

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

## **Memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee**

### **A. INTRODUCTION**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (“the Bill”). The Bill was introduced in the House of Commons on 20 December 2018. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

### **B. PURPOSE AND EFFECT OF THE BILL**

2. The Bill is in three Parts:
  - a. Part 1: Measures relating to ending free movement
  - b. Part 2: Social security co-ordination
  - c. Part 3: General.

#### *Part 1: Measures relating to ending free movement*

3. Part 1 of the Bill enables the establishment of the framework for the future immigration system for EEA nationals following the United Kingdom’s withdrawal from the European Union (“exit”). It achieves this by ending the EU’s rules on free movement of persons into the UK and other retained EU law on immigration which will be saved as, and incorporated into, UK law by the European Union (Withdrawal) Act 2018 (“EUWA”). The Bill will make those who currently rely on free movement rights to be in the UK (predominantly EEA nationals<sup>1</sup>) subject to the existing domestic immigration framework established by the Immigration Act 1971 (the “1971 Act”) and related legislation. Under that framework such persons will require leave to enter and remain in the UK, as is currently the case for those non-EEA nationals who fall outside the scope of free movement. The Bill also makes

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<sup>1</sup> For the purposes of this Memorandum we use “EEA nationals” to refer to all such persons, and also to Swiss nationals, as the status of Swiss nationals in the UK is currently provided for by the Immigration (European Economic Area) Regulations 2016 and the Bill will make substantially the same provision for Swiss nationals as it makes for EEA nationals.

provision to protect the position of Irish citizens once their EU free movement rights end.

4. The Bill does not set out the detail as to how the domestic immigration framework will apply to EEA nationals post-exit. The details of the future immigration system (i.e. the requirements to be met to come to the UK as a worker, student, family member, etc.) will be provided for in Immigration Rules made in accordance with the 1971 Act and by other existing powers to make secondary legislation, as is currently the case for the majority of non-EEA nationals.
5. At clause 4 the Bill provides the Secretary of State with a power to make provision in consequence of, or in connection with, Part 1 of the Bill. Such provision may include supplementary, incidental, transitional, transitory or saving provision; different provision may be made for different purposes. This power extends and applies throughout the UK. The subject-matter of Part 1 is immigration and this is reserved to the UK in each of the devolution settlements.

#### *Part 2: Social security co-ordination*

6. Part 2 of the Bill (clause 5) makes provision to enable an appropriate authority to make legislative changes to specified retained direct EU legislation relating to social security co-ordination, which will have been saved as, and incorporated into, UK law by the EUWA. An “appropriate authority” is defined as the Secretary of State or the Treasury, a devolved authority, or a Minister of the Crown acting jointly with a devolved authority. This will enable changes to be effected to the retained social security co-ordination regime after EU Exit. It also provides for consequential (etc.) modifications to be made to any provision made by or under primary legislation or to retained direct EU legislation not listed in the clause.

#### **C. DELEGATED POWERS**

7. The Bill includes four delegated powers:
  - a. a power to make consequential provision relating to Part 1 of the Bill at clause 4;

- b. a power to make provision relating to social security co-ordination (including to make consequential provision) at clause 5;
- c. the permissive extent clause at clause 7(2); and
- d. a power to commence provisions of the Bill at clause 7(7) and (8).

#### **Clause 4 subsection (1): Consequential etc provision**

**Power conferred on:** *the Secretary of State*

**Power exercised by:** *regulations made by statutory instrument*

**Parliamentary Procedure:** *negative unless the statutory instrument amends primary legislation, in which case affirmative; the first set of regulations are to be subject to the made affirmative procedure*

#### Context and Purpose

8. Clause 4 enables the making of provision in consequence of, or in connection with, Part 1 of the Bill. Such provision may include supplementary, incidental, transitional, transitory or saving provision; different provision may be made for different purposes (subsection 3). The power may be used to modify any provision made by or under primary legislation passed before, or in the same Session as, this Bill, and retained direct EU legislation (subsection 2).
  
9. 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 State<sup>2</sup> without 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.

#### Justification for taking the power

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<sup>2</sup> In practice, this means an official from UK Visas and Immigration acting on behalf of the Secretary of State

10. This Bill creates a substantial change to immigration law. There are references to free movement and related matters across the statute book in both primary and secondary legislation. It is therefore necessary for the Bill to contain a power wide enough to deal with consequential amendments, including consequential amendments to primary legislation, by secondary legislation once Parliament has approved the principle of the repeal of free movement law. Further, the power will be able to make consequential amendments to the retained direct EU law, which will have been incorporated into UK law by the EUWA. The power is limited to making amendments consequential to, or in connection with, Part 1 of the Bill itself, and not to consequences of withdrawal from the EU more generally. For example, the power will be able to be used to align the position of EEA nationals with that of non-EEA nationals in the sham marriage context, and to make changes to the deportation regime to align the position of EEA nationals with that of non-EEA nationals; it will also enable consequential provision to be made to protect the status of Irish citizens in consequence of clause 2. Some of these changes will be to primary legislation and some will be to secondary legislation, but all will be required as a consequence of or in connection with the provisions of Part 1 of the Bill.

11. Regulations made under this clause may include supplementary, incidental, transitional, transitory or saving provision. Such provision will be crucial to the implementation of the Bill. It is anticipated that the provision will be used to protect the rights of EEA nationals who are resident in the UK before exit, that would otherwise be affected by the Bill; for example, so that persons who have an EEA right of appeal pending at the point at which the repeal of section 109 of the Nationality, Immigration and Asylum Act 2002 is commenced do not lose that right of appeal; and so that EEA nationals who are in the UK before exit may continue to remain in the UK lawfully for a period of time to enable them to apply for, and have decisions taken in respect of, applications for leave to remain or indefinite leave to remain under the EU Settlement Scheme<sup>3</sup>.

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<sup>3</sup> The EU settlement scheme, provided for by Appendix EU of the Immigration Rules, makes provision to enable EEA nationals and their family members residing in the UK to remain in the UK post-exit.

12. Clause 4(1) specifically enables the making of provision that the Secretary of State considers appropriate in consequence of, or in connection with, Part 1 of the Bill. This is to provide a clearer basis for supplementary, incidental, transitional, transitory or saving provisions that may arguably not be regarded as consequential. For example, this may include:

- a. modifying the EEA Regulations to make policy changes to the rights of those EEA nationals and family members where this is considered appropriate in connection with the end of free movement and the move towards the future immigration system;
- b. bringing EEA nationals who are in the UK before exit within the domestic deportation regime, as opposed to the EU deportation regime, in respect of post-exit conduct; or
- c. making provision for EEA nationals who arrive after exit day where appropriate pending the implementation of the future immigration system.

13. Clause 4(4) makes clear that the power may be exercised to make provision for persons who would not, before the repeal of the exemption, be exempt from the requirement to have leave to enter or remain in the UK by virtue of EU free movement rights. For example, the provision could be used to protect the position of EEA nationals who are in the UK before exit and who are before exit treated for most purposes as though they were exercising Treaty rights, although they are not actually doing so<sup>4</sup>. Regulations made in reliance on subsection (4) are necessarily limited by the fact that provision made must nonetheless be appropriate in consequence of, or in connection with, any provision of Part 1 of the Bill.

14. There are various precedents for such provisions enabling such consequential provision, including section 115 of the Protection of Freedoms

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<sup>4</sup> For example, 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, and who is therefore not technically exercising Treaty rights.

Act 2012, section 59 of the Crime and Courts Act 2013, section 73 of the Immigration Act 2014 and section 92 of the Immigration Act 2016.

15. By subsection (5) of clause 4, regulations made under this clause may modify provisions relating to the imposition of fees and charges where they relate to a person's immigration status. This is to enable the coherent functioning of provisions which will be amended as a consequence of, or in connection with, the repeal of free movement law.

16. By subsection (5) of clause 7, regulations made under clause 4 may make provision that extends to the Isle of Man, the Channel Islands or the British overseas territories, where the legislation that is amended by the regulations already extends directly to such territories. The reference to British overseas territories is necessary in this context because the power at clause 4 may be used to make provision in relation to certain nationality legislation that extends to those territories (such as the British Nationality Act 1981).

#### Justification for the procedure

17. Regulations under this clause will be subject to the affirmative procedure if they amend or repeal primary legislation. It is considered that this ensures appropriate parliamentary scrutiny over the use of this power. This is consistent with the usual approach in relation to such a power.

18. 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.

19. After the first set of regulations, non-textual modifications of primary legislation will (unless made in the same regulations as textual modifications to primary legislation) be subject to the negative procedure. It is rare for non-textual modifications to be made instead of textual amendments. Where textual amendment is the appropriate method for effecting a change that is

what the Government would normally expect to be used. Where non-textual modifications are appropriate then the Government continues to believe that the negative procedure is appropriate. In coming to this view, the Government has considered carefully the views of the Delegated Powers and Regulatory Reform Committee as expressed in a number of its reports and this reflects the Government's position in response to the Committee's reports on previous Bills, including the Counter Terrorism and Security Bill and the Small Business, Enterprise and Employment Bill.

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

<b><i>Powers conferred on:</i></b>	<i>Secretary of State or the Treasury, a devolved authority, or a Minister of the Crown acting jointly with a devolved authority</i>
<b><i>Powers exercised by:</i></b>	<i>regulations made by statutory instrument</i>
<b><i>Parliamentary Procedure:</i></b>	<i>affirmative</i>

Context and purpose

20. This clause allows an appropriate authority to make regulations by statutory instrument to modify retained direct EU legislation relating to social security co-ordination, as set out in subsection (2) of the clause. An "appropriate authority" is defined as the Secretary of State or the Treasury, a devolved authority, or a Minister of the Crown acting jointly with a devolved authority. This legislation governs co-ordination of social security between Member States and contains rules relating to individuals whose social security situation is not confined to a single Member State. This includes rules relating to the payment of social security contributions and access to benefits (including export and aggregation) across the EU by EEA nationals, Swiss nationals and, in some cases, third country nationals.
21. Clause 5 enables modifications, implementing post-exit policy changes, to be made to the social security co-ordination regime retained under the EUWA. The clause will also disapply rights retained by section 4 of the EUWA to the extent that those rights are inconsistent or otherwise capable of affecting modifications made pursuant to the exercise of this power (see subsections (5) and (6)).

22. Subsection (3)(a) allows the regulations modifying the retained direct EU legislation relating to social security co-ordination to make different provision for different categories of person, for example those who arrived before or after exit day, and provides a non-exhaustive list of possible reference points for defining these categories. It would enable provision to be made, for example, for those persons currently covered by the Social Security Co-ordination Regulations but who are out of scope of any deal or withdrawal agreement. Subsection (3)(b) provides that different provision can be made for different purposes. This could include making provision to reflect any changes to social security co-ordination made at the EU level, to the extent that it is considered appropriate to do so. Subsection (3)(c) provides that regulations under subsection (1) include a power to make supplementary, incidental, consequential, transitional, transitory or saving provision. Subsection (4) makes clear that this includes a power to modify any provision made by or under primary legislation and retained direct EU legislation which is not expressly listed in subsection (2). Subsection (3)(d) states that the regulations may provide a person to exercise a discretion in dealing with any matter.
23. Subsection (7) defines an “appropriate authority” as being the Secretary of State or the Treasury, a devolved authority, or a Minister of the Crown acting jointly with a devolved authority. Subsection (8) indicates that further provision about the power of devolved authorities to make regulations under this clause is set out in Schedule 2.
24. Schedule 2 provides as follows:
- a. *No power to make provision outside devolved competence* - Paragraph 1 states that a devolved authority can only legislate alone if the provision is within its devolved competence. Paragraphs 2 and 3 set out what is within devolved competence for the purposes of this Schedule.
  - b. *Requirement for consent where it would otherwise be required* - Paragraph 4 sets out that if a devolved authority is using the power in a way that would require consent if it were a provision in its own legislation, or where the devolved authority would normally require consent from the UK Government to make such a provision in secondary legislation, then that consent will still be required. This will



not apply if the devolved authority has the power to make such provision without needing UK Government consent.

- c. *Requirement for joint exercise where it would otherwise be required* - Paragraph 5 sets out that where a devolved authority would normally only be able to make legislation jointly with the UK Government, the devolved authority will still have to make such legislation jointly when exercising the power.
- d. *Requirement for consultation where it would otherwise be required* - Paragraph 6 requires consultation with the UK Government on legislation made by a devolved authority in exercise of the power where the devolved authority would normally be required to consult the UK Government.
- e. *Transitional Provisions* - Paragraph 8 dis-applies section 57(2) of the Scotland Act 1998 (restriction on acting incompatibly with EU law and Convention rights) and section 24(1)(b) of the Northern Ireland Act 1998 (restriction on acting incompatibly with EU law) in relation to regulations made under clause 5.

25. Subsection (9) of clause 5 indicates that further provision about the making of regulations is set out in Schedule 3. Schedule 3 provides as follows:

- a. *Statutory instruments* - Paragraph 1 prescribes that the power is to be exercised by statutory instrument.
- b. *Scrutiny where sole exercise* - Paragraph 3 provides that where the UK Government or a devolved authority solely exercises the clause 5 power the procedure for regulations will be the affirmative.
- c. *Scrutiny where joint exercise* - Paragraph 4 provides that where the UK Government and a devolved authority exercise the power under clause 5 jointly, the affirmative procedure applies in both the UK Parliament and the devolved parliaments/assemblies.
- d. *Combination of instruments* - Paragraph 5 permits other regulations subject to the negative procedure to be included in an instrument made under clause 5.

Justification for taking the power

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.

#### Justification for the procedure

28. Although this is a wide power, it can only be used to modify retained direct EU legislation relating to social security co-ordination and to make consequential (etc.) provision to primary legislation or retained direct EU legislation. To ensure the use of the power by the Secretary of State or the Treasury is subject to full Parliamentary scrutiny, it is proposed that the exercise of the power is subject to the affirmative procedure, ensuring that Regulations using this power are only made with the approval of each House. Similar provision is made in relation to the exercise of the power by a devolved authority.

#### **Clause 7 subsection (2): Extent**

<b><i>Power conferred on:</i></b>	<i>Her Majesty</i>
<b><i>Power exercised by:</i></b>	<i>Order in Council</i>
<b><i>Parliamentary Procedure:</i></b>	<i>None</i>

## Context and Purpose

29. Clause 7 subsection (2) enables the extension of any provision of Part 1 of the Bill to the Channel Islands, the Isle of Man or the British overseas territories by Order in Council. This is to enable those territories to amend their immigration legislation in line with the changes made by the Bill and regulations made under clause 4. The Acts of Parliament listed in subsection (4) each contain a section enabling the extension of that legislation to any of the Channel Islands or the Isle of Man (a “permissive extent clause”). Subsection (3) makes clear that those existing permissive extent clauses may be exercised so as to extend the relevant legislation insofar as it is amended by this Bill.

### **Clause 7 subsections (7) and (8): Commencement**

<b><i>Power conferred on:</i></b>	<i>Secretary of State (or Secretary of State and Treasury in respect of subsection (7))</i>
<b><i>Power exercised by:</i></b>	<i>Regulations made by statutory instrument</i>
<b><i>Parliamentary Procedure:</i></b>	<i>None</i>

30. Clause 7 subsections (7) and (8) contains a standard power for the Secretary of State (or the Treasury in respect of commencing clause 5 and Schedules 2 and 3) to bring provisions of the Bill into force by commencement regulations; subsection (9) provides that such regulations may include transitional, transitory and saving provision in connection with commencement and to make different provision for different purposes. Subsection (10) enables regulations commencing clause 5 and Schedules 2 and 3 to make different provision for different areas. As is usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.