EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY CO-ORDINATION (REVOCATION OF RETAINED DIRECT EU LEGISLATION AND RELATED AMENDMENTS) (EU EXIT) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions (DWP), in part on behalf of HM Treasury (HMT), and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument ensures that, aside from some specific savings provisions, the EU Social Security Co-ordination Regulations (SSC Regulations) which are retained on a unilateral basis under section 3 of the European Union (Withdrawal) Act 2018 (EUWA) will not take effect in domestic law from the end of the transition period in areas of DWP and HMT policy. It also revokes the four statutory instruments which have been made to fix the deficiencies that would arise in the areas of DWP and HMT policy from the unilateral operation of the retained SSC Regulations, to the extent that they are no longer required.

2.2 This instrument also has the effect of bringing forward the day on which amendments will be made to the Social Security Administration Act (SSAA) 1992 and the Social Security Administration (Northern Ireland) (SSAA(NI)) Act 1992 for the purpose of implementing, and giving effect to, reciprocal agreements with international organisations covering social security. These amendments were originally due to be made by SI No. 2019/128 and SI No. 2019/129 and were due to come into effect on IP Completion Day. However, these amendments will now be effective from the day after this instrument is made.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The powers under which this instrument is made cover the entire United Kingdom.

4. Extent and Territorial Application

4.1 The extent of this instrument is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument is the entire United Kingdom. The changes being made to DWP areas of social security policy, which is transferred in Northern Ireland and partially devolved in Scotland, are in this context subject to the foreign affairs reservation.

5. European Convention on Human Rights

5.1 The Minister for Disabled People, Health and Work has made the following statement regarding Human Rights:

"In my view the provisions of the Social Security Co-ordination (Revocation of Retained Direct EU Legislation and Related Amendments) (EU Exit) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 The EU SSC Regulations 883/2004, 987/2009, 1408/1971, 574/1972 and 859/2003 will cease to have direct effect in domestic law from the end of the transition period as specified in Article 126 of the UK-EU Withdrawal Agreement. Section 3 of EUWA 2018 converts the EU SSC Regulations into "retained direct EU legislation" which will, currently, be incorporated into UK law at the end of the transition period. EUWA 2018 also includes a power in section 8(1) to make secondary legislation to deal with deficiencies that will arise in the operation of retained EU law as a consequence of the UK leaving the EU. This power was exercised in 2019 to make four "fixing" statutory instruments[1] to ensure that the retained SSC Regulations were operable, so far as possible, in the event that the UK left the EU without a deal.

6.2 The UK and EU have since agreed the Withdrawal Agreement, as well as the linked agreements with the EEA EFTA countries (Norway, Liechtenstein and Iceland) and Switzerland, which are given effect by the EU (Withdrawal Agreement) Act 2020 (EUWAA).[2] The EUWAA inserts new sections 7A and 7B into the EUWA 2018. Sections 7A (EU law) and 7B (EEA/EFTA separation agreement and the Swiss Citizens Rights Agreement) ensure that, where it is necessary to continue to apply directly applicable EU law under the three agreements, that legislation will form part of domestic law. The effect is to establish a cohort of individuals to whom the SSC Regulations will continue to apply after the end of the transition period.

6.3 Section 7A and 7B EUWA is a separate legal mechanism and so this cohort will not be affected by any changes to the retained SSC Regulations incorporated into domestic law under section 3 EUWA 2018. This instrument has no impact on anyone covered by the Withdrawal Agreement, or the linked agreements, for as long as they remain in scope of those agreements.

6.4 The powers in sections 8(1) and 23(1) of EUWA 2018 have been used to make amendments in The Social Security (Amendment) (EU Exit) Regulations 2019 (2019 No. 128 and its Northern Ireland equivalent, 2019 No. 129). The 2019 Regulations make provision to amend various pieces of social security legislation to reflect that the UK is no longer a member of the EU. These include necessary amendments to section 179 SSAA 1992 (and section 155 SSAA(NI) Act 1992) which contains a power to implement reciprocal agreements related to social security with other countries. The purpose of these amendments, which at present will take effect from the end of the transition period, is to ensure that agreements with international organisations (i.e. the EU) can be implemented in domestic legislation by way of Order in Council (or Order in Northern Ireland), and in addition to other domestic legislation to ensure that retained EU legislation (within the meaning of section 3 of EUWA 2018) can be amended/modified in order to give effect to reciprocal agreements.

[1] 2019 No. 721, 722, 723, 726

[2] References to the Withdrawal Agreement should be taken to also refer to the linked Swiss Citizens' Rights Agreement and the EEA EFTA Separation Agreement.

7. Policy background

What is being done and why?

7.1 Social security co-ordination relies on cooperation and reciprocity between countries. This is because it is not possible for one country to unilaterally impose obligations on another, for example an obligation to apply legislation to individuals moving between two countries on a co-ordinated basis or to exchange information. Until the end of the transition period, the EU SSC Regulations continue to apply to the UK and the EU (including the EEA EFTA countries and Switzerland) in order to co-ordinate social security schemes for individuals moving between these countries. The SSC Regulations are listed in paragraph 6.1 above and explained in further detail in the Immigration and Social Security Co-ordination (EU Withdrawal) Act's explanatory notes and this factsheet.

7.2 Now that the UK has left the EU it is necessary for new arrangements to be put in place from the end of the transition period. The government published its approach to negotiations on 27 February 2020, which sets out its intention to negotiate a future EU-wide agreement on social security co-ordination. The UK proposal, published on 19 May 2020, is different from the current SSC Regulations in some areas, reflecting the fact that the SSC Regulations are predicated on EU membership and operate in the context of the free movement of persons. The UK is now able to negotiate social security co-ordination arrangements with the EU as a sovereign country and is ending free movement. The government is also in discussions with the EEA EFTA countries and Switzerland about future social security arrangements that will apply between the UK and those countries after the end of the transition period.

7.3 In all circumstances the social security co-ordination provisions within the Withdrawal Agreement apply. The EU SSC Regulations will apply to those individuals in scope of that agreement for as long as they continue to be in scope of the agreement. The treatment of those individuals moving between the UK and the EU (or between the UK and the EEA EFTA countries or Switzerland) after the end of the transition period, who are not in scope of the Withdrawal Agreement and to whom no other international social security agreement applies, will be determined by the relevant domestic law in each country. No changes are being made to the domestic laws which allow benefits to be paid abroad when an individual is temporarily absent.

7.4 In Part 2 of this instrument regulation 3 revokes the EU SSC Regulations retained as domestic law by section 3 EUWA 2018 before they can take effect at the end of the transition period. This paves the way for any reciprocal agreements to be implemented under separate legislation. This instrument aligns the domestic rules that apply when individuals move between the UK and the EU (including EEA EFTA countries and Switzerland) with the rules that apply unilaterally to the rest of the world, subject to the savings in Part 3. Where no reciprocal agreement applies the effect is, for example, to prevent the payment of Child Benefit for children living in the EU, EEA EFTA and Switzerland after the end of the transition period. This instrument will also ensure that, where no reciprocal agreement applies, the rules on payment of National Insurance contributions with respect to individuals moving between the UK and the EU (including EEA EFTA countries and Switzerland) are the same as those for the rest of the world. Regulation 4 revokes the fixing regulations made under EUWA 2018 and designed to allow the UK to operate retained EU SSC Regulations unilaterally, so far as possible.[3]

[3] 2019 No. 721, 722, 723, 726

7.5 For UK and Irish nationals moving between the UK and Ireland, DWP and HMT-led aspects of social security co-ordination will continue unchanged after the end of the transition period due to a reciprocal agreement with Ireland[4] signed in February 2019 to support the Common Travel Area.

7.6 Part 3 of this instrument also makes certain specific savings of the retained EU SSC Regulations, as set out at paragraphs 7.7 to 7.12 below.

Healthcare

7.7 Regulation 6 of this instrument excepts the revocation of the provisions of retained SSC Regulations relating to the co-ordination of benefits in kind (healthcare provision – "the healthcare aspects of the retained SSC Regulations"). This is because this instrument is addressing retained SSC Regulations only in so far as they relate to DWP and HMT policy areas, in their entirety, and not to areas of competence for the Department of Health and Social Care (DHSC), namely healthcare.

7.8 The healthcare aspects of the retained SSC Regulations will be revoked by the Social Security Co-ordination (Reciprocal Healthcare) (Amendment etc.) (EU Exit) Regulations 2019 ("the SSC Healthcare Exit SI") from the end of the transition period. Paragraph 5 of the Schedule to this instrument makes amendments to the SSC Healthcare Exit SI which are consequential on the revocations made by regulations 3 and 4.

7.9 DHSC has laid in draft further secondary legislation for approval. The draft Reciprocal and Cross-Border Healthcare (Amendment etc.) (EU Exit) Regulations 2020 would, amongst other things, update the SSC Healthcare Exit SI to reflect the transition period and the Withdrawal Agreement whilst leaving intact its provisions revoking the healthcare aspects of the retained SSC Regulations from the end of the transition period.

Debt recovery savings

7.10 Regulation 7 of this instrument will save the existing debt recovery provisions in the retained SSC Regulations which will enable HM Revenue & Customs (HMRC) to continue to collect overpaid family benefits and social security contributions on behalf of an EU social security authority (including EEA EFTA and Switzerland) where the individual, or employer, is present in the UK. The provisions also ensure that the government can recognise foreign domestic court decisions relating to the collection of contributions and insolvency judgments. These debt recovery provisions can only be used where the UK has made a commitment to do so in an international reciprocal agreement relating to social security, for example the 2019 reciprocal agreement between the UK and Ireland (see paragraph 7.5).

Gibraltar

7.11 Regulation 8 of this instrument provides for continued social security co-ordination with Gibraltar by saving retained EU law to the extent necessary to give effect to the exchange of letters[5] between the Governments of the UK and Gibraltar on the co-ordination of the social security systems of the UK and Gibraltar. This will allow for social security co-ordination to continue with Gibraltar on the same terms as now until

[4] https://www.gov.uk/government/publications/cs-ireland-no12019-ukireland-convention-on-social-security enacted by SI 2019/622 - https://www.legislation.gov.uk/uksi/2019/622/contents/made

[5] As given effect to in domestic law by The Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order 1974 (for Great Britain) and The Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order (Northern Ireland) 1974 (for Northern Ireland).

a new reciprocal agreement with the Government of Gibraltar is agreed and implemented.

State pension

7.12 The government has been clear that it is seeking continuation of the rules in the area of the state pension, on equivalent terms as now, with the EU, and separately with the EEA EFTA countries and Switzerland.

Amendments to power to make Reciprocal Agreements

7.13 Paragraphs 1 to 4 of the Schedule and regulation 10 will bring forward the day on which amendments will be made to section 179 of the SSAA 1992 and section 155 of the SSAA(NI) Act 1992 for the purpose of implementing, and giving effect to, reciprocal agreements with an international organisation. It will do this by omitting the amendments in the Social Security (Amendment) (EU Exit) Regulations 2019 and the Social Security (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 and remaking them, from the day after this instrument is made, rather than IP Completion Day.

7.14 The ability to make a social security agreement with an international organisation such as the EU was not necessary while the UK was part of the EU. However, subject to the outcome of the negotiations with the EU, and the details of any agreement, it may be necessary to use the powers in section 179 of the SSAA 1992 and section 155 of the SSAA(NI) Act 1992 to make a reciprocal agreement with the EU prior to the end of the transition period. This instrument brings forward the changes as a precaution given that the amendments in the Social Security (Amendment) (EU Exit) Regulations 2019 and the Social Security (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 only take effect from the end of the transition period, as a consequence of the EU (Withdrawal Agreement) Act 2020.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is not being made under EUWA 2018 but relates to the withdrawal of the United Kingdom from the European Union. It is required to pave the way for the legislation implementing the new policy on social security co-ordination for those not in scope of the Withdrawal Agreement from the end of the transition period.

9. Consolidation

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

10. Consultation outcome

10.1 The Social Security Advisory Committee (SSAC) have been consulted on the proposed Regulations. Drafts have been shared with the Scottish Government and Northern Ireland Executive.

11. Guidance

11.1 While this instrument has no impact on the legislative architecture of the Withdrawal Agreement, guidance relating to the UK's operational implementation of the social security co-ordination provisions of the Withdrawal Agreement can be found here. This guidance will assist DWP and HMRC staff when determining how to apply the rules

under the Withdrawal Agreement or those applying to individuals impacted by the effects of this instrument.

11.2 Guidance for individuals and employers on the changes can be found here:

Withdrawal Agreement: https://www.gov.uk/government/publications/withdrawal-agreement-explainer-for-part-2-citizens-rights

Benefits and Pensions in the EU: https://www.gov.uk/guidance/benefits-and-pensions-for-uk-nationals-in-the-eea-or-switzerland

12. Impact

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

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

12.3 An Impact Assessment has not been prepared for this instrument. When negotiations have reached a conclusion DWP intend to publish on gov.uk an update to the social security co-ordination impact assessment published during the passage of the Immigration and Social Security Co-ordination (EU Withdrawal) Act.

13. Regulating small business

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

14. Monitoring & review

14.1 DWP is committed to monitoring the impacts of its policies and will use evidence from a number of sources on the experiences and outcomes of the affected groups. DWP will aim to review the policy impacts to all relevant DWP benefits on a routine basis in consultation with other relevant government departments. DWP will continue to consider the intersections of DWP policy with other departments' policies.

15. Contact

15.1 Olivia de Achaval at the Department for Work and Pensions, telephone: + 44 (0) 746 835 4444 and email: olivia.de-achaval@dwp.gov.uk, can be contacted with any queries regarding the instrument.

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

15.3 Justin Tomlinson, Minister for Disabled People, Health and Work at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.