Dear Convener

21 December 2018

AMENDMENT OF RETAINED SOCIAL SECURITY COORDINATION REGULATIONS
EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a no deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach a notification which sets out the details of four statutory instruments (SIs) which the UK Government propose to make in relation to retained social security law and the reasons why I am content that Scottish devolved matters are to be included in these SIs. My understanding is that the UK Government’s intention is to lay the SIs for sifting on 13 December and they will not be made until the Scottish Parliament has completed its consideration. We will, in accordance with the protocol, advise you when the SIs are laid and advise you as to whether the final SIs are in keeping with the terms of this notification.

The notification sets out the detail of what these SIs seek to achieve. But in short, in a no deal scenario, they would allow the UK Government to unilaterally continue honouring the existing EEA social security coordination arrangements. It is through these rules that EEA nationals in the UK, and reciprocally UK nationals in the EEA, are able to access social security on the same basis as nationals of each member state.
I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you within 28 days from the date of this letter.

Yours sincerely

SHIRLEY-ANNE SOMERVILLE
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SIs


- The Social Security Coordination (Council Regulation (EEC) No 574/72) (Amendment etc.) (EU Exit) Regulations 2018

- The Social Security Coordination (Regulation (EC) No 883/2004) (Amendment etc.) (EU Exit) Regulations 2018

- The Social Security Coordination (Regulation (EC) No 987/2009) (Amendment etc.) (EU Exit) Regulations 2018

A brief explanation of law that the proposals amend

The EU Regulations make provision for coordination of social security systems. The proposals amend retained UK law, so that it will continue to make provision to operate the coordination arrangements after the UK leaves the EU. What currently operates under EU Regulations is re-enacted, with appropriate modification of terminology (for example, references to member states are modified according to whether they are referring to the UK or to other member states, or to both).

To understand the proposal, it helps to understand how the EU Regulations operate. They do not replace national systems with a single European social security system. All participating countries (the EU members, plus Iceland, Liechtenstein, Norway and Switzerland) remain free to decide who is to be insured under their domestic rules, including which benefits are granted and under what conditions.

The original coordination regulations were 1408/71, implemented procedurally by 574/72. From 1 May 2010 a modernised and consolidated set of regulations were introduced, 883/2004 and its implementing regulation 987/2009, but for now this only applies to EU nationals, and not to nationals of the non-EU signatories. Nothing turns on that, for present purposes.

Regulation 883/04 is the main regulation and determines which member state’s social security legislation applies where a person moves between member states. It ensures they only pay contributions to one State’s social security system at any one time, and guides which State is competent (i.e. responsible) for paying benefits. It provides for equal treatment of nationals of the states that participate in
the coordination arrangements and enables benefits to be exported from one State to another.

The arrangements do not apply to all social security benefits. Member states are free to provide what is termed “social assistance” as they see fit. That is not neatly defined, but essentially is assistance provided on the basis of financial need, such as income support, to persons of limited financial means. In the context of devolved benefits, as currently envisaged, “social assistance” would be assistance with heating costs in cold weather¹, funeral expense assistance, assistance with maternity and early years costs², and housing assistance. All other assistance types would be subject to coordination requirements, under current EU legal arrangements³.

One aim of the coordination system is to ensure that persons are only subject to one national system at a particular time. A person should only pay contributions to one system at a time, and should not be entitled to assistance from more than one system for the same circumstances (but a person might, for example, have pension entitlements from more than one system in respect of different contribution periods).

Other aims are:

- The principle of equal treatment or non-discrimination. Persons who are nationals of a participating country should have the same rights and obligations as the nationals of another country in which they are living.

- The principle of exportability. If a person is entitled to a cash benefit (such as a pension or disability benefit) from one country, they should generally be able to receive it even if they are living in a different country.

- When a person claims assistance from one national system, any previous periods of insurance, work or residence in other countries should be taken into account as necessary, in the same way that residence in the country of the application would be taken into account.

**Summary of the proposals and how these correct deficiencies**

With the departure of the UK from the EU, the coordination arrangements would automatically be retained in the UK, as a result of the EU (Withdrawal) Act 2018, but would cease to work effectively as their wording is not fitted to the domestic context. The proposal is to amend terminology to interpret and give clarity as to

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¹ Cold-spell heating assistance, but winter heating assistance must be provided regardless of financial need and would therefore be subject to the coordination arrangements.

² There is a very minor element of Best Start Grant (BSG) maternity payments that is provided regardless of proof of financial need, to mothers up to 18 years of age. The UK Government has notified the Administrative Commission of Carer’s Allowance Supplement (CAS) and BSG and its decision as to how to classify the assistance is awaited. The SG and UKG position is that the CAS is subject to the coordination requirements, but BSG is social assistance and is not subject to coordination requirements.

³ Carer’s assistance would be subject to the arrangements, despite having an income threshold, in the same way that DWP carer’s allowance is subject to the arrangements.
how the arrangements are to operate in the UK. That will ensure that the arrangements continue to operate effectively as a matter of UK law (obviously, the UK legislation can have no effect on legal arrangements in other countries).

**An explanation of why the change is considered necessary**

As already stated, the legislation will ensure continuity of legal arrangements as a matter of UK law. That will cover three specific situations.

First, it will ensure that EU Nationals in the UK, who are not UK Nationals, continue to enjoy the protection that the arrangements currently give them. They will have a legal right to that protection.

Secondly, it will ensure that UK Nationals who are living in other countries that currently participate in the coordination arrangements will continue to enjoy the same rights under UK legal systems. For example, a person with a substantial connection with the UK social security system is entitled to receive a winter heating payment from DWP, if they live in one of the colder European countries and meet other qualifying criteria. That right would be continued.

Thirdly, it will ensure that UK Nationals who reside abroad in a participating country and then return to the UK continue to have rights from their overseas residence. For example, a UK national who works in a participating country for several years will be able to count those years in the same way as years spent working in the UK for the minimum threshold for the UK state pension.

As already stated, the changes cannot result in any guarantee that other participating countries will reciprocate these arrangements. However, the making of arrangements should assist in achieving that reciprocity.

**Scottish Government categorisation of significance of proposals**

The Scottish Government would categorise the proposals as Category A, issues which the Scottish Parliament should regard as technical and ensuring continuity of law. There is no significant policy decision for Ministers to make (other than that to continue the arrangements).

**Impact on devolved areas**

The legislation will require devolved social security assistance to be provided in a manner that respects the aims of the coordination arrangements. The impact is therefore not directly on how assistance is provided, but on the policy choices that could be made. Since the Scottish Ministers would intend to propose for Parliamentary approval policy approaches that respect the coordination principles, whether or not they require to do so, in practical terms there is no predicted impact on devolved areas. The effect is to restrict future choice.

At present the only fully devolved types of social security assistance that the arrangements cover are carer’s allowance and the carer’s allowance supplement. The coordination arrangements require such assistance to be provided to persons
ordinarily resident in Scotland who care for a disabled person in a way that ignores citizenship, for the countries subject to the coordination arrangements. It currently is so provided. The proposed legislation will continue arrangements that restrict the policy choices that can be made.

At present the timetable to which the Scottish Government is working to devolve further types of assistance will not see any assistance that would be covered by the coordination arrangements become fully devolved until after Brexit (on current Brexit timescales). Legislative competence for all benefit areas described in the Scotland Act 2016 has devolved to Holyrood, but other than for carer’s assistance there is no accompanying executive competence for relevant benefits. Best Start Grant and funeral expense assistance are not types of assistance that would become subject to the coordination regime, as explained above.

Summary of stakeholder engagement/consultation

The Scottish Government was not party to any stakeholder engagement or consultation undertaken by the UK Government, nor has it undertaken any itself. However, the Scottish Government understands that views were sought from the Social Security Advisory Committee, which was content with the approach being taken.

A note of other impact assessments, (if available)

None. The legislation continues current arrangements, so it has no impacts. The Scottish Government is not aware of any impact assessment of not continuing the present arrangements.

Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation

The Scottish Ministers consider that the only sensible policy choice is for the UK to continue to participate in the coordination arrangements. By enacting legislation to provide for that, unilaterally, the UK Government will strengthen its position in encouraging European partners to continue such arrangements, either as part of a Brexit agreement or by bilateral negotiation. It will also give re-assurance to EU Nationals who are not also UK citizens, and to UK Nationals living in other participating countries, that the current arrangements will continue.

In practical terms, it makes sense for the UKG to legislate on such matters on a UK-wide basis, so that there is only one set of legislation (in 4 sets of regulations, of significant length). This is not a situation where the Scottish Government would make different choices for such elements of provision as are devolved, and if devolved legislation were proposed it would simply involve straight replication of what the UKG has drafted, but a statement that it applied for devolved interests. That would not assist users, nor would it be a productive use of Parliamentary and other resources.
Intended laying date of instruments

The UK Government currently intends to submit the instruments to the Westminster Parliament Sifting Committees on 13 December and that they will not be made until the Scottish Parliament has completed its consideration. Those Committees will then scrutinise what procedure is to apply to the instruments. Negative procedure will be proposed by the UK Government and it is expected that the Sifting Committee will advise in around 10 days as to whether it agrees that negative procedure is appropriate. If so, the UK Government will then proceed to make the regulations as soon as practicable.

These arrangements could change, depending on wider developments relating to EU Exit.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Ministers' proposal to consent, why not?

See above. The timescales for making the instruments depend on procedural matters that are outwith the UK Government's control. While it is, of course, for the Scottish Parliament to decide what scrutiny is appropriate, the Scottish Government would suggest that there is no need for lengthy scrutiny of what are essentially technical instruments to ensure continuity of present arrangements, where such continuity is welcome.

Information about any time dependency associated with the proposal

See the previous answer.

Any significant financial implications?

None. The legislation continues current arrangements so has no impacts on current financial assumptions.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

No. The legislation simply continues current arrangements.