules of this Bill. Much of this could not be done except with explicit authorisation in an Act of Parliament.

4. Social security co-ordination (Part 2 of the Bill)

Part 2 of the Bill would allow the Government (and/or where appropriate, a devolved authority) by regulations to modify retained EU legislation on social security co-ordination. The Government states that this power would be necessary to enable it to deliver a range of options from EU exit day, and specifically to implement its preferred approach to social security co-ordination in a 'no deal' scenario. Any regulations would be subject to the affirmative procedure.

4.1 What is social security co-ordination?

The European Union Social Security Co-ordination Regulations do not establish a single, unified social security system across the EU but instead provide a reciprocal framework to protect the social security rights of people moving between EEA states (and Switzerland).[46] The main purpose of the co-ordination rules is to ensure that people who choose to exercise the right of freedom of movement do not find themselves at a disadvantage in respect of social security benefits – for example should fall ill or become unemployed while working in another Member State. The Regulations do not guarantee a general right to benefit throughout the EEA, nor do they harmonise social security systems. Member States remain responsible for their social security systems and it is up to them to decide which benefits are granted, at what rate, and conditions for entitlement.

The primary function of the co-ordination rules is to support free movement throughout the EEA by removing some of the problems people moving between states might encounter. Given the infinite range of personal situations that could occur and differences between social security systems the rules are necessarily complicated, but at their core are four key principles:[47]

- At any one time a person is covered by the social security system of one country and is only liable to make contributions in one country – the 'competent state' (the '**single state** principle');
- A person has the same rights and obligations as a national of the Member State where they are covered ('**equal treatment**');
- Periods of insurance, employment or residence in other Member States can be taken into account when determining a person's eligibility for benefits ('**aggregation**'); and
- A person can receive benefits from one Member State even if they are resident in another Member State ('**exportability**').

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46 Subsequent references in this paper to the EEA should be read as 'the EEA and Switzerland'

47 For further background see TRESS network, Short introduction to the European Coordination of social security schemes

A well-established system of administrative co-operation between countries ensures the effective operation of the co-ordination rules, dispute resolution and secure data sharing.[48]

The EU Regulations governing social security co-ordination are:

- Regulation 883/2004 on the co-ordination of social security systems, and its associated implementing regulation, Regulation 987/2009;
- Regulation 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 its associated implementing regulation, Regulation 574/72; and
- Regulation 859/2003 extending Regulation 1408/71 to nationals of non-EU Member Countries.

The most important measure is Regulation 883/2004 – sometimes referred to as the 'Modernised' Co-ordination Regulations. The Regulation it replaced – 1408/71 – now only applies in limited circumstances.[49]

The co-ordination rules do not cover all welfare benefits. Benefits are classed as '**social security**' – and therefore come within the scope of the co-ordination rules – if they provide cover against certain categories of 'risk' (such as sickness, maternity/paternity, unemployment, old age). Some benefits – '**special non-contributory benefits**' – fall within the co-ordination rules but cannot be exported. Benefits which are neither social security benefits nor special non-contributory benefits fall into the category '**social and medical assistance**' and are not covered by the co-ordination rules. The UK Government does not specify all the benefits it considers to be social assistance, but it considers Universal Credit to be social assistance benefit and as such outside the scope of social security co-ordination.[50]

The box below gives examples of how the social security co-ordination rules apply in different scenarios. As this indicates, the Co-ordination Regulations cover not only social security but also reciprocal healthcare rights.[51]

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48 European Commission, Electronic Exchange of Social Security Information (EESSI)

49 Regulation 1408/71 applies to people who have been relying on it since before the Modernised Co-ordination Regulations came into force and have not asked to be transferred to the new rules, and to certain non-EEA nationals

50 Home Office and DWP, Review of the Balance of Competences: Internal Market: Free Movement of Persons Call for evidence, May 2013, para 51

51 Separate legislation introduced on 26 October 2018 – the Healthcare (International Arrangements) Bill – aims to allow the UK to maintain reciprocal healthcare arrangements with the EU Member States post-Brexit. For further information see Commons Library briefing CBP-8435, Healthcare (International Arrangements) Bill 2017-19, 9 November 2018

Box 1: Social security co-ordination in action

Example 1: the competent state

Albert lives in the UK and is sent by his employer to work in Germany temporarily for 18 months. As the posting is not expected to last more than 24 months, he can remain insured under the UK social security system. Albert continues to pay UK National Insurance contributions while abroad and doesn't have to pay social insurance contributions in Germany.

Example 2: the competent state

Magda is a Danish national in receipt of a Danish state pension. She moves to the UK and claims Attendance Allowance. As Denmark is responsible for reimbursing the cost of any NHS treatment she receives, it is also the competent state for cash sickness benefits. The DWP therefore decides that Magda is not entitled to Attendance Allowance, but forwards her claim to the Danish authorities for them to determine whether she is entitled to a Danish cash sickness benefit.

Example 3: aggregation

Barbara moves to the UK from Poland and starts work. After 12 months she is made redundant and makes a claim for contribution-based Jobseeker's Allowance. Barbara's UK NI contributions aren't sufficient for her to get contribution-based JSA, but can use periods of insurance from her previous work in Poland to help satisfy the conditions. The DWP contacts the Polish authorities to get details of Barbara's insurance record.

Example 4: aggregation

Jo worked in France after leaving university, before returning to the UK in 2008. He continued to work and pay UK NI contributions until reaching State Pension age in November 2018. Jo doesn't have to make separate claims to get his French and UK state pensions – he submits a single claim to the DWP. The International Pension Centre in Newcastle contacts the French pension authority, which calculates his entitlement to the French state pension and put this into payment. It also calculates Jo is entitled to 9/35ths of the full amount of the UK State Pension (on the basis that he had nine of the 35 'qualifying years' required) and puts this into payment. His period of insurance in France meant he satisfied the minimum qualifying condition (ten qualifying years), although his actual entitlement is based on nine.

Example 5: exportability

Ana, a UK national, retires to Spain, having worked in the UK for 30 years. Her UK State Pension is paid to her in Spain and uprated annually each year, on the same basis as in the UK. As Ana is in receipt of a UK State Pension, she can also obtain an S1 form from the Department of Health's Overseas Healthcare Service. This entitles her to healthcare in Spain, with the UK reimbursing the cost of any treatment she receives.

Further information:

European Commission, EU social security coordination
Child Poverty Action Group, Welfare benefits and tax credits handbook 2018-2019, Chapter 70
TRESS network, A-Z of coordination E-learning tool

In 2017-18, UK benefits totalling around £2 billion were exported to around 500,000 claimants living in EEA countries. Over 90% of the expenditure was on State Pensions, and over 90% of the recipients of a DWP benefit or pension were UK or Irish nationals.

At February 2018, around 90% of the 484,900 UK State Pension recipients in the EEA were residing in EU15 countries. Three countries accounted for almost two thirds of the total: 133,200 recipients were resident in Ireland, 106,800 in Spain, and 66,700 in France.[52]

The EU Social Security Co-ordination Regulations are not the only provisions people moving between the UK and other countries can rely on to protect their entitlement to benefits. The UK also has a number of bilateral reciprocal social security agreements with individual states, including some non-EEA countries.[53] While these may include similar provisions to the Co-ordination Regulations – covering for example equal treatment, aggregation, and uprating of exported pensions – the bilateral agreements vary widely in scope and none are as comprehensive as the EU rules.[54]

The social security agreements the UK has with EEA states[55] were superseded by the EU Co-ordination Regulations[56] but remain in force for limited purposes (e.g. in relation to individuals who do not come within the scope of the EU Regulations).

4.2 The Withdrawal Agreement and Political Declaration

On 14 November the European Commission and UK Government published a draft Withdrawal Agreement setting out the terms of the UK's exit from the European Union, including provisions for a transition (or implementation) period running until the end of December 2020 (with the possibility of extension for up to two years). Alongside the Withdrawal Agreement the parties also issued a Political Declaration setting out the framework for the future relationship between the EU and the UK.[57]

The **Withdrawal Agreement** provides that social security co-ordination would continue to apply after the end of the transition period to individuals who come within the scope of the agreement, and to others in a cross-border situation at the end of the transition period. The intention is to ensure that citizens who have moved between the UK and EU before the end of the transition period 'are not disadvantaged in their access to pensions, benefits and other forms of social security,

52 All figures from the Policy equality statement (social security co-ordination) published alongside the Bill

53 See GOV.UK, Claiming benefits if you live, move or travel abroad: Where you can claim benefits, for a list of the countries which have social security agreements with the UK

54 For an overview of the scope and content of bilateral agreements see Child Poverty Action Group, Benefits for migrants handbook, 10th ed, 2018, chapter 17

55 EEA states with which the UK has historic bilateral social security agreements include Austria, Belgium, Croatia, Cyprus, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Slovenia, Spain, and Sweden. The UK also has a social security agreement with Switzerland

56 Article 8 of EC Regulation 883/2004 provides that the co-ordination rules 'shall replace' any pre-existing social security convention entered into by a Member State

57 An updated and expanded version of the Political Declaration was published on 28 November

including healthcare cover.'[58] The agreement also provides protections in other circumstances so that, for example, where a UK national has previously worked and paid social security contributions in a Member State, rights flowing from those contributions such as benefits, pensions and reciprocal healthcare rights are protected.[59]

Further information can be found in section 3.5 of Commons Library briefing CBP-8453, The UK's EU Withdrawal Agreement, 7 December 2018.

The **Political Declaration**[60] states that, given the United Kingdom's decision that in principle free movement of persons will no longer apply, the UK and the EU should establish 'mobility arrangements based on non-discrimination between the Union's Member States and full reciprocity'.[61] It adds that, among other things, 'The Parties also agree to consider addressing social security coordination in the light of future movement of persons'.[62] Given the commitment to non-discrimination between Member States, this would entail a single social security agreement between the UK and the EU as whole, rather than bilateral agreements with individual Member States.

In its July 2018 White Paper on the future relationship between the UK and the EU, the UK Government said that reciprocal social security arrangements – covering among other things uprating of state pensions, reciprocal healthcare for pensioners, continued participation in the European Health Insurance Card scheme and cooperation on planned medical treatment – would be important for UK nationals who want to live, work or retire in the EU in the future.[63] The Government's Explainer for the Political Declaration published on 25 November stated that the UK was 'still seeking commitments in specific areas such as uprating of state pensions and reciprocal healthcare, including [EHIC], to ensure that UK citizens living in the EU, in future, continue to benefit from their pension entitlements and associated healthcare.'[64]

Regulations have been agreed which, among other things, amend section 179 of the *Social Security Administration Act 1992* to enable the UK to implement a future social security agreement with the EU as a whole.[65]

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58 HM Government, Withdrawal agreement explainer, 14 November 2018, para 37

59 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018, Article 32

60 See Commons Library briefing CBP-8454, The Political Declaration on the Framework for Future EU-UK Relations, 30 November 2018

61 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, Paragraph 51

62 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, Paragraph 54

63 HM Government, The future relationship between the United Kingdom and the European Union, Cm 9593, July 2018, para 89

64 HM Government, Explainer for the Political Declaration, 25 November 2018, para 60

65 *Social Security (Amendment) (EU Exit) Regulations 2018*; *Social Security (Amendment) (Northern Ireland) (EU Exit) Regulations 2018*

4.3 Co-ordination in a 'no deal' scenario

If the Withdrawal Agreement is rejected and no alternative arrangements are made, the EU Social Security Co-ordination Regulations would cease to apply from the date of the UK's withdrawal from the EU. The UK would be shut out of the administrative system underpinning co-ordination and would be unable to impose reciprocal obligations on EU27 states, such as requiring them to provide information on individuals' social insurance records.

This could have serious implications for people – both UK nationals and EU27 citizens – in cross-border situations. Situations that could occur include, for example:

- Individuals being unable to aggregate contributions paid or periods of residence in the UK and the EU27 states to satisfy the conditions for benefits;
- No clear rules about which country, if any, is responsible for paying a person's benefits where they have lived in more than one country, and no mechanism for resolving disputes; and
- Posted workers – i.e. employees working in another country temporarily – finding themselves liable to pay social security contributions in both countries, instead of remaining insured only under the scheme of their home country.

For some of the states covered by the co-ordination rules, the UK has bilateral reciprocal social security agreements which pre-date their, or the UK's, EC/EU entry. These agreements were superseded by the co-ordination rules, but remain in force for limited purposes. Should the co-ordination rules cease to apply, it is possible that these bilateral agreements would become applicable again, although this is by no means certain.[66] These bilateral agreements are however far more limited in scope than the EU co-ordination rules, vary widely in terms of the persons and benefits covered, and may refer to benefits which no longer exist. Administrative mechanisms would also need to be established in tandem with each of the other countries for any reciprocal arrangements to work.

On 6 December the Department for Exiting the EU published a policy paper outlining the Government's plans to protect citizens' rights in the event that the UK leaves the EU without a deal.[67] While it acknowledged that co-ordinating social security for people in cross-border situations required reciprocity from EU states, it said that the Government was exploring options to protect past social security contributions and reciprocal healthcare arrangements in the event of a 'no deal' scenario. EU citizens resident in the UK by 29 March 2019 would be able to access benefits in the UK as they do now, and the

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66 Article 8 of EC Regulation 883/2004 provides that the co-ordination rules 'shall replace' any pre-existing social security convention entered into by a Member State. It is not clear whether this means these conventions effectively ceased to exist, or merely remain 'dormant.'

67 Citizens' Rights – EU citizens in the UK and UK nationals in the EU

Government called on the EU and Member States to take corresponding steps to protect the rights of UK nationals in the EU.

To the extent that it was within its control, the Government would seek to preserve the rights of UK nationals in the EU. Guidance for UK nationals issued on 18 December stated that the Government was committed to uprating UK State Pensions across the EU for 2019 and 2020 and would wish to continue uprating pensions beyond that but would take decisions 'in light of whether, as we would hope and expect, reciprocal arrangements with the EU are in place.'[68]

The Government is however making contingency plans to help returning UK nationals access benefits and other support quickly, should they find themselves unable to continue to live abroad. The policy paper published on 6 December stated:

> We recognise that an issue raised by UK nationals is their ability to access to benefits and housing quickly on return to the UK. Arrangements will be made to ensure continuity of payments for those who return and are already in receipt of UK state pension or other UK benefits while living in the EU. We are considering how support could be offered to returning UK nationals where new claims are made and will set out further details in due course.[69]

On 19 December the European Commission issued as communication for Member States on contingency planning for a 'no deal' Brexit covering, among other things, social security co-ordination.[70] It stated:

> If the Withdrawal Agreement is not ratified, Union rules on social security coordination will no longer apply to the United Kingdom. This raises concerns for EU citizens who currently work or reside in the United Kingdom, or have done so previously, about their social security entitlements. The same applies to UK nationals currently working/residing in a different Member State.
>
> The Commission calls upon Member States to take all possible steps to respond to these concerns and to ensure legal certainty and protection of the social security entitlements acquired by citizens who exercised their right to free movement prior to 30 March 2019.
>
> In particular, the Commission calls upon Member States to:
>
> - take into account, for EU27 citizens and UK nationals, periods of work/insurance that occurred in the United Kingdom before the withdrawal;
> - inform citizens that they should keep the appropriate documentation that provides evidence for these periods;

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68 See Commons Library briefing CBP-7894, Brexit and state pensions, 31 December 2018

69 Ibid. para 24

70 Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan, COM(2018) 890 final. See also the accompanying memo, Questions and Answers: the consequences of the United Kingdom leaving the European Union without a ratified Withdrawal Agreement (no deal Brexit)

- ensure that 'aggregation' of periods completed until withdrawal also benefits those who continue to live in the United Kingdom;
- export old-age pensions to the United Kingdom, despite the fact that it will be a third country. This would apply to those citizens who continue to reside in the United Kingdom after the withdrawal date, but also to the UK nationals who acquired old-age pension entitlements within the EU27 prior to the withdrawal date.[71]

The Commission would provide 'concrete and detailed advice' to Member States on how to achieve a 'coherent contingency approach' regarding social security co-ordination, which the Member States should apply as of the withdrawal date.

The communication remined Member States however that 'the Union has exclusive competence on social security coordination for the periods completed and for facts and events that occurred before the withdrawal date.'

4.4 Retaining EU law on social security co-ordination

The Withdrawal Act converts EU law as it stands at the moment of the UK's exit from the EU into domestic UK law ('retained EU law') in order to maintain a functioning statute book. This will include the EU Regulations relating to social security co-ordination.

Section 8 of the Act also gives Ministers a power to make regulations to prevent, remedy or mitigate-

- any failure of retained EU law to operate effectively, or
- any other 'deficiency' in retained EU law

The Government has already laid before Parliament for consideration four proposed negative Statutory Instruments relating to social security co-ordination, under section 8 of the EU (Withdrawal) Act:

- *Social Security Coordination (Regulation (EC) No 883/2004, EEA Agreement and Swiss Agreement) (Amendment) (EU Exit) Regulations 2018*
- *Social Security Coordination (Regulation (EC) No 987/2009) (Amendment) (EU Exit) Regulations 2018*
- *Social Security Coordination (Council Regulation (EEC) No 1408/71 and Council Regulation (EC) No 859/2003) (Amendment) (EU Exit) Regulations 2018*
- *Social Security Coordination (Council Regulation (EEC) No 574/72) (Amendment) (EU Exit) Regulations 2018*

[71] Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan, COM(2018) 890 final. See also the accompanying memo, Questions and Answers: the consequences of the United Kingdom leaving the European Union without a ratified Withdrawal Agreement (no deal Brexit), p5

The DWP's Explanatory Memorandum accompanying the regulations states:

> *Why is it being changed?*
>
> 2.4 The whole system of social security coordination relies on cooperation and reciprocity from other Member States ('MS'); but we cannot assume this would continue in a no deal scenario. It will not be possible to impose reciprocal obligations on MS when correcting deficiencies in the Coordination Regulations - such as requiring that they cooperate with the UK or provide information, or that they apply the rules contained in the Coordination Regulations to individuals moving to/from the UK.
>
> *What will it now do?*
>
> 2.5 These instruments address deficiencies in retained law caused by the UK withdrawing from the EU, which would impact the operation of the retained Coordination Regulations in a no-deal scenario.
>
> 2.6 These instruments aim to ensure that citizens' rights are protected as far as possible in a no-deal scenario. As per the intent of the EU (Withdrawal) Act 2018, these instruments aim to maintain the status quo. These instruments are intended to ensure a functioning statute book in the event of a no deal scenario, by fixing deficiencies in retained EU law, in line with the power provided by section 8.

The regulations delete Articles referring to bodies at the EU level concerned with administrative or technical matters arising from social security co-ordination – such as the Administrative Commission – since these bodies would no longer have any powers or functions in relation to the UK in a 'no deal' scenario.

The regulations also however include provisions intended to ensure that, to the extent that the UK can do so unilaterally, social security co-ordination can continue to operate if there is 'no deal.' Changes made include:

- Provisions to enable the DWP to ask claimants themselves to provide evidence to help determine the 'competent state' for benefits, where the relevant Member State does not respond to a request for information.
- Provisions for people living in an EEA country to provide medical evidence where this is required for benefits purposes.
- Removing Articles covering provisional payment of benefits where there is a dispute between Member States regarding competence (although the Explanatory Memorandum states that such payments are extremely rare – the DWP has only ever made provisional payments in two instances).
- Provisions relating to situations where people resident outside of the UK remain liable to pay UK National Insurance contributions.

Further information can be found in the Explanatory Memorandum accompanying the draft regulations.

The regulations also remove entirely Article 4 of EU Regulation 883/2004. This provides that people covered by the co-ordination rules

have the same rights to benefit and obligations as nationals of the host state – 'equal treatment.' The Explanatory Memorandum does not explain why this particular provision is removed.

4.5 The Bill

Part 2 of the Bill (**clause 5** and **Schedules 2-3**) covers powers to amend retained EU law governing social security co-ordination (as 'fixed' by regulations made under section 8 of the *EU (Withdrawal) Act* – see above). Further background information can be found in the Explanatory Notes accompanying the Bill as introduced in the Commons[72], and other policy documents published alongside the Bill.[73]

The Explanatory Notes state that the intention is to-

> …allow the Government (and/or, where appropriate, a devolved authority) to reflect its preferred policy if no agreement is reached with the EU on social security co-ordination matters, or alternatively, to make changes to the regime covering those persons who fall outside the scope of any agreement that is made.[74]

Clause 5 provides a power to modify, by regulations under the affirmative procedure (see **Schedule 3**), retained direct EU legislation relating to social security co-ordination, specifically:

- Regulation 883/2004 on the co-ordination of social security systems, and its associated implementing regulation, Regulation 987/2009;
- Regulation 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 its associated implementing regulation, Regulation 574/72; and
- Regulation 859/2003 extending Regulation 1408/71 to nationals of non-EU Member Countries.

The power may be exercised by an 'appropriate authority.' This means the UK Government or a devolved authority, or both acting jointly. This is covered further below.

The power conferred by clause 5 is a broad one. The legislation may be amended, or repealed/revoked completely.[75] Regulations may make different provision for different categories of person and for different purposes, as well as making consequential, supplementary, incidental, transitional, transitory or saving provision. The power to make consequential (etc) provision would also include the power to modify any primary legislation, and retained EU legislation other than that listed

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72 *Immigration and Social Security Co-ordination (EU Withdrawal) Bill)* explanatory notes, Bill 309-EN 57/1

73 In particular the Impact Assessment, Policy equality statement (social security co-ordination), ECHR memorandum, Delegated powers memorandum, and Factsheet 5: social security co-ordination

74 *Immigration and Social Security Co-ordination (EU Withdrawal) Bill)* explanatory notes, Bill 309-EN 57/1,15

75 clause 6

above. The European Convention on Human Rights (ECHR) memorandum says this is to allow 'modifications made to the listed retained EU legislation to be reflected, where necessary, across the complex legal framework in this area.'[76] Regulations may also provide for a person 'to exercise a discretion in dealing with any matter.' There is no mention of the circumstances where discretion might be exercised in any of the documents published alongside the Bill.

Furthermore, clause 5(5) allows any directly effective rights derived from retained EU law to be disapplied if they are inconsistent with, or would otherwise effect, any changes made by regulations. The ECHR memorandum merely states that this is 'broadly consistent with the approach adopted in other policy areas in relation to rights saved by section 4 of the [EU (Withdrawal) Act].'[77]

The ECHR memorandum states that the purpose of the clause is to provide the UK Government and/or devolved authority 'with the powers that it may foreseeably need after EU exit in order to modify the retained social security co-ordination regime'. It adds:

> The power may be used in a no deal scenario, in which the UK and EU fail to reach an agreement on withdrawal issues, but also in certain deal scenarios (for example, in order to provide for those people that fall within the scope of the retained social security co-ordination regulations, but are outside of the scope of any deal or agreement). The anticipated policy changes could not otherwise be delivered by existing powers, such as the EUWA powers.[78]

The Delegated powers memorandum acknowledges that the power is broad, but emphasises that as regulations are subject to the affirmative procedure they will be subject to 'full Parliamentary scrutiny.' It states:

> 26. This power is necessarily broad so as to enable an appropriate authority to make suitable legislative provision for a range of post-exit day scenarios that may arise. In the absence of a deal or withdrawal agreement with the EU, the power may need to be exercised to implement policy changes to the social security co-ordination rules that will have been retained into domestic law by the EUWA. These rules cover a wide range of issues and, in developing a framework for future social security co-ordination policy, the following matters may be under consideration:
>
> - what access EU nationals will have in the future to certain UK benefits and pensions;
> - the extent to which UK nationals can export certain benefits and pensions if they move to an EU Member State; and
> - the administration and rules which govern entitlement and obligations when people live and work in more than one country
>
> 27. This power will provide the appropriate authorities with the ability to deliver a range of policy options from exit day in any or all of these areas.

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76 ECHR memorandum, para 10
77 ECHR memorandum, para 13
78 para 12

No further information is given on what the Government's 'preferred policy' on social security co-ordination might be were there to be 'no deal'. The Policy equality statement on social security co-ordination accompanying the Bill states that 'detailed policy arrangements are yet to be determined' and therefore that 'it is difficult to assess the impacts of provisions in the Bill in a meaningful way.'

As indicated in part 6 of this briefing the Joint Committee on Human Rights has voiced concern that provisions in the Bill could remove the rights of certain groups without ensuring they retain an adequate level of human rights protection, potentially leaving individuals and families in a precarious situation with regard to their future rights, including to social security. Accordingly, the Committee proposes amending clause 5 of the Bill to ensure that where an 'appropriate authority' exercises its power to make regulations, those regulations 'must contain measures, as necessary, to protect the accrued rights of those persons who, prior to 29 March 2019, benefitted, in the UK, from right of free movement of persons under EU law.'[79]

Schedule 2 would cover the scope of the powers granted to devolved authorities, the circumstances where devolved authorities would require the UK Government's consent to exercise the powers, and when devolved authorities would only be able to exercise powers jointly with the UK Government. **Schedule 3** would set out further detail on the scrutiny of regulations. Paragraphs 24-25 of the Delegated powers memorandum summarise the effect of the Schedules.

Devolved authorities would only be able to exercise powers to amend social security co-ordination legislation to the extent that it is within their legislative competence. Social security is not devolved to Wales, so the National Assembly for Wales would not be able to exercise powers in this area. Under the *Scotland Act 2016*, the Scottish Parliament now has full powers in relation to certain categories of benefits including disability and carer's benefits; and benefits for maternity, funeral and heating expenses. Social security is devolved in Northern Ireland, but the long-standing 'parity' principle – now enshrined in the *Northern Ireland Act 1998*[80] – requires Northern Ireland to keep in step with the rest of the UK in social security matters. So the extent to which a Northern Ireland Assembly would be able to exercise powers to amend legislation in relation to social security co-ordination is unclear.

79 Letter to the Home Secretary, regarding the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, dated 23 January 2019

80 section 87

5. General provisions (Part 3)

Clause 6 would set out the interpretation of the Bill's clauses. **Clause 7** deals with commencement and territorial extent.

The Bill would apply to the whole of the United Kingdom. The provisions in Part 1 (which end free movement) may also be extended to any of the Channel Islands, the Isle of Man and any of the British Overseas Territories by Her Majesty via Order in Council. Legislative Consent Motions would be sought from Scotland and Northern Ireland in relation to the social security provisions in **Clause 5. Clause 7** also authorises regulations made under Clause 4 to extend to these territories and Islands when the legislation authorising such regulations already extends to those territories.

Clauses 6 and 7 (interpretation, and commencement and territorial extent respectively) would come into force on the day the Bill is passed into an Act. The remainder of the Bill would come into force on a day appointed by regulations. Clause 5 and Schedules 2 and 3 (all relating to social security) may commence on different days in different parts of the UK.

Table 1 of Annex A of the Bill's Explanatory Memorandum provides an overview of the territorial extent and application of the Bill's provisions.

Comment

The main policy provisions of the Bill would come into effect on a day appointed by regulations. This would allow the Home Office to repeal free movement at a suitable time depending on the Brexit outcome.

If the Withdrawal Agreement is ratified free movement would continue during the implementation period until the end of 2020. In this scenario the Government would not need the Bill to come into effect until the end of the implementation period. If there is a no-deal Brexit there will be no implementation period. This means that the Government may wish to implement the Bill to repeal free movement sooner, potentially on 29 March 2019. Further analysis on this can be found in part 3 on the briefing, in the discussion of clause 1.[81]

[81] Pages 14-16

6. Further comment

Given the short timeframe between the introduction of the Bill on 20 December 2018 and second reading scheduled for the 28 January 2019 there is little external commentary available.

Some critics have questioned whether the Immigration Bill should include a right of appeal for EU citizens who are refused settled status.[82] The Withdrawal Agreement guarantees appeal rights for such individuals but their rights under a no-deal Brexit are less certain. Appeal rights are generally very limited in immigration matters.

On 23 January 2019 the Chair of the Joint Committee on Human Rights Harriet Harman wrote a letter to the Home Secretary with draft amendments to the Bill in relation to human rights protections. The letter states:

> The main provisions of this Bill seem to remove the rights of certain individuals without ensuring that affected individuals will retain an adequate level of human rights protection in legislation. These provisions could also leave individuals and families in a situation of precarity as to their futures, including housing, social security and property rights.[83]

The letter goes on to propose amendments to Clauses 4 and 5 of the Bill. The proposed amendments are:

> Clause 4, page 2, line 35, at the end insert:
>
> (1A) The Secretary of State must exercise the power to make regulations under subsection (1) where this is necessary to protect the accrued rights of those persons who, prior to 29 March 2019, benefitted, in the UK, from right of free movement of persons under EU law.
>
> (1 B) Where the Secretary of State exercises the power to make regulations under subsection (1) those regulations must contain measures, as necessary, to protect the accrued rights of those persons who, prior to 29 March 2019, benefitted, in the UK, from right of free movement of persons under EU law.
>
> Clause 5, page 3, line 37 at the end insert: (1 A) Where the appropriate authority exercises the power to make regulations under subsection (1) those regulations must contain measures, as necessary, to protect the accrued rights of those persons who, prior to 29 March 2019, benefitted, in the UK, from right of free movement of persons under EU law.

These amendments are in relation to EU citizens living in the UK prior to 29 March 2019 under EU free movement law. The amendments would require the Secretary of State to make regulations when necessary to protect the accrued rights of such individuals as a consequence of or in connection with repealing free movement.

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82 See, for example, 'Immigration Bill to end EU free movement finally published', *Free Movement*, 20 December 2018

83 Letter to the Home Secretary, regarding the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, dated 23 January 2019

Additionally, any regulations that the Secretary of State makes under Clause 4 would be required to contain measures, as necessary, to protect the accrued rights of such persons. This requirement would also extend to regulations made in respect of social security provisions (see part 4.5 of this briefing).

7. Annex 1

Non-exhaustive list of the directly effective rights relevant to paragraph nine of schedule one		
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
	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

Source: Immigration and Social Security Co-ordination (EU Withdrawal) Bill) explanatory notes, Bill 309-EN 57/1

8. Annex 2

Attributes/Requirements	Current/Non-EU system	Future Immigration System – EU and Non-EU
Specialist routes; Investor; Entrepreneur; Graduate Entrepreneur		
No maximum stay	✓ (except graduate entrepreneur)	✓ (except graduate entrepreneur)
Any work allowed	✓ (with exceptions)	✓ (with exceptions)
Dependants	✓	✓
Settlement	✓ (except Graduate Entrepreneur)	✓ (except Graduate Entrepreneur)
Capped	✓ (only Exceptional Talent and Graduate Entrepreneur)	✓ (We will increase the number of places once EU citizens come within its ambit)
Public funds	×	×
Sponsorship	×	×
Skilled workers General; Intra-Company Transfer (ICT); Minister of Religion; Sportsperson		
Skills threshold	✓ (RQF6) (General and ICT)	✓ (RQF3 plus)
Salary threshold	✓ (General and ICT)	✓
RLMT	✓	×
Maximum stay	✓	✓
Dependants	✓	✓
Settlement	✓ (except for ICT and threshold applies)	✓ (except for ICT)
Capped	✓ (only for general route)	×
Sponsorship	✓	✓ (new, streamlined system)
Public funds	×	×
Skills charge	✓	✓
Health surcharge	✓	✓
Right to Work Checks	✓	✓
In-country Switching	×	✓
Shortage Occupation List	✓	✓
Youth Mobility Scheme		
Age restrictions	✓ (18-30)	**TBC** – dependent on negotiations of any new, reciprocal, UK-EU Youth Mobility Scheme.
Nationality restrictions	✓ (From participating country)	
Maximum stay	✓ (two years)	
Any work allowed	✓ (with exceptions)	
Country-specific quotas	✓	
Sponsorship	✓	
Public funds	×	
Dependants	×	
Settlement	×	
Capped	×	
Temporary Workers		
Maximum stay	**n/a**	✓ (required cooling-off period)
Dependants	**n/a**	×
Sponsorship	**n/a**	×
Settlement	**n/a**	×
Capped	**n/a**	×
Public funds	**n/a**	×
All skill levels	**n/a**	✓
Fee for temporary work visa	**n/a**	✓
Right to work checks	**n/a**	✓
Nationality Restrictions	**n/a**	✓ Transitional new temporary short-term worker route, open only to certain low-risk nationalities.
Visitors		
Study	✓ (no more than 30 days)	✓ (no more than 30 days)
Maximum stay	✓	✓
Multiple entry	✓	✓
Short-term business activities	✓	✓
Work	× (in most cases)	× (in most cases)
Settlement	×	×
Capped	×	×
Public funds	×	×
Mobility Framework negotiations for short-term business visitors	×	✓

Source: Home Office, The UK's future skills-based immigration system, Cm 9722, December 2018 page 59

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