

**The draft EU contingency Regulation COM(2019)53¹ on Social Security
Coordination**

A Joint Note by British in Europe and the3million

Our underlying themes

- **Do not move the goalposts:** All the life-changing decisions which UKinEU and EUinUK made – where to live, work, start a family etc – were taken within the framework of our rights as EU citizens, and the legitimate and firm belief that we would keep these for life. The preservation of these rights was correctly made a priority by both sides in the negotiations, although the Withdrawal Agreement (“WA”) does not always match these promises. The evident injustice of moving the goalposts when it is too late for us to do anything about it underlies all the points we make in this paper.
- **Ring-fence our rights:** if the WA is not ratified, ring-fencing the Citizens’ Rights part of the WA by making it the only agreement under Article 50 remains by far the simplest and the only secure way of protecting the rights of UKinEU and EUinUK. This is a “backstop” which everyone could willingly embrace, but to be legally effective such agreement **has** to be signed and ratified before March 29 or any extended Art. 50 time limit. If the assertions about the importance of Citizens Rights are more than empty words, the EU27 should put aside its policy of not talking to the UK on No Deal matters and offer ring-fencing now.
- As Brexit approaches there is widespread serious anxiety among UKinEU and EUinUK about vital matters such as future healthcare, benefits and export of our pensions.

Executive Summary

- The draft Reg. leaves UKinEU in a horribly exposed position. It removes almost all the Social Security Coordination rights they had when they moved to the EU27, and seems to fail even to guarantee the aggregation of contributions they made pre-Brexit in EU27 States. The way which this proposed Regulation could work in conjunction with Regulation 1231/10 for third country nationals has not been acknowledged (it could at least be explained in the Explanatory Memorandum).
- The glaring gaps in their protection are not filled by other EU measures affecting Third Country Nationals (“TCNs”).
- The impact of the Regulation should on any view have been assessed to ensure compliance with the EU Charter of Fundamental Rights (Article 34: the right to social security and social assistance) and with the property protection provisions of Art. 17 of the Charter or Article 1 of the First Protocol to the European

¹ https://ec.europa.eu/info/files/social-security-rights_en

Convention on Human Rights. There is no evidence in the Explanatory Memorandum or anywhere else that this has been done.

- EU in UK are less affected but they do suffer important losses of rights to aggregate contributions they make in the UK post-Brexit and of the right to export benefits to the UK.
- Overall the draft Reg. does virtually nothing to protect these groups of people of whom the Commission has said *"It has always been the EU's intention that citizens should not pay the price of Brexit."*
- The UK's proposed law, though far from perfect and vulnerable to very easy future change, provides much better rights for the recipients of UK benefits, and it is surprising that reciprocity, of which there has been so much talk when the UK reduces citizens' rights, seems to count for little when it offers more than the EU.

The gaps left in Social Security Coordination by the UK's departure

1. EU-wide Social Security Coordination is effected through Regs. 883/2004/EC and 987/2009/EC. Reg. 883 creates the main rules, and 987 deals with implementation.
2. Reg. 883 covers only EU citizens, refugees and stateless persons and their families and survivors (Art. 2). It follows that, on the UK's departure, Reg. 883 ceases to apply at all to UK citizens except to the extent that new legislation specifically preserves it.
3. Reg. 883 also only regulates what is to happen to claims under the legislation of Member States and/or what happens where events (such as residence or work) take place in a Member State. Again, then, on Brexit Reg. 883 will not apply to claims under UK legislation or events taking place there, unless new legislation specifically so provides.

What does the draft Regulation do and not do?

4. The draft Regulation has a very limited scope. In practical terms all it does is preserve the rules governing "aggregation" and "assimilation" in so far as these relate to events which occurred in the UK pre-Brexit.
5. Some Member State benefits, such as pensions, usually require a claimant to have worked/resided in that State for a minimum period or contributed a minimum amount. Under Reg. 883 the State is obliged to aggregate the periods spent in all EU countries when determining whether a claimant has reached that minimum. Aggregation can also come into play when calculating the amount of benefit to which the claimant is entitled. The draft Reg. preserves this right to aggregation where the period or amount being aggregated occurred in the UK pre-Brexit.

6. What the draft Reg. does NOT do, and what it ought to do if only to achieve its evident aim, is preserve the right of a UK national to aggregate pre-Brexit contributions etc. made in one or more Member States other than the UK. Art. 6 is confined to contributions etc. made in the UK. Given that after Brexit UK nationals are outside the scope of Reg. 883 save to the extent specifically provided for by this draft Reg., this is a major omission. It is thought to be a drafting error.
7. “Assimilation” is the process whereby if the receipt of social security benefits or other income or the occurrence of certain facts or events has certain legal consequences under the law of the State administering the benefit in question, it is irrelevant that the receipt, fact or event takes place in another Member State. So, for example, if I am entitled in principle to a benefit from State X subject to fulfilling a qualifying period of work, and under the law of X the qualifying period is extended by any time I have spent bringing up my children, the fact that I may have brought them up in another State is irrelevant even if that State does not have a similar provision. Again, the draft Reg. preserves the assimilation of receipts and events taking place in the UK pre-Brexit.
8. Moreover, in so far as events which took place in the UK before Brexit are relevant to the entitlement to or payment of a benefit, the claimant is entitled under Article 4 to equal treatment with nationals of the State responsible for the benefit.

UK NATIONALS IN THE EU27

What are the gaps left by the draft Reg?

9. The biggest gap left by the draft Reg. is that, except to the limited extent described above, it preserves none of the rules on Social Security Coordination for UK nationals after Brexit and Regs. 883 and 987 simply cease to apply to them. At the beginning of this paper we spelled out the importance of not moving the goalposts for those who decided to live or work in the EU27 before Brexit. Their commitment to living in the EU27 does not stop at Brexit: they should still be able to live, work, retire and if necessary claim benefits on the same terms as before. The Commission clearly had the option of preserving as far as possible the rights of this group, but decided not to do so. That approach does nothing to encourage the idea of a Europe of citizens, a Europe that will look after those who embrace its ideals.
10. In particular, UKinEU will lose their Reg. 883 rights to:
 - Equal treatment with the nationals of the State administering their benefits: Member States will be able to discriminate against them in the payment of benefits, including the imposition of discriminatory conditions.
 - Aggregation of pre-Brexit contributions other than in the UK (see paras. 5 and 6 above) and of all post-Brexit contributions. See the box below for an example of the latter.

Anna, a British national born in Italy, worked in the Netherlands for 3 years after university there, but moved to the UK in 2015. She works there for 9 years. She marries an Italian and returns to Italy and, taking into account time she spends bringing up a family, she only works for another 10 years. Italy will aggregate (i) her 4 years in the UK pre-Brexit and (ii) her 10 years in Italy, leaving her with less than the 20 years minimum needed for an Italian pension. Her 3 years in the Netherlands and 5 years in the UK post-Brexit are not taken

- The right to export benefits without discrimination on the grounds of residence – they lose out if they are entitled to a pension from a State such as the Netherlands which does discriminate in that way, or if they are presently exporting a family benefit for dependents living in the UK or another Member State.
 - The loss of this right is contrary to the Commission’s own recommendation in its Contingency Planning paper of December 19 2018.²
 - It is fully open to the Commission to propose that EU-27 States export benefits based on pre-Brexit contributions to UK citizens: it has chosen not to do this in its proposal. If the reason why is because it considers it cannot legislate for reciprocity on the part of the UK, then we suggest the Commission explore making a proper “no-deal” agreement between the EU27 and the UK on this issue. As the Commission well knows, since EU social security coordination between the UK and EU-27 was EU competence from 1 January 1973 until Brexit, EU27 Member States, even those that have bilateral social security agreements with the UK, will not be able to deal with this on a bilateral basis for contributions made pre-Brexit. There are also a large number of EU27 Member States that have no bilateral agreements with the UK. It is not acceptable simply to ignore the important issue of export of benefits in this way.
- The right to equal treatment in access to health care.
- The right of pensioners, frontier workers and posted workers to health care paid for by the country of their competent institution, even where both that country and their country of residence are still in the EU.
- The healthcare right of pensioners, frontier workers and posted workers where their competent institution is in the UK. It is accepted that this right is more difficult to preserve as it is essentially bilateral, but it would not have been impossible to preserve it. The EU’s general approach to contingency

² https://ec.europa.eu/info/publications/communication-19-december-2018-preparing-withdrawal-united-kingdom-european-union-30-march-2019-implementing-commissions-contingency-action-plan_en p.5.

planning for No Deal has included unilateral arrangements which are conditional upon the UK doing something: it would have been possible to provide that the healthcare arrangements would continue as before conditional upon the UK continuing to play its part. The UK is on record as wanting to preserve these arrangements. Again, the point above about making a proper “no-deal” agreement between the EU-27 and the UK is relevant. Is the EU really serious about protecting citizens’ rights or not?

Reg. 1231/2010 to the rescue?

11. The EU does, of course, have another Regulation (1231/2010) which applies the Reg. 883 rules to TCNs who are or have been in a situation involving more than one Member State. Given that all UKinEU are or have been in such a situation while the UK was in the EU, one might have thought that this historic fact would enable UKinEU to take advantage of that Regulation. After all, it was the Commission itself which recommended that periods of residence by UKinEU as European Citizens under Directive 2004/38 should count for the purpose of acquiring *the right to long term* residence under Directive 2003/109³. Moreover, those UKinEU who have not only worked in the UK and their host state, but in more than one other EU 27 state will still be in a situation involving more than one Member State post Brexit.
12. However it appears that the solution proposed by the Commission in relation to residence is *not* to be used to preserve the rights of UKinEU to social security. The lead author of this paper recently received a communication from the Commission to the effect that Reg. 1231/2010 would only apply to UK nationals who were in a situation involving two or more Member States after Brexit, and that a historic situation involving the UK while a Member State, or indeed two or more Member States, whether in addition or not to the UK, would not assist. Given that UKinEU have been deprived of freedom of movement, this means that for some years at least only frontier and posted workers, living in one Member State and working in another, are likely to benefit.
13. If what we have been told is correct, the question arises whether the European Commission has done an impact assessment to satisfy itself that the proposal is ECHR-compliant and respects the right to property in Article 1 of the First Protocol and the rights under Articles 17 and 34 of the Charter of Fundamental Rights of the EU? If so we would like to see it. If not the draft Regulation is fundamentally flawed on that ground alone.
14. Key issues on this matter are information and transparency. The relationship between the proposal and Regulation 1231/10, in particular how they will relate to UK nationals in the EU, should have been made clear in the proposal itself or in

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0880> pp.6-7.

its explanatory note. Publicly accessible transparency on the part of the EU on this issue is lacking. We ask for urgent action to remedy this and for the Commission to produce a clear information note that sets out the relationship between its proposal, Regulation 1231/10, any other social security-relevant aspects of legal migration *acquis* and Member State bilateral agreements.

15. We note also that current third country nationals are left out completely of the contingency regulation, a matter of concern for TCN family members of British in Europe.

Other TCN schemes

16. That is not to say that all UKinEU will lose the benefit of all EU schemes for the assimilation of social security. There is the mish-mash of EU laws covering TCNs which provides different degrees of protection for different groups of people in different circumstances. Examples are the TCN Long Term Residence Directive, the Single Permit Directive, the Blue Card Directive and the Family Reunification Directive. Many UKinEU will not be covered by any of these schemes and the coverage provided from one scheme to another varies enormously⁴. Suffice it to say that the protection afforded does nothing to recognise the legitimate expectations of this finite group of UK nationals who came to live and/or work in the EU27 as EU citizens.

EU27 NATIONALS IN THE UK

17. We turn now to the position of EU27 nationals who are or have been in a situation involving both a Member State and the UK. The position here is simpler because they remain EU citizens and therefore in principle subject to Reg. 883 regardless of Brexit. All that needs to be dealt with is so much of their situation as relates to time spent or events which have taken or will take place in the UK.
18. In so far as they are receiving a UK benefit, then their post-Brexit entitlement has to be covered by UK law in the absence of either the Withdrawal Agreement being ratified, the Citizens' Rights section being ring-fenced under Art. 50 or a bilateral EU/UK agreement being made. We consider below what provision the UK is making to replace Reg. 883.
19. Turning then to the entitlement of EUinUK to Member State benefits, their right to aggregation of pre-Brexit contribution/residence/employment periods or amounts is fully preserved. In so far as these were in a Member State, they are covered by Reg. 883 itself. In so far as they were in the UK, Art. 5(2) of the draft Reg. preserves them. They do not suffer from the same problem as UKinEU, referred to in para. 6 above.

⁴ See the discussion in BiE's paper "No Deal Brexit preparedness – why the Commission's proposal does not work", November 2018.

20. Where EUinUK do suffer, however, is in relation to post-Brexit contributions etc. Any such contributions as take place in the UK after Brexit will be left out of account in the aggregation carried out by a Member State. Again, a practical example may assist.

Matteo, an Italian national, went to study in the UK under an Erasmus+ programme, graduating in 2015. He then works in the UK for 30 years before returning to Italy for 10 years and then retiring. The Italian aggregation of his contributions will take into account only 4 years of his UK contributions (2015-19). When these are added to his Italian contributions they will be insufficient to reach the minimum threshold for an Italian pension. He will receive a UK pension, but only based on 30 years unless the UK continues to aggregate long after Brexit.

21. EUinUK are also deprived of their ability to export a benefit payable by a Member State to a person resident in the UK. This is because the draft Reg. does not deal with the fact that Art.7 of Reg. 883, which governs exportability, only prohibits discrimination on the ground of residence where the exporTEE is resident in a Member State. After Brexit of course the UK will not be a Member State so the prohibition will fall away. As was stated in para. 10 above in relation to UKinEU, this is contrary to the Commission's own recommendation.

The UK's treatment of Reg. 883

22. Reg. 883 forms part of UK law as long as the UK is in the EU. Upon Brexit it becomes "retained EU law" under the European Union (Withdrawal) Act 2018. On January 30 the UK government published a draft regulation to modify the application of Reg. 883 to take account of the UK's departure. In principle most of the Regulation is retained, but the following are the main amendments introduced:

- A new Art. 1A provides a practical solution for the problems that will arise when the present arrangements for exchange of information between the UK and the EU27 as Member States cease on March 30. When administering benefits involving itself and another country the UK will try to obtain information from the Member State in question. Failing that it will ask the claimant to supply relevant evidence. Failing that it will disallow the claim. This last is an exceptionally heavy-handed and disproportionate response to the problems people may experience in providing documents to prove their work or contribution history in another country many years earlier, but it does at least try to grapple with the real problems that will arise from the difficulty of exchanging data.
- Art. 4, which provides for equal treatment, is deleted for reasons which are wholly unexplained.

- References to “Member State” are changed to “State” where, after Brexit, the intention is to refer to the UK or a Member State. Where “Member State” is left unaltered it is intended to refer to an EU27 State.
 - The entire section on healthcare is left unamended but is intended not to apply any more. This is achieved by leaving unchanged the references to Member State, so that the only obligations in the section fall on a Member State (over which the UK clearly has no power to legislate) and thus not the UK.
23. In essence, then, the UK is retaining Reg. 883 subject to those changes. This treats those citizens subject to its law, whether EUinUK or UKinEU, very much better than the Commission’s draft Regulation does. If reciprocity, of which there has been so much talk, means anything the EU should reciprocate here. It should not however reciprocate on the unexplained deletion of the right to equal treatment nor on the heavy-handed means of dealing with communication problems.
24. The story does not quite end there, however. The UK Parliament is at present considering an Immigration and Social Security Coordination Bill which confers on Ministers (and the devolved administrations of the UK) a power to make regulations to change all or any of Reg. 883 in future. This power is colloquially known as a Henry VIII power to reflect the relative lack of democratic control over it, and is a cause of considerable concern. Both the3million and British in Europe have made representations to the UK Parliament that this regulation-making power be deleted from the Bill.
25. However, the lead author of this paper was recently told by a senior official that the UK government at present has no present intention of exercising this power. It is said to be there to deal with social security coordination at the same time as any future changes to UK immigration law. The UK is at present on record as having promised to preserve the present law: “They (sc. EUinUK) will continue to be able to ... access benefits and services in the UK on the same basis after we exit the EU as they do now.⁵”

⁵ UK Policy Paper on Citizens’ Rights - 6 December 2018 para. 4.