

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

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill as introduced in the House of Commons on 20 December 2018 (Bill 309).

- These Explanatory Notes have been prepared by the Home 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. The Department for Work and Pensions and Her Majesty's Revenue and Customs have contributed to the clause and Schedules relating to Social Security Co-ordination.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 The purpose of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (the Bill) is to end free movement of persons into the UK and make European Union (EU), European Economic Area (EEA) and Swiss nationals and their family members subject to UK immigration controls. The Bill ends the EU's rules on free movement in the UK and other retained EU law on immigration which will have been saved in UK law by the European Union (Withdrawal) Act 2018 ("EU (Withdrawal) Act"). The Bill also repeals section 7 of the Immigration Act 1988. This means that EEA nationals and their family members will require permission to enter and remain in the UK under the Immigration Act 1971. The Bill makes provision for the status of Irish citizens. It also contains provision for the Government (and/or, where appropriate, a devolved authority) to amend retained direct EU legislation relating to the social security co-ordination regime, which will also have been saved in UK law by the EU (Withdrawal) Act.
- 2 The main measures in the Bill include:
 - repealing the main retained EU law relating to free movement and bringing EEA nationals and their family members under UK immigration control;
 - protecting the status of Irish citizens in UK immigration law once their EU free movement rights end; and
 - powers to amend, by regulations, retained EU law governing social security co-ordination, enabling policy changes to be delivered post EU Exit.

Policy background

- 3 There are currently two immigration systems in the UK: one that governs the immigration arrangements for EEA nationals and their family members and one that governs the arrangements for nationals from countries outside the EEA.
- 4 The movement of people between EEA member states is governed primarily by the EU Free Movement Directive 2004/38/EC. This sets out the rights of EEA nationals and their family members to move and reside freely within these territories. The European Court of Justice has the final say on how these rights are interpreted. The Directive is primarily implemented in UK law through the Immigration (European Economic Area) Regulations 2016 ("EEA Regulations"). As the EEA Regulations also extend to nationals of the European Economic Area (EEA) and Switzerland, measures in the Immigration Bill will extend to these nationalities as well, except clause 2 which relates specifically to Irish citizens. EU, EEA and Swiss nationals are collectively referred to as "EEA nationals" in these Notes for brevity, whereas those outside the scope of free movement are referred to as "non-EEA nationals". Unless the context requires otherwise, and/or it is stated otherwise, references to "EEA nationals" in these Notes exclude Irish citizens.
- 5 Non-EEA nationals (other than those who are family members of EEA nationals) require permission to enter and stay in the UK under the Immigration Act 1971 ("the 1971 Act"). The detailed requirements a person must meet to be granted leave to enter and remain are set out in the Immigration Rules, which are made under the 1971 Act.
- 6 The key difference between the two immigration systems is that, while the UK is a member of the EU, EEA nationals and their family members enjoy a right to enter and reside in the UK without the need to obtain leave under the 1971 Act. This is known as EU free movement of persons. Non-EEA nationals (other than family members of EEA nationals), on the other

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hand, generally need leave to enter and remain in the UK. This is given, or refused, on a case-by-case basis by the Home Office according to the UK Immigration Rules in place at the time of the decision.

- 7 The Bill will end the UK's implementation of EU free movement - the underpinning legislation for which will have been saved in UK law by the EU (Withdrawal) Act.
- 8 When free movement ends, EEA nationals and their family members will become subject to UK immigration laws and will be required to have leave to enter and remain under the 1971 Act. The details of the future immigration arrangements (i.e. the requirements to be met to come to the UK as a worker, student, family member etc.) will be set out in the Immigration Rules, as they are now for non-EEA nationals.
- 9 The future Immigration Rules for EEA nationals have not yet been finalised and will take account of evidence, including from the Migration Advisory Committee, which published its report on the economic and social impacts of the UK's exit from the EU on 18 September 2018, as well as stakeholder views, wider UK social and economic priorities and discussions with the EU and other countries (including on the nature of the UK's future relationship with the EU). These Immigration Rules may be the same as those that apply to non-EEA nationals, or they may be different. They can be adapted to take account of any future trade arrangements with other countries.
- 10 The Government's White Paper containing proposals for the UK's future skills-based immigration system has been published. This provides further details on what the future system might look like for EEA nationals and how the Bill provides the legal framework to help deliver it.
- 11 The Bill also clarifies the status of Irish citizens in the UK once their EU free movement rights end. Since the 1920s British and Irish citizens have enjoyed a status in each other's State, distinct from that later enjoyed as a consequence of EU citizenship. Section 2(1) of the Ireland Act 1949 declares that "notwithstanding that the Republic of Ireland is not part of Her Majesty's dominions, the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the UK". The fundamental provisions for the immigration status of Irish citizens in the UK are provided for in the Immigration Act 1971, however these provisions only cover Irish citizens who enter the UK from within the Common Travel Area (CTA); Irish citizens travelling from outside the CTA currently enter under the Free Movement Directive 2004/38/EC. The Bill will rectify this disparity and protect the status of Irish citizens; confirming their right to enter and remain without permission when free movement rights end, irrespective of where they have entered the UK from, unless they are subject to a deportation order, exclusion order or an international travel ban.
- 12 The status for Irish citizens in the Bill supports the wider reciprocal rights enjoyed by Irish citizens when in the UK, mirrored by equivalent provision in Ireland for the treatment of British citizens who are resident there. The British Nationality Act 1948 provides the legal basis for the rights of Irish citizens in the UK, with subsequent legislation and bilateral agreements giving effect to these reciprocal arrangements. As a result of the historic arrangements between the UK and Ireland these rights include, in addition to the right to enter and reside as provided for by this new clause: the right to work and study; access to social welfare entitlements and benefits; access to health services; and voting rights. This Bill does not amend or otherwise modify those historical pieces of legislation; it sets out the immigration rights upon which some of these other rights depend.
- 13 The Bill also includes provision on social security co-ordination. The EU Social Security Co-ordination Regulations ("SSC Regulations"), as listed in clause 5(2), co-ordinate access to social security for individuals moving between EEA states (and Switzerland). The SSC

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Regulations deal with social security benefits that cover specific social risks such as unemployment, sickness or old age and cover UK contributory benefits as well as some non-contributory benefits.

- 14 The SSC Regulations provide for a reciprocal framework and apply to EEA and UK nationals in the UK and in the EEA (respectively) and to some non-EEA nationals. The SSC Regulations determine which member state's social security legislation applies; the rules ensure an individual is only subject to a single member state's legislation at any one time, and determine where contributions are due and which state is responsible for payment of certain types of benefit. The SSC Regulations provide for equal treatment of those in scope and for member states to consider periods of work, insurance or residence in another member state when determining entitlement to benefit, which is known as "aggregation". The SSC Regulations also enable individuals, in certain circumstances, to receive certain benefits from the UK irrespective of where they, or the person they are claiming in respect of, reside in the EEA (i.e. UK and EEA nationals can export benefits from the UK).
- 15 The SSC Regulations will form part of retained EU law post-Exit because they will have been saved in UK law by the EU (Withdrawal) Act. This Bill takes a power to allow the Secretary of State and the Treasury to make post-Exit policy changes to the retained social security co-ordination regime. This will 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.

Legal background

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

Territorial extent and application

- 17 Clause 7 sets out the territorial extent of the Bill, that is the jurisdictions in which the Bill forms part of the law. The extent of a Bill can be different from its application. Application is about where the provisions of a Bill will have a practical impact when implemented.
- 18 The provisions of the Bill will extend to the whole of the United Kingdom.
- 19 The Bill includes provision for Part 1 of the Bill to be extended to the Crown Dependencies or the British overseas territories by Order in Council. In addition, the power at clause 4 may be used to make provision extending to the Channel Islands, the Isle of Man and the British overseas territories where the legislation being amended by future regulations made under that power already extends directly to those territories.
- 20 The Bill will not make any changes to the Common Travel Area arrangements between the UK and Ireland and the Crown Dependencies.
- 21 Aside from clause 5, relating to social security co-ordination, in the view of the UK Government, the matters to which the provisions of the Bill relate are not within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly. Legislative Consent Motions will therefore not be sought in relation to the immigration measures in the Bill but will be sought in relation to the social security co-ordination provision, at clause 5 from Scotland and Northern Ireland.
- 22 The Bill will have an impact in areas within the legislative competence of the Devolved Administrations in relation to certain aspects of social security co-ordination. The Scottish Parliament and Northern Ireland Assembly will have competence to amend limited elements of the retained SSC Regulations.
- 23 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding Legislative Consent Motions and matters relevant to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

Commentary on provisions of Bill

Part 1: Measures relating to ending free movement

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

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

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

- 25 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.¹ 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.
- 26 Clause 2 introduces a new section 3ZA to the Immigration Act 1971 to confirm the status afforded to Irish citizens. Irish citizens will not require leave to enter or remain in the UK and will therefore not be subject to immigration controls unless one of the exemptions set out in new subsections (2), (3) and (4) applies. These exemptions are if the Irish citizen is subject to a deportation order, exclusion order or an international travel ban. This reflects current and long-standing practice. Irish citizens have been liable to deportation since the Commonwealth Immigrants Act 1962 and these powers, along with the powers to exclude or impose a travel ban on Irish citizens, exist in current legislation. 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.
- 27 New section 3ZA is set out in subsection (2). The inserted 3ZA makes clear that where an Irish citizen is subject to one of the exemptions in its subsections (2), (3) and (4), that individual is not allowed to enter the UK without leave. The clause supports the Government's commitments in the Belfast ('Good Friday') Agreement in relation to citizenship and identity, specifically the birth-right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both as they may so choose and that such persons have the right to hold both British and Irish citizenship.
- 28 The Bill does not affect the CTA arrangements set out in section 1(3) of the Immigration Act 1971, except as follows.
- 29 Subsection (3) amends section 9 of the 1971 Act which relates to further provisions about the CTA, to ensure a consistent approach to how Irish citizens are treated for immigration

purposes in line with section 3ZA.

- 30 Subsection (4) amends Schedule 4 of the 1971 Act which deals with the integration of UK law and the immigration law of the Islands (Jersey, Guernsey and Isle of Man), to align the approach with Irish citizens as set out in section 3ZA.

Clause 3: Meaning of “the Immigration Acts” etc

- 31 Subsection (1) amends the UK Borders Act 2007 to ensure that this Bill, when enacted, will be covered by any reference to “the Immigration Acts”.
- 32 Subsection (2) makes clear that the Bill is not retained EU law. This means that it is not part of the body of law that will have been saved in UK law by the EU (Withdrawal) Act.

Clause 4: Consequential etc provision

- 33 Clause 4 allows the Secretary of State to make such regulations as he considers appropriate as a consequence of, or in connection with, Part 1 of the Bill, including supplementary, incidental, transitional or transitory provision and savings. Subsection (2) provides that such regulations may modify any domestic primary or secondary legislation, as well as direct EU legislation which has been retained by the EU (Withdrawal) Act. Subsection (3) provides that such regulations may make supplementary, incidental, transitional, transitory and saving provision and make different provision for different purposes.
- 34 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.
- 35 Subsection (5) provides that regulations made under this clause can amend legislation relating to fees and charges which are connected with the wider repeal of free movement law.
- 36 Subsections (6) to (9) set out the Parliamentary scrutiny for regulations made under clause 4. Subsections (6) and (7) state that any regulations made under clause 4 which amend existing primary legislation will be subject to the affirmative procedure, which means they must be approved by both Houses of Parliament. In the case of the first set of regulations made under clause 4, they will be subject to the made-affirmative procedure, which means they will come into effect immediately but must then be approved by both Houses to remain in force. Subsection (8) confirms that any other regulations will be subject to the negative procedure. Subsection (9) specifies circumstances which will not count towards the scrutiny period set out in subsection (6) for regulations made under clause 4.
- 37 Subsection (10) states that if any regulations made under clause 4 cease to apply because they are not approved by both Houses of Parliament within 40 days, where this is required, this will not affect anything which has already been done under those regulations or prevent further regulations from being made.

Part 2: Social security co-ordination

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

- 38 Clause 5 provides a power to an appropriate authority (defined, in subsection (7), as the Secretary of State or the Treasury, a devolved authority, or a Minister of the Crown acting jointly with a devolved authority) to modify, by regulations, the retained direct EU legislation listed in subsection (2) (commonly known as the EU Social Security Co-ordination Regulations). These directly applicable EU regulations provide for social security co-ordination across the EEA (including Switzerland).
- 39 This clause allows the Government (and/or, where appropriate, a devolved authority) to make regulations to implement any new policies regarding co-ordination of social security. This clause is intended to be used to implement new policies in situations where the UK has not entered into an agreement with the EU and/or another member state of the EU. It is also intended to be used to make provision for persons who fall outside of the scope of any agreement, but who are nevertheless within the scope of the EU social security co-ordination regulations, as retained in domestic law on exit via the EU (Withdrawal) Act.
- 40 Subsection (3) sets out that such regulations can make different provision for different categories of person and for different purposes, as well as making supplementary, incidental, consequential, transitional, transitory or saving provision.
- 41 Subsection (4) states that consequential (etc) provision includes modification to provisions made by or under primary legislation or to retained direct EU legislation not listed in subsection (2).
- 42 Subsection (5) ensures that any directly effective rights that will have been saved by the EU (Withdrawal) Act cease to apply insofar as they are inconsistent with, or are otherwise capable of affecting, the interpretation or application of provision made by regulations under clause 5.
- 43 Subsection (6) provides for the interpretation of terms included in subsection (5).
- 44 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.
- 45 Subsection (8) indicates that further provision about the power of devolved authorities to make regulations under this clause is set out in Schedule 2.
- 46 Subsection (9) indicates that further provision about the making of regulations under this clause is set out in Schedule 3.

Part 3: General

Clause 6: Interpretation

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

Clause 7: Extent, commencement and short title

- 48 The provisions of the Bill extend to the whole of the United Kingdom. In the view of the UK Government, the immigration matters to which the provisions of the Bill relate are not within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly. However, it is within the legislative competence of the Scottish Parliament and Northern Ireland Assembly to amend limited elements of the retained SSC Regulations. Therefore, a Legislative Consent Motion (LCM) will be sought for clause 5,

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relating to social security co-ordination.

- 49 Subsections (2) to (4) enable the provisions of, and amendments made by, Part 1 of the Bill to be extended to the Channel Islands, the Isle of Man or the British overseas territories by Order in Council.
- 50 Subsection (5) provides that provisions of regulations made under clause 4 of the Bill which amend legislation that already extends directly to any of those territories have the same extent as the legislation being amended.
- 51 Subsection (6) sets out that this clause and clause 6 on interpretation will come into force on the day the Bill receives Royal Assent.
- 52 Subsection (7) sets out that clause 5 and Schedules 2 and 3 come into force on a day appointed by the Secretary of State or the Treasury by regulations. Subsection (10) provides that commencement regulations under subsection (7) may commence clause 5, and Schedules 2 and 3, on different days for different parts of the United Kingdom.
- 53 Subsection (8) provides that the other provisions in the Bill will come into force on a day appointed by the secretary of State by regulations.
- 54 Subsection (9) sets out that regulations commencing provisions of the Bill under subsections (7) and (8) may make transitional, transitory or saving provision and may make different provision for different purposes.
- 55 Subsection (11) states that the short title of the Bill when enacted will be the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2019.

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

Part 1: EU-derived domestic legislation

- 56 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.
- 57 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.
- 58 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.

Part 2: Retained direct EU legislation

- 59 Part 2 of Schedule 1 repeals direct EU legislation relating to free movement of persons, which will have been saved in domestic law by the EU (Withdrawal) Act. These measures are being

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revoked because they will no longer be recognised in domestic law once the UK leaves the EU.

- 60 Paragraph 4 deals with Regulation (EU) No. 492/2011 relating to freedom of movement for workers within the Union (the “Workers Regulation”), which provides for the freedom of movement of workers in various ways, including through rights to residency, equal treatment and access to education.
- 61 Paragraph 4, sub-paragraph (1), revokes Article 1 of the Workers Regulation, which is specific to immigration and provides a right to be in the territory of another member state to pursue employment. Paragraph 4, sub-paragraph (2), ensures that other provisions of the Workers Regulation, which are not specific to immigration, do not have ongoing effects for UK immigration law but continue to have effect for other purposes. For example, this will prevent an individual claiming that they have a right of residence in the UK under Article 10 of the Workers Regulation on the basis that their child is in education here; this does not prevent the resident child of an EU national who is legally resident and employed in the UK from being able to rely on Article 10 to access UK education on the same conditions as UK nationals.

Revoked Regulations

- 62 Paragraphs 5(a) and (b) revoke two Council Regulations which relate to harmonising formats for visas within the EU. These measures ensure that standards for issuing visas and resident permits are the same between all EU member states. As the UK is leaving the EU, the UK will no longer be obliged to meet the same requirements for issuing these documents as the EU and therefore these measures are being revoked.
- 63 Paragraph 5(c) revokes Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers (ILO) network. This measure allows member states to send ILOs to non-EU countries to establish and maintain contacts with the relevant authorities of that country, with a view to combatting illegal immigration. Once the UK leaves the EU, it will no longer take part in the ILO network established under this Regulation; therefore, it is being revoked.

Revoked decisions

- 64 Paragraph 6(a) revokes Commission Decision of 8 June 1988 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries (88/384/EEC). This Decision requires member states to communicate to the other member states and to the EU Commission any measures which they intend to make in the areas of asylum and immigration, at the latest when they are made public. Although in force, this measure is no longer used by member states. The UK will no longer be required to provide this information once it leaves the EU and therefore the measure, as saved in domestic law, is being revoked.
- 65 Paragraph 6(b) revokes Council Decision of 26 May 1997 on the exchange of information concerning assistance for the voluntary repatriation of non-EEA nationals (97/340/JHA). This Decision requires EU member states that have developed national voluntary return programmes to report them to the General Secretariat of the Council of the European Union. The UK will no longer be required to report this information to the Council of the European Union in the future; therefore, the measure is being revoked.
- 66 Paragraph 6(c) revokes Council Decision of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of non-EEA nationals (2004/191/EC). This Decision sets out criteria and practical arrangements for the compensation of the financial imbalances which may result from the application of

Directive 2001/40/EC where an individual cannot be removed at their own expense and payment is required from the member state which issued the removal decision. The UK will no longer be able to request financial re-payment from EU member states, for persons who are being removed after it leaves the EU; therefore, this measure is being revoked.

- 67 Paragraph 6(d) revokes Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more member states of non-EEA nationals who are subjects of individual removal orders (2004/573/EC). This measure aims to set out the procedures for coordinating joint removal operations by air of non-EU nationals. The UK will no longer be able to operate this Decision unilaterally after it leaves the EU; therefore, this measure is being revoked.
- 68 Paragraph 6(e) revokes Council Decision of 16 March 2005 establishing a secure web-based Information and Coordination Network for Member States' Migration Management Services (2005/267/EC). This measure establishes a secure web-based Information and Coordination Network for the exchange of information on irregular migration, illegal entry and immigration and the return of illegal residents. The UK will no longer have access to this EU web-based network after it leaves the EU; therefore, the measure will not operate and is being revoked.
- 69 Paragraph 6(f) revokes Commission Decision of 29 September 2005 on the format for the report on the activities of immigration liaison officer networks and on the situation in the host country in matters relating to illegal immigration (2005/687/EC). This measure annexes a template for ILOs to use when reporting on activities on illegal migration in host countries outside the EU. The UK will no longer participate in the ILO network after it leaves the EU and will therefore not be required to provide reports on illegal migration in this format. Consequently, this measure is being revoked.
- 70 Paragraph 6(g) revokes Council Decision of 14 May 2008 establishing a European Migration Network (EMN) (2008/381/EC). This measure establishes the EMN network, which aims to provide up-to-date, objective and comparable information on migration and asylum, with a view to supporting policymaking in the European Union in these areas. This measure will no longer operate in domestic law after the UK leaves the EU because the UK will no longer participate in the EMN network as a member state.
- 71 Paragraph 7 relates to the Schengen area, which represents a territory where the free movement of persons is guaranteed. States which have signed the agreement have abolished all internal borders in lieu of a single external border.
- 72 Article 1(1) of Council Decision of 29 May 2000 concerns the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (2000/365/EC) (as amended) and Article 1 of Council Decision of 22 December 2004 (2004/926/EC) concerns the implementation of parts of the Schengen acquis by the UK (as amended). These Decisions gave effect to Article 26 of the 1990 Schengen Convention, which implements the original Schengen Agreement of 14 June 1985, and obliges the UK to:
- adopt national rules which oblige carriers to assume immediate responsibility for 'aliens' who are refused entry and to return those persons to the third state from which they were transported, the third state which issued the travel document on which that person travelled or to any other State to which they are certain to be admitted;
 - adopt national rules which ensure that carriers are obliged to take all necessary measures to ensure that an 'alien' carried by air or sea is in possession of the travel documents required for entry into the territories of the contracting parties; and

- impose penalties on carriers who transport those who do not possess the necessary travel documents from a third state into the territories of the contracting parties.

73 The UK currently only takes part in some aspects of the Schengen Agreement, such as penalising of carriers for conveying inadequately documented passengers. Paragraph 7(1)(a) and (b) repeal these Council Decisions insofar as they relate to Article 26 of the 1990 Schengen Convention to ensure that the UK has the freedom to adopt its own approach to penalising carriers for conveying inadequately documented passengers.

Part 3: EU-derived rights etc

74 The EU (Withdrawal) Act saves as part of UK law directly effective rights that currently flow through section 2(1) of the European Communities Act 1972 (ECA). This includes rights set out in the Treaty on the European Union, the Treaty on the Functioning of the European Union (TFEU), the agreement with the European Economic Area (EEA) and in other international agreements, such as the Swiss Agreement on the Free Movement of Persons and the EU's Association Agreement with Turkey. It also saves rights derived from Directives that have been recognised by the courts prior to Exit. A number of these rights could be relied upon in an immigration context.

75 Part 3 of Schedule 1 disapplies other retained EU law relating to free movement of persons. It deals with directly effective rights flowing from the Free Movement Agreement between the EU and Switzerland which will have been saved as part of domestic law by the EU (Withdrawal) Act. It ensures that the rights derived from the specific provisions listed in paragraph 8, sub-paragraph (1)(b), cease to be recognised and available in domestic law. As a result, Swiss nationals and their family members, like EEA nationals and their family members, will be subject to the immigration requirements set out in the 1971 Act and the rules made under that Act.

76 Paragraph 9 ensures that any directly effective rights that will have been saved by the EU (Withdrawal) Act and would, in the absence of this paragraph, be retained, cease to apply insofar as they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, immigration legislation or functions. For example, the right that is derived from Article 56 of the TFEU (free movement of services) will be retained EU law and, although it does not specifically concern immigration, unless it is revoked it may be argued that it provides a right to enter the UK to provide services. If such an argument were raised and that interpretation conflicted with the relevant immigration legislation, the right derived from Article 56 would cease to be recognised for that purpose. However, the right derived from Article 56 would continue to apply in non-immigration contexts unless revoked.

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

Title of Treaty	Relevant article	Subject area
Treaty on European Union	Article 9	Citizenship and equality
Treaty on the Functioning of the European Union	Article 18, paragraph 1	Non-discrimination
	Article 20(1) and (2)(a)	Citizenship
	Article 21(1)	Free movement
	Article 45(1), (2) and (3)	Free movement of workers
	Article 49	Freedom of establishment
	Article 56	Free movement of services

These Explanatory Notes relate to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill as introduced in the House of Commons on 20 December 2018 (Bill 309)

Title of Treaty	Relevant article	Subject area
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	Persons receiving services	

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Title of Treaty	Relevant article	Subject area
	[Immigration only]	

Schedule 2: Power of Devolved Authorities Under Section SSC01

Part 1: Scope of the Power

- 78 *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. Paragraph 2 and 3 set out what is within devolved competence for the purposes of this Schedule.
- 79 *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.
- 80 *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.
- 81 *Requirement for consultation where it would otherwise be required* - Paragraph 6 requires consultation with the UK Government on legislation made by a devolved authority in exercise of the power where the devolved authority would normally be required to consult the UK Government.

Part 2: Transitional Provision

- 82 *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.

Schedule 3: Regulations Under Clause 5

Part 1: Statutory Instruments

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

Part 2: Scrutiny of Regulations under Clause 5

- 84 *Scrutiny where sole exercise* - Paragraph 3 provides that where the UK Government or a devolved authority solely exercises the clause 5 power the procedure for regulations will be the affirmative. This means the regulations must be debated and approved by both Houses of Parliament before they have legal effect.
- 85 *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.

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- 86 *Combination of instruments* - Paragraph 5 permits other regulations subject to the negative procedure to be included in an instrument made under clause 5.

Commencement

- 87 The Bill provides for commencement on a day appointed by regulations (apart from clause 6 (interpretation) and clause 7 (extent, commencement and short title) which will come into force on the day on which the Bill receives Royal Assent). Such commencement regulations may make transitional, transitory or saving provision in connection with commencing provisions of the Bill.

Financial implications of the Bill

- 88 The Bill has financial implications in relation to both the ending of the free movement of persons (Part 1 of the Bill) and social security co-ordination (Part 2 of the Bill). Most of the cost to the public sector of ending free movement will relate to the administration of the system of immigration control that replaces free movement in relation to those who previously benefited from free movement. The new system is not set out in this Bill. It is therefore not possible to quantify precisely the costs that will result directly from the provisions in Part 1 of the Bill. The costs of moving to the new system are, however, expected to be more than merely notional.
- 89 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.
- 90 The power to make regulations under Part 2 of the Bill has the potential to be used in a way that could change the cost to the public sector in terms of social security co-ordination. It is not possible to quantify precisely what those costs may be at this stage, but there is the potential for costs that are more than merely notional.

Parliamentary approval for financial costs or for charges imposed

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

Compatibility with the European Convention on Human Rights

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

Related documents

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

- White Paper: Future Skills-based immigration system (published 19 December 2018)
- Prime Minister’s Mansion House speech announcing the Government’s intention to end free movement, 3 March 2018:
<https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>
- Prime Minister’s statement on Brexit confirming the intention to end free movement, 14 November 2018: <https://www.gov.uk/government/speeches/pms-statement-on-brexit-14-november-2018>
- Prime Minister’s statement to Parliament following European Council 26th November 2018:
<https://www.gov.uk/government/speeches/pms-statement-on-the-special-european-council-26-november-2018>
- delegated powers memorandum
- impact assessment (Bill page on Gov.uk)
- policy equality statement (Bill page on Gov.uk)

Annex A - Territorial extent and application in the United Kingdom

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

The information provided is the view of the UK Government.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clauses 1 to 4, 6, 7 and Schedule 1	Yes	Yes	Yes	Yes	No	No	No	No
Clause 5 and Schedules 2 and 3	Yes	Yes	Yes	Yes	No	Yes - the Scottish Parliament will have competence to amend limited elements of the retained Social Security Co-ordination Regulations.	Yes - the Northern Ireland Assembly will have competence to amend limited elements of the retained Social Security Co-ordination Regulations.	Yes

Annex B – Glossary

Term	Reference
1971 Act	Immigration Act 1971
2002 Act	Nationality, Immigration and Asylum Act 2002
Affirmative procedure	<p>A type of parliamentary procedure that applies to statutory instruments (SIs). Its name describes the form of scrutiny that the SI receives from Parliament.</p> <p>An SI laid under the affirmative procedure must be actively approved by both Houses of Parliament.</p>
EEA	European Economic Area
Immigration Rules	Rules laid down by the Secretary of State pursuant to section 3(2) of the Immigration Act 1971
MAC	Migration Advisory Committee
Made affirmative procedure	An SI made under this procedure comes into effect immediately and Parliament will have a set time to approve it (normally 28 or 40 days). The SI will stop being law if Parliament does not approve the SI within that prescribed time.
Negative procedure	<p>A type of parliamentary procedure that applies to statutory instruments (SIs). Its name describes the form of scrutiny that the SI receives from Parliament.</p> <p>An SI laid under the negative procedure becomes law on the day the Minister makes it and remains law unless a motion – or ‘prayer’ – to reject it is agreed by either House within 40 sitting days.</p>

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

EXPLANATORY NOTES

These Explanatory Notes relate to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill as introduced in the House of Commons on 20 December 2018 (Bill 309).

Ordered by the House of Commons to be printed, 20 December 2018

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PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS