

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 5 March 2020. 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 citizens following the United Kingdom’s withdrawal from the European Union. 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 at the end of the transition period by the European Union (Withdrawal) Act 2018 (“EUWA 2018”) – as amended by the European Union (Withdrawal Agreement) Act 2020 (“EUWAA 2020”). The Bill will make those who currently rely on free movement rights to be in the UK (predominantly EEA citizens and their family members¹) subject to the existing domestic immigration framework established by the Immigration Act 1971 (the “1971

¹ For the purposes of this Memorandum we use “EEA citizens” to refer to all such persons, and also to Swiss citizens, as the status of Swiss citizens 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 citizens as it makes for EEA citizens.

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 citizen migrants who fall outside the scope of free movement. The Bill also makes 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 citizens at the end of the transition period. 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 citizens.
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 enables the UK Government (and/or, where appropriate, a Northern Ireland department) to make legislative changes to the retained social security co-ordination regime, at the end of the transition period.
7. The retained social security co-ordination regime, which clause 5 takes a power to modify, governs the co-ordination of social security between EEA States and contains rules relating to individuals whose social security situation is not confined to a single EEA State. This includes rules relating to the payment of social security contributions and access to benefits (including export and aggregation) across the EEA by EEA citizens, and in some cases non-EEA citizens.

8. The retained social security co-ordination regime will be saved as, and incorporated into, domestic law under the EUWA 2018 at the end of the transition period. The retained regime applies to people who do not fall within scope of the EU, EEA EFTA and Swiss withdrawal agreements (“the Agreements”) (as separate provision is made for those falling within scope of the Agreements).
9. The power in Part 2 of the Bill enables the Government to implement future social security co-ordination policy in respect of those people who do not fall within scope of the Withdrawal Agreement.

C. DELEGATED POWERS

10. The Bill includes four delegated powers:

- a. a power to make provision in consequence of, or in connection with, 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 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

11. 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 (subsection(3)(a); different provision may be made for different purposes (subsection (3)(b)). 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 (subsection (2)(a) and retained direct EU legislation (subsection (2)(b)).

12. 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 State² without a valid passport or equivalent document. Subsections (4)(a) and (b) and (5)(a) and (b) provide a defence for a person to prove that they are an EEA citizen, or a family member of an EEA citizen exercising treaty (i.e. free movement) rights in the UK. These defences and the related definition of “EEA National” in subsection (12) will be omitted as a consequence of the wider repeal of free movement law. Subsection(4)(a) will be amended to provide a new defence for a person to prove that they have leave to enter or remain in the UK granted under the EU Settlement Scheme. This ensures the amended provision operates appropriately for those who entered the UK before the repeal of free movement.

Justification for taking the power

13. 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 2018.

14. 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 could be used to align the position of EEA citizens with that of non-EEA citizens in the sham marriage context, to make changes to the voluntary removal regime for EEA citizens; it will also enable consequential provision to be made to reflect

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

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.

15. 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 the provision will be used to, for example:

- a. protect the rights of EEA citizens who are resident in the UK before the end of the transition period, that would otherwise be affected by the Bill; for example, so 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
- b. make transitional provision in relation to the immigration status of an Irish citizen who was subject to an exclusion order under the EEA Regulations immediately before those regulations were revoked, to enable them to be treated for the purposes of new section 3ZA of the Immigration Act 1971 (inserted by clause 2 of the Bill), as a person to whom section 3ZA(3) applies.

16. Given the breadth of the subject matter it is anticipated that regulations under clause 4 will cover, clause 4(1) specifically enables the making of provision that the Secretary of State considers appropriate in connection with Part 1 of the Bill. This is to ensure a clear basis for supplementary, incidental, transitional, transitory or saving provisions that may arguably not be regarded as consequential. Amendments may be made to legislation governing access to benefits and services to reflect the ending of free movement whilst ensuring the necessary protections for those with, or eligible for, leave under the EU Settlement Scheme.

17. Clause 4(4) makes clear the power may be exercised to make provision for persons who would not, before the repeal of section 7 of the Immigration Act 1988 by paragraph 1 of Schedule 1 to the Bill, be exempt from the

requirement to have leave to enter or remain in the UK by virtue of EU free movement rights. This enables provision to be made for the position of EEA citizens who are in the UK before the end of the transition period and who are treated for most purposes as though they were exercising Treaty rights, although they are not actually doing so³. Such people have been granted (and will continue to remain eligible for) leave under the EU Settlement Scheme, notwithstanding that they fall outside the scope of the Agreements. As such people have access to the scheme, the intention is (in nearly all cases) to make provision for all with EU Settlement Scheme leave in the same way, without differentiating between those who were and were not technically exercising free movement rights at the end of the transition period. Regulations made in reliance on subsection (4) are necessarily limited by the fact provision made must nonetheless be appropriate in consequence of, or in connection with, any provision of Part 1 of the Bill.

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

19. 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. For example, to remove the exemption on EEA citizens from the Immigration Skills Charge as part of the Government's plans for the global points-based immigration system (details of which were published in the policy statement "the UK's Points-Based Immigration System" on 19 February 2020). This will align the position between EEA and non-EEA citizens in respect of this charge.

³ An EEA citizen who does not fall within any of the categories of person entitled to a right of residence of more than 3 months in another Member State in accordance with Article 7 of Directive 2004/38 EC or any derivative rights of residence originating from CJEU case law.

20. 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. This is necessary because the power at clause 4 may be used to make provision in relation to nationality legislation that extends to those territories (such as the British Nationality Act 1981).

Justification for the procedure

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

22. The first set of regulations made under this clause will be subject to the affirmative procedure. This is to enable the regulations to come into force alongside the commencement of Part 1 of the Bill on the intended date of 31 December 2020 (the end of the transition period), subject to parliamentary approval of the Bill. The first set of regulations must nonetheless be approved by both Houses of Parliament within 40 days of being made (excluding any period of prorogation or dissolution, or adjournment of either House of more than four days – see subsection (9)). The fact Parliament must approve the regulations to continue them in force, ensures an appropriate level of parliamentary scrutiny for this power.

23. 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 believes 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

Powers conferred on: *Secretary of State or the Treasury, a Northern Ireland department, or a Minister of the Crown acting jointly with a Northern Ireland department*

Powers exercised by: *regulations made by statutory instrument*

Parliamentary Procedure: *affirmative*

Context and purpose

24. This clause allows an appropriate authority to make regulations by statutory instrument to modify retained direct EU legislation relating to social security co-ordination ("Social Security Co-ordination Regulations"), as specified in subsection (2) of the clause.
25. Clause 5 enables modifications to the Social Security Co-ordination Regulations retained under the EUWA. This enables the Government to respond flexibly to the outcome of negotiations on the future framework. The clause will also disapply rights retained by section 4 of the EUWA to the extent those rights are inconsistent or otherwise capable of affecting modifications made pursuant to the exercise of this power (see subsections (5) and (6)).
26. 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 are not in scope of the Withdrawal Agreement and provides a non-exhaustive list of possible reference points for defining these categories. Subsection (3)(b) provides that different provision can be made for different purposes. 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 this includes a power 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 which is not expressly

listed in subsection (2). Subsection (3)(d) states the regulations may provide a person to exercise a discretion in dealing with any matter. These provisions provide an appropriate authority the ability to respond to developments which arise in relation to the UK's future relationship with the EU which may require legislative amendments to retained EU law.

27. Subsection (7) defines an "appropriate authority" as being the Secretary of State or the Treasury, a Northern Ireland department, or a Minister of the Crown acting jointly with a Northern Ireland department. Subsection (8) indicates further provision about the power to make regulations under this clause is set out in Schedule 2.

28. Schedule 2 provides as follows:

- a. *Scope of the Power of a Minister of the Crown acting alone or jointly* – Paragraph 1 states that no appropriate authority can use clause 5 to make provisions which are otherwise within the legislative competence of the Scottish Parliament unless those provisions are merely incidental to or consequential on provisions made outside of the legislative competence of the Scottish Parliament. Paragraph 2 states that when considering whether a provision is within Scottish legislative competence no consideration should be given to whether the provision is incompatible with EU law.
- b. *No power to make provision outside devolved competence* – Paragraph 3 states a Northern Ireland department can only exercise sole use of the power in clause 5 if the provision is within devolved competence of the Northern Ireland department. Paragraph 4 sets out what is within devolved competence for the purposes of this Schedule.
- c. *Requirement for consent where it would otherwise be required* - Paragraph 5 sets out that if a Northern Ireland department is using the power in a way that would require consent if it were a provision in its own legislation, or where the Northern Ireland department would normally require consent from the UK Government to make such a provision in secondary legislation, then consent will still be required. This will not apply if the Northern Ireland department has the power to make such provision without needing UK Government consent.

- d. *Requirement for joint exercise where it would otherwise be required* - Paragraph 6 sets out where a Northern Ireland department would normally only be able to make legislation jointly with the UK Government, the Northern Ireland department will still have to make such legislation jointly when exercising the power.
- e. *Requirement for consultation where it would otherwise be required* - Paragraph 7 requires consultation with the UK Government on legislation made by a Northern Ireland department in exercise of the power where they would normally be required to consult the UK Government.
- f. *Transitional Provisions* – Paragraph 9 dis-applies section 24(1)(b) of the Northern Ireland Act 1998 (restriction on acting incompatibly with EU law), in so far as relating to EU law, in relation to regulations made under clause 5.

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

- a. *Statutory instruments* - Paragraph 1 prescribes the power is to be exercised by statutory instrument.
- b. *Scrutiny where sole exercise* - Paragraph 2 provides that where the UK Government or a Northern Ireland department solely exercises the clause 5 power the procedure for regulations will be the affirmative.
- c. *Scrutiny where joint exercise* - Paragraph 3 provides that where the UK Government and a Northern Ireland department exercise the power under clause 5 jointly, the affirmative procedure applies in both the UK Parliament and the Northern Ireland Assembly.
- d. *Combination of instruments* - Paragraph 4 permits other regulations subject to the negative procedure to be included in an instrument made under clause 5.

Justification for taking the power

30. This power is necessarily broad so as to enable an appropriate authority to respond flexibly to the outcome of negotiations on the future framework and

make changes to the retained social security co-ordination rules. 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:

- the extent to which UK nationals or EEA citizens can export certain benefits and pensions if they move to an EEA State; and
- the administration and rules which govern entitlement and obligations when people live and work in more than one country.

31. This power will provide the appropriate authorities with the ability to deliver a range of policy options from the end of the transition period in any or all of these areas.

Justification for the procedure

32. 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 supplementary, incidental, consequential, transitional, transitory or saving 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 appropriate Parliamentary scrutiny, it is proposed that the exercise of the power is subject to the draft affirmative procedure, ensuring 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 Northern Ireland department.

Clause 7 subsection (2): Extent

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

Context and Purpose

33. Clause 7 subsection (2) enables the extension, with appropriate modifications, of any provision of Part 1 of the Bill (in addition to clauses 6 and 9, to the extent relating to Part 1) 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 any repeal or amendments to the relevant legislation made by this Bill.

Clause 8: Commencement

<i>Power conferred on:</i>	<i>Secretary of State (or Secretary of State and Treasury in respect of subsection (3))</i>
<i>Power exercised by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary Procedure:</i>	<i>None</i>

34. Clause 8 deal with commencement of provisions of the Bill. Subsection (1) contains a standard power for the Secretary of State to bring provisions of Part 1 of the Bill into force by commencement regulations; subsection (3) provides the Secretary of State or the Treasury with an identical power to commence provisions of Part 2 of the Bill. Subsection (4) enables regulations commencing Part 2 to make different provision for different purposes or areas; subsection (2) enables different provision to be made for different purposes when commencing Part 1; and subsection (6) enables regulations specifying a time of day for commencing Parts 1 and 2. This is to enable commencement at the same time as the end of the transition period. 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.

Home Office
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