UK State Pensions and other benefits – what the UK should do in a No Deal scenario

Executive summary

- The UK has committed to uprating UK State Pensions payable to UK nationals living in the EU only as far as 2019/20. It has expressed a desire to continue to do so thereafter but only “subject to reciprocity”.
- The UK’s policy of not uprating State Pensions for those resident outside the UK save where obliged by “reciprocity” to do so is itself irrational and unjust to those who have earned a pension by paying contributions and taxes to this country.
- The UK State Pension is already the lowest in all the OECD countries\(^1\). To refuse to increase that does not merely add insult to injury: it causes massive hardship to the poorest pensioners in the civilised world.
- Moreover those living in the EU are already hit by a fall of one fifth\(^2\) in the value of their pensions following Brexit: this decline in the value of Sterling is predicted to continue for at least the medium term following a No Deal Brexit.
- To extend this policy to those who paid UK contributions and taxes and moved to an EU country during a period when the UK did uprate the pensions of those resident in the EU would be outrageous: there can be no justification for moving the goalposts for this vulnerable group when it is too late for them to do anything about it. They have a legitimate expectation that they will receive uprated pensions as long as they live in the EU.
- But equally, all those who made significant contributions in the UK before moving to another EU 27 country to work did so with the legitimate expectation that when they retired, their UK pension would be uprated.
- The UK’s departure from the EU will unravel the complex interlocking mechanisms for the aggregation of social security contributions by those who work in several EU countries. The Government must confirm that after Brexit:
  - it will continue to pay benefits based on aggregated contributions and allow them to be exported;
  - that, so far as benefits for which it is liable are concerned, it will ensure that beneficiaries who worked in the UK before Brexit are not in any way prejudiced by a failure to have achieved a minimum contribution level/period;
  - that it will use its best endeavours to reach urgent agreement with the EU on a resurrection of the aggregation scheme, at least in so far as is necessary to ensure the aims set out above.

Pension uprating

1. The UK has a long-standing policy of not uprating for inflation UK state pensions paid to those who reside outside its territory if it can avoid doing so. It does however uprate pensions paid to its pensioners residing in countries where it has a reciprocal agreement or, in the case of the EU, where it is required to do so by law\(^3\).

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\(^2\) Comparing £/€ exchange rates on 1\(^{st}\) Jan 2016 and 1\(^{st}\) Jan 2019.

\(^3\) Reg. 883/2004/EC Art. 7.
2. If, as seems unlikely, the UK exits the EU on the terms of the Withdrawal Agreement (“WA”) agreed between negotiators in November 2018, then uprating will continue for UK pensioners residing/working in the EU at the end of the transition period, since the same EU law will continue to have effect for them – WA Art.31.

3. If, however, the UK exits with No Deal, the UK has only agreed to continue to uprate until 2019/20. Thereafter para. 20 of its policy paper of 6 December 2018⁴ says that it will continue “to pay an uprated UK state pension to eligible UK nationals living in the EU”, but this is then heavily qualified by the words “subject to reciprocity” hidden in a footnote. On December 13 British in Europe submitted 8 questions to the DWP about this proposal, but has not received a substantive response from that Department.

Reciprocity

4. The meaning of “subject to reciprocity” in the UK contingency paper is unclear. It could mean that it will pay pension increases to UK pensioners living in an EU27 country which as a matter of fact uprates the pensions of its pensioners living outside the EU. Alternatively it could mean that increases will only be paid where the UK pensioner lives in a country which has a bilateral agreement with the UK under which each country is obliged to uprate pensions paid to its pensioners living in the other. All UK pensioners present or future are entitled to know what is meant.

5. If it is the former meaning, the DWP must make clear which countries are affected. British in Europe is not in a position to ascertain the rules across 27 countries, but is not aware of any country which “reciprocates” by penalising its pensioners for leaving the EU.

6. The requirement of “reciprocity” underlay some of the early bilateral agreements relating to pension increases made by the UK, but on the DWP’s own evidence, has no place in an agreement made today. A DSS (now DWP) memo in June 1996 sets out the justification for reciprocal agreements:

“16. Reciprocal social security agreements are not entered into solely with a view to paying annual uprating increases to UK pensioners living abroad. They are not strictly necessary for that purpose as uprating can be achieved through UK domestic legislation...

17. The main purpose of reciprocal agreements so far has been to provide a measure of social protection for workers and the immediate members of their families, when moving from one country to another during their working lives...

19. Since June 1996, the Government’s policy has been that reciprocal agreements should normally be limited to resolving liability for social security contributions. These “Double Contribution Conventions” ... will not be suitable vehicles to provide benefits reciprocity.  

7. No agreements providing for increases have been made since 1981.

8. The DSS memo proves that the requirement of “reciprocity” now is utterly specious.

9. Whilst the logic of providing social protection for workers who move from one country to another during their working lives does not apply directly to those who retire elsewhere after working in a single country, the underlying policy ought to be similar. In essence, the object of paying social security contributions while you work is to achieve “a measure of social protection”. If the goalposts are moved only when you have retired and ceased to pay contributions, it is too late for you to do anything to restore your social protection.

10. And of course the argument of the DSS memo applies directly, and not merely by extension, to anyone who has contributed in more than one country during their working life.

EU nationals in receipt of a UK State pension

11. The UK contingency paper only mentions a desire to uprate the pensions of UK nationals living in the EU. It says nothing about uprating the pensions of the very substantial group of EU citizens who are entitled to UK State pensions by having spent all or part of their working lives in the UK and who have then retired to their country of origin or another EU country. Equal treatment must be assured for EU citizens who are, or have in the past, lived/worked in the UK.

A cut-off date for protection?

12. There should be no cut-off date to separate those UK State pensioners living in the EU who are entitled to increases from those who are not. In particular the policy of paying increases should not be restricted to those who retired before Brexit. Otherwise a gross injustice would be perpetrated on those who spent their entire lives working in the UK, contributing and paying taxes with the legitimate expectation that they would receive increases if they retired to the EU, but who happen to be a few years short of pension age at Brexit.

13. There is no other cut-off date which overcomes this problem without some such injustice. This is because planning for retirement usually takes place well in advance. The young Italian who goes to work in the UK will often have had, from the outset, a settled intention to return to be near her family when she retires. Many thousands of UK nationals now working in the EU 27 worked for a substantial period in the UK, thus contributing to a UK

Frozen overseas pensions, House of Commons Library briefing paper 17.5.16, p.7, citing the DSS memorandum.
State pension, before moving abroad. Most UK nationals who work in the UK and retire to the EU will have made their plans, bought a house etc many years before retiring\(^6\). Therefore, and given the DSS memo’s view on the inappropriateness of “reciprocity” in this context, the UK should commit to continuing indefinitely to uprate the State pension of any UK pensioner living in the EU27: alternatively of any UK pensioner living in the EU 27 who made any NI contributions while the UK was in the EU.

A precedent

14. We have made the point that it would be unjust to penalise UK pensioners by moving the goalposts when it is too late for them to do anything about it. This potential injustice was recognised in what happened when Australia terminated the bilateral agreement it had with the UK.

15. There was a reciprocal agreement with Australia on pensions. Its form was simply that periods of residence in one country counted towards pension entitlement in the other for people who ended up retired in the second country. It did not provide for the payment of pension increases and it was on this ground that Australia terminated the agreement with effect from 2001. But clearly those covered by it received a larger pension than they would have done without it, as their pension paid in one country was boosted by their contributions made in the other. However when the agreement came to an end, the legitimate expectation of those who had retired while it was in force was preserved, as they continued to be covered by it, and to receive their augmented pensions, as long as they resided in the UK/Australia as the case may be\(^7\).

How is continued uprating to be achieved?

16. Continued uprating is not difficult to achieve legally. The primary legislation which enables/provides for there to be no uprating for those resident abroad specifically allows exceptions to be made by regulation or Order in Council\(^8\). Therefore continued uprating can be achieved either by not repealing Art. 7 of the amended UK version of Reg. 883/2004/EC which was published in a draft statutory instrument just before Christmas. Alternatively by including appropriate provision in the instruments uprating pensions every year.

\(^6\) The lead author of this paper bought his house, with the intention of retiring there, 15 years before doing so.

\(^7\) Frozen overseas pensions p.8.

\(^8\) In the case of “old pensions”, ie those to which entitlement arose before April 2016, it is s.113 Social Security Contributions and Benefits Act 1992, read with regs. 4 and 5 of the Social Security Benefits (Persons Abroad) Regs. 1975 and s.179 Social Security Administration Act 1992. In the case of “new pensions” it is S.20 Pensions Act 2014.
Aggregation of contributions

17. Social security contributions and benefits are subject to a coordinated system in the EU, backed by IT systems, under which time spent/contributions made in all Member States are aggregated in calculating entitlement to benefits such as old age pensions. This will come to an end on March 30 if there is No Deal and the UK/EU IT links will also be broken on that day.

18. The UK has just produced a draft statutory instrument under which it shows that it intends to pay unilaterally its share of benefits earned in multiple jurisdictions. At the same time, however, the Government is promoting the Immigration and Social Security Coordination (EU Withdrawal) Bill, clause 5 of which enables it to repeal the draft SI even before it comes into effect. The Government must, therefore, make a public commitment not to repeal so much of this proposed regulation as is required to keep the aggregation system functioning. The policy paper of Dec. 6 does not do this.

19. The draft SI also needs to be amended. The new Art. 1A which it adds to Reg. 883/2004/EC deals with the difficulty which might be experienced by the UK in obtaining from an EU27 country information relevant to a claim after Brexit in the following way. First the UK will ask the EU 27 country for the information. If it is not given it will ask the claimant for such information as is in his/her possession. If the claimant does not give it or if the DWP is of the view that the information given is not accurate or is incomplete, then the DWP is not obliged to pay the benefit in question. The following problems arise:
   a. The test “the DWP is of the view” gives it the lowest possible legal threshold for refusing to pay a benefit. The DWP’s view is substituted for reality. The test “the DWP is of the view” gives it the lowest possible legal threshold for refusing to pay a benefit. The DWP’s view is substituted for reality.
   b. Moreover the information will often relate to work done or contributions made decades earlier, and very very few people will have maintained records of these matters because at the time they were entitled to rely on the relevant institution in the country in question doing so. Almost everyone will be supplying incomplete information at best, and many will quite innocently provide inaccurate information. There needs to be express provision for such difficulties to be taken into account by decision-makers assessing these claims, and for claims to be allowed even when very little information is provided.

20. Moreover it is essential to ensure that those who have contributed pre-Brexit not only retain the benefit of those contributions but are also not caught post-Brexit by minimum contribution periods not having been satisfied. For example, a UK national who, after a life working in the EU, returns to work in the UK aged 60 in 2019 should not have to work for another 10 years in order to meet the minimum contribution period for the UK State pension.

9 There is not even a requirement that the DWP’s view be “reasonably held”, which makes this test even more Draconian than that considered in the landmark case of **Liversidge v Anderson** [1942] AC 206.
This could be achieved by providing that Reg. 883/2004 continues to apply to everyone who has been within its scope at any time.

21. Finally, it is clear that the only way to ensure a return to a fully functioning system is to make a new agreement with the EU covering social security even if all other discussions are taboo. The UK must initiate such a process as soon as possible.

British in Europe

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