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Thinking ahead for Europe

Brexit and Social Security in the EU

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According to the British Prime Minister, Theresa May, "Brexit means Brexit" and the UK will be leaving the EU. From the various statements issued by the Prime Minister and her new Home Secretary, "Brexit means Brexit" seems to mean that "Brexit means in any event the end of free movement of (non-British) EU citizens to the UK in particular for the purposes of extended residence, work and self-employment". There is much discussion in the media and political circles regarding a 'hard' Brexit and a 'soft' Brexit, although exactly what the difference may be is unclear. It would seem that a 'soft' Brexit would include access for the UK to the EU's internal market on terms similar to those it currently has as a member state. But this is only possible if there is a deal on free movement of EU citizens to the UK, which is acceptable to the other member states. A 'hard' Brexit appears at the moment to mean a UK departure for the EU without preferential access to the internal market and perhaps a fall-back position of movement of goods, services and capital as regulated by the World Trade Organisation agreements on customs and tariffs.

For EU citizens, both British who have worked or lived in another member state and non-British who have worked or lived in the UK, Brexit of any kind may have consequences for their social security entitlements. Unless agreement is reached between the UK authorities and their EU counterparts (or bilaterally), many people may lose out. This commentary sets out some of the key issues and areas where EU citizens will need to watch out regarding their rights.

The status quo

One of the most complicated areas of EU law is the coordination of social security. The member states have always closely guarded their competences in this area, thus resulting in a complex patchwork of highly different systems of social security across the member states. Some experts speak of three kinds of systems, the first being the Bismarkian, which is based on contributions similar to an insurance-based regime, and supplemented by provisions for the indigent. The second is the Beveridgian system – primarily found in the UK where benefits are based on a mix of need and residence with some types of benefits having a contribution element. The third system, often termed Nordic, is based on universal rights, qualified on residence in the territory and decoupled from contributions and employment record.

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Tying together these systems, which are based on profoundly different roles of the state in social policy, has been a long and slow process. The current legislation dates from 2004, which only became applicable starting in 2010 (partly as a result of a UK challenge to parts of it). It applies to everyone who is affiliated with a social security system of a member state[1] (with express extension to third-country nationals lawfully resident in the member state). There are four principles to the coordination of social security set out in this Regulation 883/2004:

- *Single applicable law*. People are covered by the legislation of only one member state and pay premiums in that state; the coordination is then resolved among the member states according to the common rules.
- *Equal treatment*. Everyone is entitled to the same treatment regarding social security irrespective of whether they are a national at home or an EU citizen in a host member state (this also applies to qualifying third country nationals).
- *Aggregation*. All periods of insurance, work or residence in all member states (and no matter how many someone may have lived or worked in) are taken into account to calculate an individual's benefits.
- *Exportability*. All cash benefits must be exportable to any other member state where either the beneficiary or family members live.

EU social security rules cover eight branches of benefits:

- Sickness
- Maternity and paternity
- Old-age pensions
- Pre-retirement and invalidity pensions
- Survivors' benefits and death grants
- Unemployment
- Family benefits
- Accidents at work and occupational illness

These rules are very generous in so far as they ensure that people receive the full benefit of the contributions they have made and are rarely disadvantaged by reason of having lived or worked in more than one member state. Various problems crop up with the system, but the European Commission works very hard at finding solutions that give a positive result for the citizen. It is not uncommon, however, for member states to occasionally seek to reserve benefits for their own nationals to the exclusion of other EU citizens or to apply the rules in an imbalanced manner towards nationals of other member states. For this reason, the jurisprudence of the Court of Justice of the European Union is littered with hundreds of cases about social security claims. Indeed, this class of cases is one of the biggest.

Brexit and social security

The UK is notoriously stingy about allowing third-country nationals access to social benefits and exporting social benefits (including state pensions) to British citizens who live in other countries. The EU rules came as a welcome change for both British citizens living outside the UK (although within the EU) and non-British EU citizens living in the UK when they came into force back in 1972 on the accession of the UK to the EU. Regarding third-country nationals, the UK applies a strict rule that these people are not entitled to claim public funds

[1] With an extension to Iceland, Liechtenstein, Norway and Switzerland.

in the UK. Exceptions are made for a limited group of vulnerable people, such as recognised refugees. The prohibition on access to public funds covers all the following UK benefits:

- Income-based jobseeker's allowance
- Income support
- Child tax credit
- Universal credit
- Working tax credit
- A social fund payment
- Child benefit
- Housing benefit
- Council tax benefit
- Council tax reduction
- Domestic rate relief (Northern Ireland)
- State pension credit
- Attendance allowance
- Severe disablement allowance
- Personal independent payment
- Carer's allowance
- Disability living allowance
- Local authority homelessness assistance

If a third-country national ever qualifies for indefinite leave to remain in the UK (the length of periods of residence and work vary from immigration category to immigration category), then he or she will gain access to these otherwise prohibited benefits (at least according to the current state of British law).

The European Health Insurance Card (EHIC)

In addition to the coordination system set out above, the EU also has a health insurance system for tourists and visitors from one member state who fall ill and need health services while visiting another member state. The system is based on the European Health Insurance Card (EHIC), which is issued by the national authorities of the state in which the EU citizen lives and guarantees access to medically necessary, state-provided healthcare during a temporary stay in any of the 28 EU countries, Iceland, Lichtenstein, Norway and Switzerland, under the same conditions and at the same cost (free in some countries) as people insured in that country. There are few limitations applicable to the system but the most important is that the person's visit cannot be for the purpose of seeking health services. It applies to unanticipated health needs that arise during the short stay. The European Commission is careful to advise EU citizens that the EHIC system is not an alternative to private travel insurance, as it does not cover private health services or repatriation costs. Furthermore, the conditions of access to health services in the member state where the individual is visiting are the same as those that apply to nationals of the country. Thus, if health services must be paid for at point of use (as in France) and reimbursed subsequently, then this rule will also apply to the EU visitor. One further issue is that the EU citizen must be insured in his or her home member state in order to obtain an EHIC card, which is nationally issued. If someone does not have health insurance in their home country, then the system will not cover them.

In general, however, this system is exceedingly valuable for EU citizens who are travelling for holiday or work in the EU and happen to fall ill. It is exceedingly simple for the user and

the settlement of the relative costs of services in different member states is resolved at the administrative level.

What will happen once Brexit takes effect?

Following Brexit, if no arrangement is made for non-British EU citizens to have access to these benefits, which are categorised as public funds not available to third country nationals, they will be excluded (unless they obtain indefinite leave to remain in the UK). Non-British EU citizens will become third-country nationals or foreigners in the UK once Brexit takes effect. Without a specific regime being put into place, as for instance is the case for Switzerland, all the rules will fall away.

In the negotiations between the UK Government and the European Council leading to the decision by the UK Prime Minister to campaign in favour of remaining in the EU in the referendum that he had called, social security benefits were a hot issue. The UK sought some rather important changes to the social benefits rules that would mean that they could treat non-British EU citizens less favourably than British citizens. The Council Conclusions of 19 February 2016 (EUCO1/16) contain the final deal that was reached.

The first issue on which the UK Government insisted related to the export of child benefits. It demanded a change to EU rules so that the UK would not be required to export child benefits to which EU citizens working and resident in the UK are entitled to the home countries of those EU citizens. For instance, a German national living and working in the UK is entitled to child benefits for her children in accordance with the equal treatment principle. If those children remain in Germany while she is working in the UK, she is entitled to child benefits at the same rate as British citizens with children living in the UK (but she would not be entitled to German child benefits, which are substantially more generous).

In the deal that was struck and set out in the Council Conclusions of 19 February 2016, the Council and the Commission accepted to change the rules to allow child benefits to be indexed to the conditions of the member state in which the child resides. This means that instead of getting the amount of child benefit that someone with a child living in the UK receives, the UK social security authorities would determine what would be the equivalent according to the standard of living in the state of residence of the child and only give that amount.

Implicit in the deal was the intention that the UK would be paying child benefits only at lower rates for children living in Central and Eastern European member states, not higher rates for children living in Germany or France. Clearly this constitutes overt discrimination contrary to the EU social security principle of equal treatment. The Commission sought to stop the erosion of equal treatment by expressly stating that it would not propose a similar system of "optional indexation" (as it delicately called the system), to be extended to other types of exportable benefits such as old-age pensions.

For third-country nationals living in the UK with children living in their home country, the rule is that no child benefit is paid. Exceptions have been made for a small number of countries[2] or if the parent is a servant of the crown.

The UK Government also sought and obtained in the negotiations the right to discriminate against non-British EU citizens working in the UK regarding in-work benefits. The minimum wage in the UK is considered too low to cover the living costs of working families. In order to compensate for this, the UK has a social benefit entitled "working tax credit" which has

[2] Barbados, Bosnia, Canada, the Channel Islands, Israel, Kosovo, Macedonia, Mauritius, Montenegro, New Zealand and Serbia.

the effect of bringing the income of the family up to that of a living wage. However, the UK Government determined that it did not want to pay this benefit to non-British EU workers in the UK. This is a central attack on the principle of equality on which EU social security coordination is based. In the end, the Council agreed that the UK could limit access to non-contributory in-work benefits for newly arriving EU workers for a total period of four years only. Furthermore, the scheme for excluding non-British EU workers from non-contributory in-work benefits could not last for more than seven years. Of course, this deal will not now come into force. But in the absence of any negotiated agreement on Brexit, non-British EU citizens working in the UK will be subject to the general prohibition on access to any non-contributory in-work benefits, which applies to other foreigners.

With respect of contributory benefits, UK law does not export unemployment benefits outside the EU and so once it is outside the EU, these benefits will not be exported. UK state pensions are also subject to rules that disadvantage anyone who moves abroad (at the moment outside the EU). Under the normal state pension rules, pension payments are index-linked[3] and thus there is an annual increase in the amount of pension that retirees receive. However, anyone entitled to a British state pension who moves abroad does not get the benefit of the annual increase. So the pension never rises – which becomes more and more problematic as time goes on. Special bilateral agreements to index-linked exported pensions exist with only a small number of countries.[4]

The principle of aggregation is virtually non-existent in UK social benefits law outside the EU. The idea that contributions made in another country might count towards calculating the entitlement to a British social benefit is rather foreign to the British way of thinking.

As regards the EHIC system, British citizens may be excluded from automatic access to health services when they are visiting other member states. They will need to purchase private health insurance before travelling in the 27 member states. Similarly, nationals of the 27 member states will need private health insurance to cover health services that may arise while they are visiting the UK.

Conclusions

Brexit is likely to have substantial consequences for EU citizens, both British and non-British regarding social security. The EU system is complex and designed to ensure that anyone exercising a free movement right does not suffer as regards their social security entitlements as a result of the move. However, British social security rules are designed to exclude all foreigners from almost all social benefits for substantial periods of time. Only a limited number of contributory social security benefits are available to foreigners in the UK. There is no principle of equal treatment applicable to foreigners in British social security law. Similarly, there is no principle of export of benefits. This is only permitted on the basis of a very limited number of bilateral agreements. There is no principle of aggregation of contributions made in different countries to calculate any benefit entitlement.

In short, a 'hard' Brexit may result in a bonfire of social security rights for both British and non-British EU citizens.

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[3] Either according to the average percentage growth of wages in the UK or percentage growth in prices or 2.5%, whichever is highest.

[4] Barbados, Bermuda, Bosnia, Jersey, Guernsey, the Isle of Man, Israel, Jamaica, Kosovo, Macedonia, Mauritius, Montenegro, the Philippines, Serbia, Turkey and the United States.