These notes refer to the European Union (Croatian Accession and Irish Protocol) Bill as introduced in the House of Commons on 18 October 2012 [Bill 76]

EUROPEAN UNION (CROATIAN ACCESSION AND IRISH PROTOCOL) BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the European Union (Croatian Accession and Irish Protocol) Bill as introduced in the House of Commons on 18 October 2012. They have been prepared by the Foreign and Commonwealth Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not require any explanation or comment, none is given.

SUMMARY

3. The purpose of the Bill is to:

a) give effect in UK law to the Treaty concerning the accession of the Republic of Croatia to the European Union ("the Accession Treaty");
b) provide Parliamentary approval of the Accession Treaty for the purposes of section 2 of the European Union Act 2011 ("the 2011 Act");
c) provide a regulation-making power to make provision on the entitlement of Croatian workers to work and reside in the UK; and
d) provide approval for a proposed Protocol to be annexed to the Treaty on European Union ("TEU") and the Treaty on the Functioning of the European Union ("the TFEU") on the concerns of the Irish people in relation to the Treaty of Lisbon ("the Irish Protocol").

BACKGROUND

The Accession Treaty

4. The Accession Treaty, signed by the Member States of the EU and the Republic of Croatia on 9 December 2011, provides for the accession of Croatia to the European Union on 1 July 2013. The Treaty falls into four parts:

a) Treaty between the twenty-seven existing Member States and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union,
b) Act concerning the conditions of accession and the adjustments to the Treaties on which the European Union is founded ("the Act of Accession"),
c) Protocol on certain arrangements concerning a possible one-off transfer of assigned amount units issued under the Kyoto Protocol, and
d) Final Act of the parties to the Treaty.

5. The text of the Accession Treaty was deposited in the Libraries of the House on 2 February 2012 to accompany the statement relating to the Treaty which was laid before Parliament under section 5 of the EU Act 2011.

Implementation in UK law of the Accession Treaty

6. In order to give effect in UK law to the Accession Treaty, the Bill amends the definitions of "the Treaties" and "the EU Treaties" in the European Communities Act 1972 ("the 1972 Act"). In broad terms, this grants automatic effect to directly applicable Treaty provisions, and otherwise allows designated Ministers, under section 2(2) of the 1972 Act, to make regulations amending existing UK legislation, to the extent necessary to implement the Treaty.

Freedom of movement for workers

7. The Accession Treaty sets out the transitional provisions in relation to the free movement of workers that will apply to Croatian nationals. These provisions are as follows:

a) for the first two years after accession, Member States are required to apply national measures or bilateral agreements regulating the rights of nationals from Croatia to work in their territories;
b) from the third year, Member States must either grant nationals from Croatia the right to move and work freely in accordance with EU law, or continue to apply national measures or bilateral agreements for a further three years; and
c) from the fifth year, Member States must either grant nationals from

> Croatia the right to move and work freely in accordance with EU law, or, in cases of serious disturbances in its labour market or threat thereof, continue to apply national measures or bilateral agreements for a further two years.

8. Clause 4 of the Bill provides a power to make regulations implementing these transitional arrangements concerning the free movement of Croatian workers. Regulations made under clause 4 of the Bill would, in effect, constitute the "national measures" anticipated in the Accession Treaty.

9. A Statement of Intent setting out in more detail the transitional restrictions which the Government intends to implement pursuant to these clauses is being placed on the UK Border Agency's website at http://www.ukba.homeoffice.gov.uk/news-and-updates/?area=Working.

10. Clause 5 requires the first set of Regulations made under clause 4 to follow the affirmative parliamentary procedure. Any further Regulations will be subject to either the negative or affirmative procedure.

Irish Protocol

11. In December 2008, the European Council agreed that the concerns of the Irish people in respect of the Lisbon Treaty relating to taxation policy, the right to life, education and the family, and Ireland's traditional policy of military neutrality would be addressed to the mutual satisfaction of Ireland and the other Member States, by way of legal guarantees. In June 2009, the Heads of State or Government of the 27 Member States of the European Union, meeting within the European Council, adopted a Decision on the concerns of the Irish people on the Treaty of Lisbon ("the Decision"). The Decision gave a legal guarantee that certain matters of concern to the Irish people would be unaffected by the entry into force of the Treaty of Lisbon. Its content was fully compatible with the Treaty of Lisbon and would not necessitate any re-ratification of that Treaty.

12. The Heads of State or Government also agreed that at the time of the conclusion of the next accession Treaty, the provisions of the Decision would be set out in a Protocol, to be attached to the TEU and TFEU. The Irish Protocol clarifies, but does not change either the content or the application of the TEU and the TFEU and in no way alters the relationship between the EU and its Member States. Its sole purpose will be to enshrine in the Treaties, by means of a new Protocol, the guarantees set down in the Decision. The Treaty of Lisbon came into force on 1st December 2009.

13. On 12 October 2011, the draft Irish Protocol was submitted by the Council to the European Council and notified to national Parliaments in accordance with Article 48(2) TEU. At its meeting of 23 October 2011, the European Council consulted the European Parliament and the Commission on the proposed Protocol to the Treaties

under the first sub-paragraph of Article 48(3) TEU. It also requested the consent of the European Parliament not to convene a Convention given that, in its view, the convening of such Convention was not justified by the extent of the proposals On 18 April 2012, the European Parliament gave a favourable opinion on the proposed Protocol and gave its consent to a Convention not being required. On 4 May 2012, the European Commission issued a favourable opinion on the proposed Protocol. The European Council agreed, on 10 May 2012, by means of a written procedure, not to convene a Convention and defined the terms of reference for a conference of representatives of the governments of the Member States (IGC). The IGC was convened on 16 May 2012 and the proposed Irish Protocol was agreed then signed by all 27 Member States. The Protocol must now be ratified by all 27 Member States before it can enter into force.

Requirements under the European Union Act 2011

14. Section 2 of the 2011 Act sets out three requirements for the approval, by the UK, of a treaty amending the TEU or the TFEU: a Ministerial statement as to whether the treaty triggers a referendum under section 4 of the Act; an Act of Parliament approving the treaty; and compliance with either the referendum condition or exemption condition. The exemption condition is that the Act approving the treaty states that the treaty does not fall within section 4 of the 2011 Act. Section 4 of the 2011 Act sets out the cases in which a treaty attracts a referendum.

15. In relation to the Accession Treaty, section 4(4)(c) of the 2011 Act sets out an exemption to the referendum requirement and provides that a treaty does not fall within section 4 merely because it involves the accession of a new Member State.

16. None of the matters covered in the Irish Protocol would constitute a transfer of competence or power from the UK to the EU as set out in section 4(1)(a)-(m) of the Act. The Irish Protocol therefore does not attract a referendum as it does not fall within section 4 of the 2011 Act.

17. Under section 5 of the 2011 Act, the Minister must lay a statement before Parliament setting out his or her opinion as to whether a referendum is required under section 4 of the Act within two months of the date on which the treaty is agreed. The Foreign Secretary laid a statement before Parliament on 2 February 2012 to the effect that, in his opinion, the Accession Treaty does not fall within section 4 of the 2011 Act. A separate statement was laid before Parliament on 5 July 2012 to the effect that the Irish Protocol does not fall within section 4 of the 2011 Act.

TERRITORIAL EXTENT AND APPLICATION

18. The Bill extends to the whole of the United Kingdom.

19. The Bill does not contain any provisions falling within the terms of the Sewel Convention. Because the Sewel Convention provides that Westminster will not

normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

20. The Bill does not contain any provisions that would require a legislative consent motion in respect of Wales or Northern Ireland.

COMMENTARY

Clause 1: Approval of Croatian Accession Treaty

21. This clause provides for approval of the Accession Treaty for the purposes of section 2 of the 2011 Act, under which primary legislation is required before a treaty amending the TEU or TFEU can be ratified by the UK.

22. Clause 1(2) approves the Accession Treaty for the purposes of section 2(1)(b) of the 2011 Act.

23. Clause 1(3) provides, as required by section 2(3) of the 2011 Act, that the Accession treaty does not fall within section 4 of that Act (cases where treaty or Article 48(6) decision attracts a referendum).

Clause 2: Approval of Irish Protocol

24. This clause provides for the approval of the Irish Protocol for the purposes of section 2 of the European Union Act 2011, under which primary legislation is required before a treaty which amends or replaces TEU or TFEU can be ratified by the UK.

25. Clause 2(2) approves the Irish Protocol for the purposes of section 2(1)(b) of the 2011 Act.

26. Clause 2(3) provides, as required by section 2(3) of the 2011 Act, that the Protocol does not fall within section 4 of that Act (cases where treaty or Article 48(6) decision attracts a referendum).

Clause 3: Addition of Croatian Accession Treaty and Irish Protocol to list of Treaties

27. Clause 3 amends section 1(2) of the 1972 Act, so as to include the Accession Treaty and the Irish Protocol within the list of treaties given effect in UK law by that Act.

Clause 4: Freedom of movement for Croatian Nationals as workers

28. Clause 4 provides a power for the Secretary of State to make regulations implementing the transitional arrangements concerning the free movement of Croatian workers.

29. Clause 4(1) allows for regulations to make provision concerning the entitlement of Croatian nationals to enter or reside in the UK as workers and any other matter ancillary to that entitlement.

30. Clause 4(2) states that such regulations may provide that an enactment relating to the rights of nationals of the European Economic Area (EEA) to enter or reside in the UK in order to work (the "specified enactment") applies (with or without modifications) to nationals of Croatia. The general free movement rights of EEA nationals are currently implemented in the UK by the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) (as amended). The transitional provisions made in relation to workers from eight of the States that acceded to the EU in 2004 are set out in the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219) (as amended). The transitional provisions for nationals of these States were applied for the full seven year period and have now been lifted. The transitional provisions made in relation to workers from the two States that acceded to the EU in 2007, Bulgaria and Romania, are set out in the Accession (Immigration and Worker Authorisation) Regulations 2006 (SI 2006/3317) (as amended). The transitional provisions for nationals of Bulgaria and Romania have also been applied for the full seven year period and will be lifted at the end of 2013.

31. Clause 4(3)(a) provides that regulations under this section may, in particular, require Croatian workers to be authorised in order to work in the United Kingdom. Regulations made pursuant to these provisions will specify the circumstances in which Croatian nationals are subject to, or exempt from, such a requirement; the criteria which may be applied to an application for work authorisation, including the types of employment which qualify for such authorisation; the information which should be submitted in support of such an application; and the documentary form that such authorisation takes.

32. Clause 4(3)(b) provides that such regulations may require a fee to be paid in relation to an application for such authorisation. The fees charged in respect of the Croatian authorisation scheme will be at a level that does no more than cover the expenses of administering the work authorisation requirements.

33. Clause 4(3)(c)-(e) provide that regulations may make it an offence for:

a) a Croatian national to work unless authorised to do so under the regulations, (subsection (3)(c)).
b) an employer to employ a Croatian worker, whether knowingly or otherwise, unless the worker has been authorised to work under the regulations (subsection (3)(d)). This power encompasses more than one type of employer offence, for example, the Secretary of State could make a criminal offence under this subsection that is dependant on the employer's knowledge that the employee had not been properly authorised or the Secretary of State could make a criminal offence that does not require any specific knowledge. If the former approach was

taken, this would mirror the scheme adopted by the relevant provisions of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") in respect of illegal working offences for third country nationals. Section 21 of the 2006 Act provides that a person commits an offence if he employs another (the employee) knowing that the employee has not been granted leave to enter or that leave has expired.

c) deception to be used in connection with an application for authorisation to work under the regulations (subsection (3)(e)).

34. Clause 4(3)(f)-(g) enable the Secretary of State to issue civil penalties in the following circumstances:

a) With regards to the liability of an employee, subsection (3)(f) provides that regulations made under this section may allow the liability of a person to conviction for the offence of working without authorisation to be dischargeable by payment of a penalty. This penalty needs to be a specified amount and paid in pursuance of a notice given to the person concerned.
b) With regards to the liability of the employer, subsection (3)(g) provides that such regulations may enable the Secretary of State to require a person who employs another person in contravention of a specified provision of the regulations to pay a penalty of an amount not exceeding a specified amount. This power is also mirrored in the scheme adopted by the relevant provisions of the 2006 Act in respect of illegal working offences for third country nationals. Section 15 of the 2006 Act provides that the Secretary of State may issue a civil penalty if the employer employs an adult subject to immigration control who does not have leave (or his leave is invalid, has ceased to have effect or is subject to conditions preventing him accepting employment).

35. Clause 4(3)(h) provides that regulations may include provision to treat an offence under the regulations as one to which any specified provision of section 28A to 28H of the Immigration Act 1971 (which relate to arrest, search and entry) applies.

36. Clause 4(4) provides that an offence by virtue of these regulations will be a summary offence. If a fine is imposed, it will not be punishable by a fine exceeding level 5 on the standard scale. If a term of imprisonment is imposed, then this is not to be punishable by imprisonment for a term exceeding the applicable maximum.

37. Clause 4(5) states that the applicable maximum for England and Wales is 51 weeks. The applicable maximum for Scotland and Northern Ireland is 3 months for an offence committed by the employee or a deception offence and 6 months for an offence committed by the employer. However, the maximum term of imprisonment of 51 weeks in England and Wales must be read in conjunction with subsection (6) which provides that, if the conviction occurs before the commencement of section

154(1) of the Criminal Justice Act 2003, the reference to 51 weeks imprisonment shall be read as 3 months for an offence committed by the employee or a deception offence and 6 months for an offence committed by the employer. Section 154(1) of the Criminal Justice Act 2003 has not yet been commenced at the time of writing so the applicable maximum for the whole of the UK is currently 3 months for an offence committed by the employee or a deception offence and 6 months for an offence committed by the employer.

38. Clause 4(7) provides that the fixed fine for employee offences will be less than the maximum imposable fine under subsection (3)(c). This ensures that the amount of any civil penalty that could be imposed by the Regulations cannot exceed the maximum fine that can be imposed by a criminal offence created under the Regulations. This clause also provides that a notice requiring payment of a civil penalty is to be given by a constable or an immigration officer and that this must include provision about the circumstances in which the notice is to be withdrawn.

39. Clause 4(8) provides that the fixed fine for employer offences will be less than the maximum imposable fine under subsection (3)(d). This ensures that the amount of any civil penalty that could be imposed by the Regulations cannot exceed the maximum fine that can be imposed by a criminal offence created under the Regulations. Subject to any modification that the Secretary of State thinks appropriate, any civil penalty imposed under clause 4(8) must include provision corresponding to section 16, 17 and 19 of the 2006 Act. These sections set out safeguards for employers, namely, section 16 of the 2006 Act sets out how an employer can object to a penalty notice, section 17 sets out how an employer can appeal any penalty notice to a court and section 19 sets out how the Secretary of State shall issue a code of practice specifying factors to be considered in determining the amount of a penalty imposed.

40. Clause 4(9) allows the regulations made under section 4 to include incidental, supplementary, transitional or consequential provisions and to make different provisions for different cases; this would, for example, allow different provision to be made in relation to different economic sectors.

41. Clause 4(10) states that regulations under this section are to be made by statutory instrument.

Clause 5: Orders under section 4: Parliamentary Control

42. Clause 5(1) requires the first set of Regulations made under section 4 to follow the affirmative parliamentary procedure, which requires that a draft of the regulations be approved by both Houses of Parliament before they are made. Subsections (2) and (3) provide that any further Regulations will be subject to either the negative or affirmative procedure.

Clause 6: Extent and commencement

43. Clause 6(1) makes provision for the territorial extent of the Bill. The Bill

extends to the whole of the United Kingdom.

44. Clause 6(2) makes provision about the Bill's coming into force. The Bill will come into force on the day of Royal Assent.

FINANCIAL EFFECTS OF THE BILL

45. There will be no financial effects as a result of the Bill.

EFFECT OF THE BILL ON PUBLIC SERVICE MANPOWER

46. There will be no impact on public service manpower as a result of the Bill.

IMPACT ASSESSMENT

47. The provisions contained within this Bill do not require an Impact Assessment.

COMPATIBILITY WITH THE EUROPEAN CONVENTION OF HUMAN RIGHTS

48. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions in the Bill with the Convention rights (as defined by section 1 of that Act).

49. The Secretary of State for Foreign and Commonwealth Affairs has made the following statement:

> "In my view the provisions of the European Union (Croatian Accession and Irish Protocol) Bill are compatible with the Convention rights."

COMMENCEMENT DATE

50. The Bill will enter into force on the day of Royal Assent.

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