EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY COORDINATION (REGULATION (EC) NO 883/2004, EEA AGREEMENT AND SWISS AGREEMENT) (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 722

THE SOCIAL SECURITY COORDINATION (REGULATION (EC) NO 987/2009) (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 723

THE SOCIAL SECURITY COORDINATION (COUNCIL REGULATION (EEC) NO 1408/71 AND COUNCIL REGULATION (EC) NO 859/2003) (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 726

THE SOCIAL SECURITY COORDINATION (COUNCIL REGULATION (EEC) NO 574/72) (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 721

1. Introduction

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

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments and the Sifting Committees.

2. Purpose of the instrument

2.1 These four Statutory Instruments amend the retained EU Regulations which provide for EU Social Security Coordination (the 'Coordination Regulations'). The amendments remedy deficiencies arising as a result of the United Kingdom's withdrawal from the European Union ('EU'), ensuring that retained EU law is operable in the event there is no withdrawal agreement, and no future relationship agreement.

Explanations

What did any relevant EU law do before exit day?

2.2 The Coordination Regulations are:

- Regulation (EC) 883/2004[1] of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems ("Regulation 883/2004")

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004R0883

- Regulation (EC) No 987/2009[2] of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems ("Regulation 987/2009")
- Council Regulation (EEC) No 1408/71[3] of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community ("Regulation 1408/71")
- Council Regulation (EEC) No 574/72[4] of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community ("Regulation 574/72")
- Council Regulation (EC) No 859/2003[5] of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality ("Regulation 859/2003")

2.3 Together these Regulations coordinate social security systems throughout the EU.

Why is it being changed?

2.4 The whole system of social security coordination relies on cooperation and reciprocity from other Member States ('MS'); but we cannot assume this would continue in a no deal scenario. It will not be possible to impose reciprocal obligations on MS when correcting deficiencies in the Coordination Regulations - such as requiring that they cooperate with the UK or provide information, or that they apply the rules contained in the Coordination Regulations to individuals moving to/from the UK.

What will it now do?

2.5 These instruments address deficiencies in retained law caused by the UK withdrawing from the EU, which would impact the operation of the retained Coordination Regulations in a no-deal scenario.

2.6 These instruments aim to ensure that citizens' rights are protected as far as possible in a no-deal scenario. As per the intent of the EU (Withdrawal) Act 2018, these instruments aim to maintain the status quo. These instruments are intended to ensure a functioning statute book in the event of a no deal scenario, by fixing deficiencies in retained EU law, in line with the power provided by section 8.

[2] https://publications.europa.eu/en/publication-detail/-/publication/1cb8bb8d-3370-4889-a03f-924da9af7318/language-en
[3] https://publications.europa.eu/en/publication-detail/-/publication/81312945-046b-4697-9712-905771f1bd77
[4] https://publications.europa.eu/en/publication-detail/-/publication/bc43c0c2-fc26-44fc-8711-b7f66f24d554
[5] https://publications.europa.eu/en/publication-detail/-/publication/b9cb64f6-c17f-4ba2-ae42-5d127b148dcf/language-en

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 These instruments were laid for sifting on 20th December 2018. The European Statutory Instrument Committee recommended on 15th January 2019 that these instruments use the affirmative procedure because the issue of social security coordination is of sufficient importance to justify the scrutiny and debate afforded by affirmative resolution. They have already been considered by the sifting committees as they were originally laid as negative on 20th December 2018. Following on from their recommendations, they are being relaid as affirmative.

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.

4. Extent and Territorial Application

4.1 The territorial extent of these instruments is the United Kingdom.

4.2 This territorial application of these instruments is the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister of State for Employment, Alok Sharma, has made the following statement regarding Human Rights:

"In my view the provisions of the Social Security Coordination (Regulation (EC) No 883/2004, EEA Agreement and Swiss Agreement) (Amendment) (EU Exit) Regulations 2019, the Social Security Coordination (Regulation (EC) No 987/2009) (Amendment) (EU Exit) Regulations 2019, the Social Security Coordination (Council Regulation (EEC) No 1408/71 and Council Regulation (EC) No 859/2003) (Amendment) (EU Exit) Regulations 2019 and the Social Security Coordination (Council Regulation (EEC) No 574/72) (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 Section 3 of the European Union (Withdrawal) Act 2018 ('the Act') retains EU law as part of the UK's domestic legislation after withdrawal from the EU. Section 8 of the Act allows retained EU law to be amended to remedy any deficiencies that arise as a result of exit. These instruments make amendments to the retained Coordination Regulations, principally to remedy deficiencies that arise as a result of provisions that do not apply to the UK, confer functions on EU entities that no longer have functions in relation to the UK and make provision for, and in connection with, reciprocal arrangements between the UK and EU MS.

6.2 Regulation 883/2004 is the principal Coordination Regulation and determines which MS social security legislation applies when a person moves between MS, ensuring they only pay contributions into one State's social security scheme at a time, and giving clear guidance as to which State is competent (responsible) for payment of a

benefit[6]. It provides for equal treatment of EU nationals, requires MS to aggregate social security contributions (or equivalent periods of insurance) in another MS when necessary, and enables the export of certain benefits. It also provides for reciprocal access to healthcare[7].

6.3 Regulation 987/2009 makes more detailed provision for implementation of Regulation 883/2004. Regulation 1408/71 and its implementing Regulation 574/72 are the older versions of those Regulations which still apply in some transitional cases. Regulation 859/2003 extends Regulations 1408/71 and 574/72 to third country nationals. The UK did not opt into the Regulation which extends Regulations 883/2004 and 987/2009 to third country nationals.

6.4 By virtue of the European Economic Area ("EEA") Agreement[8] and the Swiss Free Movement of People Agreement[9], the Coordination Regulations also apply in the EEA and Switzerland, and references in this Explanatory Memorandum to the EU, EU MS, and EU nationals, are to be understood as also applying to the EEA, Switzerland, and their nationals.

6.5 The whole system of social security coordination across the EU relies on cooperation and reciprocity, for example in relation to data-sharing about social security contributions made in different member states. The legal framework for this will cease in a no deal scenario. The UK will have no means of enforcing reciprocal obligations on EU MS and cannot therefore legislate for this when correcting deficiencies in the Coordination Regulations - such as by legislating to require that EU MSs cooperate with us or provide information, or that they apply the rules contained in the Coordination Regulations to individuals moving to/from the UK.

What will it now do?

6.6 These instruments aim to maintain the status quo on a unilateral basis, ensuring that citizens' rights are protected as far as possible in a 'no deal' scenario in relation to social security. They are intended to ensure a functioning statute book in the event of a no deal scenario, by fixing deficiencies in retained EU law, in line with the power provided by section 8 of the EU (Withdrawal) Act.

7. Policy background

What is being done and why?

Data and information sharing

7.1 The Coordination Regulations require EU MS to exchange information through specific administrative procedures laid down in the Regulations. Data shared is, for example, used to establish which EU MS is responsible for payment of benefits to avoid overlapping benefits being paid in different EU Member States.

---

[6] Legislation and welfare provisions relevant to these regulations vary by state – but can be found at: https://ec.europa.eu/social/main.jsp?catId=868&intPageId=2285&langId=en

[7] Fixes for deficiencies related to healthcare are not provided for in these Statutory Instruments (and Explanatory Memorandum).

[8] http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf

[9] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22002A0430%2801%29

7.2 These instruments will enable us to ask claimants to provide (within reasonable time) the relevant data to determine competence in cases where the relevant EU MS does not do so, if asked. However, in the event that the information provided by the claimant is insufficient, the UK will no longer be required to fulfil any obligation under the Coordination Regulations.

7.3 The instruments also include provisions to ensure that the UK can continue to share data with EU MS when they are applying the Coordination Regulations.

Inoperable provisions

7.4 The Coordination Regulations make provision for a number of bodies at EU level to deal with administrative and technical issues or disputes arising from the application of the Social Security Coordination Regulations. The Administrative Commission[10] is the main one, but provision is also made for the Audit Board[11], Advisory Committee[12] and Technical Commission for Data Processing[13]. It is worth noting that these bodies are not independent but are part of the Commission.

7.5 In a no deal scenario, the UK will cease to be represented on these bodies, and they will no longer have any powers or functions in relation to the UK.

7.6 The Coordination Regulations also contain obligations for provisional payments to be made to an individual while a dispute is resolved between two EU MS regarding competence to pay benefits. This provision, which is very rarely used (provisional payments have only ever been paid by DWP in two instances), will no longer be engaged in respect of the UK because there will no longer be a legal mechanism for resolving a dispute over competence between the UK and an EU MS.

[10] The Administrative Commission for the Coordination of Social Security Systems comprises a representative of the government of each EU country and a representative of the Commission at official level. It is responsible for dealing with administrative matters, questions of interpretation arising from the provisions of regulations on social security coordination, and for promoting and developing collaboration between EU countries. Administrative Commission decisions, although generally adopted by MS, are not legally binding.

[11] The Audit Board is attached to the Administrative Commission and verifies methods, collects data, provides the AC with periodic accounts in relation to implementation particularly as regards the financial aspect, provides the data and reports necessary for decisions to be made, makes any relevant suggestions to the AC and carries out all work, studies or assignments on matters referred to it by the Administrative Commission.

[12] The Advisory Committee for the Coordination of Social Security Systems comprises one government representative, one trade union representative and one representative from the employers' organisations. The Advisory committee can examine general questions or questions of principle and problems arising from the implementation of the Community provisions on the coordination of social security systems and formulate opinions on such matters for the Administrative Commission and proposals for any revisions of the said provisions.

[13] The Technical Commission for Data Processing is attached to the Administrative Commission and proposes to it common architecture rules for the operation of data-processing services, in particular on security and the use of standards; and delivers reports and a reasoned opinion before decisions are taken by the Administrative Commission.

7.7 These instruments remove references to these bodies and to the requirement to make provisional payments, on the basis they will be inoperable when the UK withdraws from the EU in a no deal scenario.

Applicable legislation

7.8 The Coordination Regulations state that an individual shall only be subject to one EU MS legislation at a time, meaning that a worker (and their employer) need only pay social security contributions (National Insurance Contributions (NICs) in the UK) to one MS at a time. The Coordination Regulations set out clear guidance on where a worker's (and their employer's) contributions are due in a variety of circumstances, and which country is responsible for any applicable benefit payments.

7.9 These arrangements rely on coordination between EU MS in order to operate effectively, so will largely be inoperable in a no-deal scenario.

7.10 The approach to amending the Coordination Regulations has therefore been to focus on circumstances where the UK legislation does apply i.e. in cases where UK NICs are payable. Broadly speaking, UK NICs will be due where work is undertaken in the UK, even if the worker is resident outside of the UK. This may give rise to occasions where an individual becomes subject to the legislation of more than one state at a time - an unavoidable consequence of a no-deal exit which cannot be managed using powers available in this Act.

Who would be impacted by the changes?

7.11 The changes will affect people who are currently in scope of the Coordination Regulations. These may be overlapping, but largely affect:

- The process for medical assessments being conducted in other MS, when UK nationals or EU nationals move to the EU and claim a UK benefit, such as Employment and Support Allowance, or State Pension. The amendments make provision for such nationals to provide medical evidence where necessary.
- UK or EU nationals where there is a dispute between the UK and an EU MS about which country is competent. Prior to exit, the individual could have accessed provisional payments in such a case. The amendments remove provisional payments.
- The calculation of entitlement to benefits for UK nationals or EU nationals who have spent a period of time residing and working in the EU, but who now live in the UK and make a claim for a UK benefit or State Pension. The amendments make provision for nationals to provide evidence relating to their claim - in the instance where an EU MS does not provide it if requested.
- UK nationals working (either employed or self-employed) in an EU MS, and residents of an EU MS working in the UK, and some third country nationals coming to work in the UK from an EU MS. This group may be impacted by, for example, being required to pay National Insurance Contributions ('NICs') in the UK, under UK legislation, as well as in an EU MS if that MS legislation also applies to them.

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

8.1 These instruments are being made under section 8 of the European Union (Withdrawal) Act 2018 to address anticipated deficiencies in retained EU law arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 Informal consolidated text of instruments is available to the public free of charge via the National Archives' website www.legislation.gov.uk.

9.2 Informal consolidated text of social security law in Northern Ireland is available free of charge to the public via the Department for Communities website http://iaccess.communities-ni.gov.uk/sspldbluevolumesinternet/users/internetsearchpage.aspx

10. Consultation outcome

10.1 As this instrument is addressing deficiencies in retained EU law and there is no significant impact as a result of this instrument, a full consultation was not considered necessary.

10.2 We nevertheless had informal discussions with the Social Security Advisory Committee on these instruments. These focused around both technical issues (such as drafting points), and policy considerations (testing our approaches to ensure we are providing the best outcomes).

11. Guidance

11.1 In the event of a no deal scenario, guidance will be provided in due course and in adequate time in order to adapt to these amendments in practice.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies as a result of these instruments which are intended to maintain the status quo.

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

12.3 An Impact Assessment has not been prepared for these instruments as they only make technical changes to retained EU law, and as such do not give rise to any new costs or any financial or economic impact beyond the status quo.

13. Regulating small business

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

14. Monitoring & review

14.1 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Ashley Sawyer at the Department for Work and Pensions Telephone: 0207 449 5187 or email: ashley.sawyer@dwp.gsi.gov.uk can be contacted with any queries regarding the instruments.

15.2 Jonathan Harris, Head of EU Exit Policy at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.

15.3 Alok Sharma MP, Minister of State for Employment at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Minister of State for Employment, Alok Sharma, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view The Social Security Coordination (Regulation (EC) No. 883/2004) (Amendment) (EU Exit) Regulations 2019, The Social Security Coordination (Regulation (EC) No. 987/2009) (Amendment) (EU Exit) Regulations 2019, The Social Security Coordination (Council Regulation (EEC) No. 1408/71) and Council Regulation (EC) No. 859/2003 (Amendment) (EU Exit) Regulations 2019, and The Social Security Coordination (Council Regulation (EEC) No. 574/72) (Amendment) (EU Exit) Regulations 2019 do no more than is appropriate. This is the case because they do no more than prevent, repeal or mitigate deficiencies in otherwise retained EU law arising from the withdrawal of the UK from the EU".

2. Good reasons

2.1 The Minister of State for Employment, Alok Sharma, 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 these instruments, and I have concluded they are a reasonable course of action. These reasons are detailed in section 7 of this explanatory memorandum."

3. Equalities

3.1 The Minister of State for Employment, Alok Sharma, has made the following statement(s):

"The instruments do 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 of State for Employment, Alok Sharma, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to these instruments, I, Alok Sharma, 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."

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum

5. European Convention on Human Rights

5.1 The Minister of State for Employment, Alok Sharma, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018

"In my view the provisions of The Social Security Coordination (Regulation (EC) No. 883/2004) (Amendment) (EU Exit) Regulations 2019, The Social Security Coordination (Regulation (EC) No. 987/2009) (Amendment) (EU Exit) Regulations 2019, The Social Security Coordination (Council Regulation (EEC) No 1408/71 and Council Regulation (EC) No 859/2003) (Amendment) (EU Exit) Regulations 2019, The Social Security Coordination (Council Regulation (EEC) No. 574/72) (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights."