EXPLANATORY MEMORANDUM TO

THE CESSATION OF EU LAW RELATING TO PROHIBITIONS ON GROUNDS OF NATIONALITY AND FREE MOVEMENT OF PERSONS REGULATIONS 2022

2022 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions (DWP) and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

1.2 This instrument disapplies or amends certain retained EU equal treatment provisions so that they no longer apply in relation to access to social security, statutory payments, social assistance, housing, education training and apprenticeships, and childcare related matters. These provisions became redundant when the freedom of movement of EEA citizens[1] ended on 31 December 2020[2]. This is therefore a technical rectification to ensure that UK law functions with legal clarity.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

1.3 None.

4. Extent and Territorial Application

1.4 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.

1.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. European Convention on Human Rights

1.6 The Minister for Pensions and Growth, Alex Burghart, has made the following statement regarding Human Rights:

"In my view the provisions of the Cessation of EU Law Relating to Prohibitions on Grounds of Nationality and Freedom of Movement of Persons Regulations 2022 are compatible with the Convention rights."

6. Legislative Context

1.7 As a consequence of its membership of the EU, the UK was bound by EU bilateral and multilateral agreements (agreements with single or multiple countries), including: the Agreement on the European Economic Area[3] (the EEA Agreement) and the

[1] "EEA citizens" means citizens of the European Union (EU) countries and of other constituent countries of the European Economic Area (EEA) (Iceland, Liechtenstein and Norway) and of Switzerland.
[2] This date is the end of the transition period following the UK's exit from the EU.
[3] https://www.legislation.gov.uk/eut/eea-agreement/contents

Agreement between the European Community and its Member States and the Swiss Confederation on the free movement of persons[4] (FMOPA).

1.8 Directly effective rights[5] derived from EU treaties and regulations were based on reciprocal relationships between EU Member State territories. Directly effective rights derived from EU bilateral and multilateral agreements were based on reciprocal relationships between EU Member State territories and certain non-EU territories.

1.9 This instrument concerns directly effective rights found in the Treaty on the Functioning of the European Union[6] (TFEU), the EEA Agreement, FMOPA and directly applicable provisions in Regulation (EU) No 492/2011 of the European Parliament and the Council[7].

1.10 Article 18 TFEU prevented discrimination on the grounds of nationality within the scope of application of the Treaties. Prohibitions on the grounds of nationality were also found in Article 4 of the EEA Agreement and Article 2 of FMOPA.

1.11 Article 21 TFEU provided the right to move and reside freely within the territory of the Member States. Article 45 TFEU provided for free movement and equal treatment of workers on the same basis as workers of the host Member State. The same rights are replicated in the EEA Agreement under Articles 28 and 29, as well as under Articles 3, 9 and 15 of Annex 1 of FMOPA.

1.12 Article 45 was given further expression by Regulation (EU) 492/2011. Articles 7 and 9 provided for the equal treatment of EEA workers on conditions of employment, access to social and tax advantages and housing on the same basis as national workers. Article 10 provided for the right for children of workers to access general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State.

1.13 The European Communities Act 1972[8] was repealed by the European Union (Withdrawal) Act 2018 (EUWA). EUWA created a new body of law which turned EU law existing immediately before the end of the transition period[9] into retained EU law under sections 2, 3 and 4. Section 3 saved direct EU regulations and turned them into domestic law. Section 4 provided for EU rights and obligations not falling within sections 2 and 3, including directly effective rights contained within EU Treaties, to be recognised and available in domestic law. Where directly effective rights are retained under section 4 EUWA, it is the substance of the right, which is retained, not the text of the treaty provision itself.

1.14 Provisions on prohibitions on the grounds of nationality and free movement of persons, which derived from the TFEU, the EEA Agreement and FMOPA, continued as directly effective rights in domestic law by virtue of section 4 after the end of the transition period. Regulation (EU) 492/2011 continued as direct European Union (EU) legislation under section 3.

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[4] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22002A0430(01)&from=EN

[5] "Directly effective rights" was the term used to reference provisions of European Union (EU) law which were sufficiently clear, precise and unconditional to confer rights directly on individuals, which could be relied on in national law without the need for further implementing measures. EU treaties and regulations were directly applicable.

[6] https://www.legislation.gov.uk/eut/teec/contents

[7] https://www.legislation.gov.uk/eur/2011/492/contents

[8] https://www.legislation.gov.uk/ukpga/1972/68/contents

[9] The end of the transition period was 11.00 pm (UK time) on 31 December 2020.

1.15 Regulation 1 of the instrument includes provisions relating to its commencement and interpretation. These regulations come into force the day after the day on which they are made, because the instrument corrects deficiencies in retained EU law which became redundant at the end of the transition period and does not impose duties or obligations.

7. Policy background

What is being done and why?

1.16 The body of retained EU law was created by the European Union (Withdrawal) Act 2018 (EUWA) to avoid leaving gaps on the statute book and to ensure a smooth and orderly exit when EU law ceased to apply to the UK at the end of the transition period. After this, because the supremacy of EU law would no longer operate on new, post-exit legislation, Parliament (and, within devolved competence, the devolved legislatures) would be able to decide which elements of that law to keep, amend or repeal once the UK had left the EU[10].

1.17 Prior to the end of the transition period, through EU freedom of movement of persons rights, EEA citizens had access to certain benefits, services and educational entitlements. The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (ISSCA)[11] repealed freedom of movement of EEA citizens. It also revoked directly effective equal treatment provisions connected to nationality and freedom of movement in so far as they were inconsistent with immigration legislation. When the freedom of movement of EEA citizens ended at the end of the transition period, the application of these directly effective rights (relating to prohibitions on the grounds of nationality and freedom of movement) became redundant with respect to access to social security, statutory payments, social assistance, housing, education training and apprenticeships, and childcare related matters.

1.18 Disapplying these redundant equal treatment provisions therefore clarifies the policy situation already in effect, which is to treat EEA citizens coming to the UK after the end of the transition period equally with those coming from non-EEA countries. This instrument does not, therefore, effect any policy change. It purely addresses the deficiency of these redundant equal treatment provisions by disapplying them in relation to relevant benefits, services and educational entitlements.

1.19 By virtue of the European Union (Withdrawal Agreement) Act 2020, EEA citizens resident in the UK before the end of the transition period who are protected by the EU Withdrawal Agreement, the EEA European Free Trade Association (EFTA) Separation Agreement and the UK-Swiss Citizens' Rights Agreement ("the Withdrawal Agreements") continue to be afforded the same equal treatment and free movement protections as they had before the end of the transition period.

8. European Union Withdrawal and Future Relationship

1.20 This instrument is being made using the power in section 8 of European Union (Withdrawal) Act 2018 (EUWA) in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act,

[10] https://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf
[11] https://www.legislation.gov.uk/ukpga/2020/20/contents/enacted

the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

1.21 This instrument does not involve consolidation and there are no plans to consolidate the relevant legislation at this time.

10. Consultation Outcome

1.22 No formal consultation has taken place in relation to this instrument as it does not effect any policy change. The Devolved Administrations have been informed of the instrument.

11. Guidance

1.23 No guidance is required for this instrument as it is a technical rectification.

12. Impact

1.24 There is no, or no significant, impact on business, charities or voluntary bodies.

1.25 There is no, or no significant, impact on the public sector.

1.26 An Impact Assessment has not been prepared for this instrument because no impact on business is foreseen.

13. Regulating small business

1.27 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

1.28 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

1.29 This is a technical rectification, and it is not foreseen that monitoring and evaluation will be necessary.

15. Contact

1.30 Dionne West at the Department for Work and Pensions. Email: internationalaccessto.benefitpolicyteam@dwp.gov.uk can be contacted with queries regarding the instrument.

1.31 Ronan O'Connor, Director, Strategy and Governance, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.

1.32 Alex Burghart, Minister for Pensions and Growth can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018 and the European Union (Future Relationship) Act 2020

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2	A statement that the Statutory Instrument (SI) does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all European Union (Withdrawal)Act 2018 (EUWA) SIs	Explain the instrument, identify the relevant law before IP completion day, explain the instrument's effect on retained European Union (EU) law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Part 2

Statements required under the European Union (Withdrawal) 2018 Act or the European Union (Future Relationship) Act 2020

1. Appropriateness Statements

1.1 The Minister for Pensions and Growth, Alex Burghart, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Cessation of European Union (EU) Law Relating to Prohibitions on Grounds of Nationality and Freedom of Movement of People Regulations 2022 does no more than is appropriate."

1.1 This is the case because it does no more than is necessary to ensure that the UK statute book operates correctly, is coherent and tidy, and aligns with the position following EU exit, the ending of freedom of movement, and the position with countries outside of the European Economic Area (EEA) and Switzerland. Further explanation can be found in sections 6 and 7 of this Explanatory Memorandum.

2. Good reasons

2.1 The Minister for Pensions and Growth, Alex Burghart, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action."

2.2 These reasons are provided for in section 6 of this Explanatory Memorandum.

3. Equalities

3.1 The Minister for Pensions and Growth, Alex Burghart, has made the following statement(s):

"The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006, or the Equality Act 2010 or subordinate legislation made under those Acts."

3.2 The Minister for Pensions and Growth, Alex Burghart has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, Alex Burghart have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."