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Rt Hon. Lord Blencathra
Chair
Delegated Powers and Regulatory Reform Committee

29th September 2020

Dear David,

We are grateful to the Delegated Powers and Regulatory Reform Committee for its report on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (the Bill), published on 25 August, and for its earlier consideration of the Bill's delegated powers in a previous report published in 2019. The Government has considered very carefully the Committee's latest report, which helped to provide a constructive debate during the Lords Committee stage on the delegated powers in clauses 4 and 5 of the Bill on immigration and social security co-ordination respectively, and Parliament's role in scrutinising them.

As set out in the Delegated Powers Memorandum, the Government maintains that the delegated powers in clauses 4 and 5 are necessary, no wider than is required, and provide sufficient Parliamentary oversight over their use.

Clause 4 – power to make provision in consequence of, or in connection with, Part 1 of the Bill.

Turning to clause 4 first, on 4 September we shared with Peers and MPs the draft illustrative 'consequential amendments' regulations, alongside the draft illustrative 'grace period' regulations to be made under s.7 of the EU (Withdrawal Agreement) Act 2020. Copies were also placed in the libraries of both Houses and supplementary explanations were provided in accompanying factsheets. In so doing, the Government's intention was to demonstrate the necessity of having the power in clause 4, as it is drafted, and how it will be used in tandem with the power in the EU (Withdrawal Agreement) Act 2020 to end free movement in a way that is coherent, comprehensive and fully meets the requirements of the withdrawal agreements.

We would like to address each of the Committee's recommendations in turn.

Part 1 measures in relation to ending free movement

Recommendation: We remain of the view, expressed in our earlier Report, that transitional arrangements to protect existing legal rights of EEA citizens should appear on the face of the Bill, and not simply be left to regulations, particularly as—

(a) the first set of regulations made under clause 4(1) is subject to the 'made affirmative' procedure, which provides no opportunity for Parliamentary scrutiny until after they have been made and come into force; and

(b) subsequent changes could be made by regulations subject only to the negative procedure.

The Government has legislated through the EU (Withdrawal Agreement) Act 2020 to protect the residence rights of EEA citizens who are resident in the UK by the end of the transition period and has established the EU Settlement Scheme (EUSS) to enable them to apply for a UK immigration status. There have been more than 3.9 million applications to the EUSS, of which more than 3.7 million have been concluded, and there is still plenty of time to apply before the deadline of 30 June 2021.

The provisions of the withdrawal agreements[1] have been given direct effect by the 2020 Act, so the power will not, and cannot, be used to make any provision that is inconsistent with those agreements.

The Government has published the illustrative regulations to be made under clause 4, together with the illustrative regulations to be made under section 7 of the EU (Withdrawal Agreement) Act 2020. The Government believes these provide clarity to Parliament as to how the rights of EEA citizens who take up residence prior to the end of the transition period will be protected. Furthermore, both sets of regulations will be subject to the scrutiny of both Houses of Parliament. Consequential and savings provisions are often made by Regulations. They have no less force of law as a result. The Government cannot subsequently amend these Regulations in a way which breaches any of the directly effective rights in the withdrawal agreements.

Recommendation: We remain of the view, expressed in our earlier Report, that clause 4(1) contains an inappropriate delegation of power and that the Bill should be amended so that:
• the words "or in connection with" are removed from clause 4(1);

The changes which can be made using this power are restricted to those which are appropriate in consequence of, or in connection with, the provisions in Part 1 of the Bill. They can therefore only be used in relation to the ending of free movement and protecting the status of Irish citizens. The Government considers that the inclusion of "in connection with" provides a clearer basis for making provision for those who are not exercising free movement rights at the end of the transition period, but who are eligible to apply to the EUSS as a result of the UK's more generous implementation of the withdrawal agreements. By way of example, regulation 15 of the draft illustrative regulations provides a statutory defence to any person with leave under the EUSS from the offence in section 2 of the Immigration and Asylum (Treatment of Claimants, etc.) Act 2004 of attending a leave or asylum interview without adequate identity documents. Examples of such persons who are not within the scope of the withdrawal agreements, but who are nevertheless afforded the same treatment regarding residence rights as those who are once they have status under the EUSS, include those EEA citizens who were not carrying out qualifying activity in accordance with free movement law (because they were not workers, students, self-employed persons, etc).

[1] The EU Withdrawal Agreement, the Swiss Citizens' Rights Agreement and the EEA EFTA Separation Agreement

The Home Office believes it is more apt to describe providing for such cohorts as being "in connection with" the ending of free movement, rather than in consequence of it, because they are not actually exercising free movement rights when they are to be repealed by this Bill. The Home Office is determined that everyone who obtains status under the EUSS is treated equally in respect of their right to stay in the UK and believes this element of the power is necessary to achieve this important objective.

• consequential amendments are included in the Bill itself, but with a power to add others (subject to a test of necessity) by regulations (subject to the affirmative procedure if primary legislation or retained direct principal EU legislation is amended or repealed);

Parliament will scrutinise regulations made under the power in clause 4. The Government has been clear that it is intending to make the required changes to the UK's statute book in the regulations which need to commence by the end of the transition period. However, it is prudent to retain the ability to make further changes in the event that these are identified at a later stage. As the draft illustrative regulations show, this instrument comprises a considerable number of principally technical amendments, which the Government considers are better contained in regulations rather than in a schedule to the Bill.

• transitional protections for EEA nationals who are resident in the UK before the end of the transition period are included on the face of the Bill

Transitional protections for those who are resident in the UK before the end of the transition period but who have not applied to the EUSS before the end of the transition period, are provided for primarily in the draft affirmative regulations being made under section 7 of the EU (Withdrawal Agreement) Act 2020, which the Government shared with both Houses in illustrative form on 4 September to assist with scrutiny of the Bill. Now that these regulations have been formally laid in draft, they will be subject to the scrutiny of both Houses before they are made. This was the procedure that Parliament deemed appropriate to deal with the transitional protections for resident EEA citizens required by the "grace period" when it passed the 2020 Act, and the Home Office intends to use the power that Parliament has conferred.

• clause 4(5) (about fees and charges) is removed, unless the Government can provide full justification for its inclusion and explain how they intend to use the power; and

The power in sub-section (5) may only modify legislation relating to the imposition of fees and charges where they relate to a person's immigration status, and, importantly, where that is as a consequence of, or connected with the provisions in Part 1 of the Bill. Therefore, the power cannot be used in relation to fees in the wider immigration system. However, without this limb of the power, there would not be a clear basis for amending provisions relating to immigration fees and charges that provide for exemptions or preferential treatment of EEA citizens or those exercising free movement rights.

An example of what subsection (5) authorises is the amendment to section 70A of the Immigration Act 2014 by regulation 20(7) of the draft illustrative regulations to be made under this power. This substitutes the existing exemption from the Immigration Skills Charge from those exercising free movement rights with a new exemption for those with leave under the EUSS. The Department believes subsection (5) provides a clear basis for this provision, without which it could not be made. Omitting subsection (5) would therefore continue the preferential treatment of EEA citizens arriving after the end of free movement, contrary to the fundamental aim of this Bill. It would also prevent us from securing the

clarification that applications to the EUSS are exempt from the Immigration Skills Charge, potentially resulting in a breach in the UK's obligations under the equal treatment requirements of the withdrawal agreements.

• clause 4(6), which provides for the first set of regulations under clause 4(1) to be subject to the made affirmative procedure, is removed from the Bill.

The made-affirmative procedure is needed in the likely event there is a short window between Royal Assent to this Bill and the end of the transition period. It is therefore important to retain the made affirmative procedure for this set of regulations given the need to meet the Government's commitment to end free movement in full at the first available opportunity (the end of the transition period on 31 December 2020).

There is recent precedent for using the made affirmative parliamentary procedure in cases where there is insufficient time for the ordinary draft affirmative procedure, for example the first set of regulations providing rights of appeal to immigration restrictions under section 11 of the EU (Withdrawal Agreement) Act 2020. The secondary legislation made under clause 4 will remain subject to parliamentary oversight, using well established procedures.

Part 2 – social security co-ordination

• We remain of the view, expressed in our earlier Report, that the Government have provided an inadequate justification for a wholesale transfer to Ministers of power to legislate in a field that could have a major impact on large numbers of UK citizens resident in EEA countries, and EEA citizens resident in the UK, who currently rely upon reciprocal arrangements. Accordingly, we remain of the view that clause 5 should be omitted from the Bill on the ground that it contains an inappropriate delegation of power.

The Committee's report identifies a number of areas in respect of Clause 5 of the Bill on which the Government welcomes the opportunity to respond. The Government does not accept that the powers provided by Clause 5 of the Bill are designed to prevent scrutiny of future policy.

The Government intends to use the powers in Clause 5 to effectively respond to, the ongoing negotiations on Social Security Co-ordination (SSC) with the EU. Clause 5 provides the essential legislative framework to respond, by draft affirmative regulations, to the outcome of negotiations with the EU by modifying retained EU law in respect of social security coordination. The form of such modifications is dependent on the outcome of negotiations with the EU and are dependent on the scenario the Government finds itself in. Therefore, the power is only to be used to modify retained EU SSC regulations and any consequential amendments required thereafter.

Other powers on social security coordination

There is a distinction between the powers available for use under the EU Withdrawal Act 2018 (EUWA) and that under Clause 5 of this Bill. Section 8 of EUWA is used to fix deficiencies arising from the withdrawal from the EU. This restricts the Government's ability to make policy changes, that go beyond mere deficiencies, including changes which reflect the reality of the future agreement with the EU. The powers under the EU Withdrawal (Agreement) Act 2020 are to ensure the operability of the Withdrawal Agreement. Neither power provides for changes which impact those not covered by the Withdrawal Agreement nor, as mentioned above, to provide the ability to adequately respond to the outcome of negotiations with the EU.

How the Government intends to use the power

Since the Committee's report was published, the Government has shared a draft, illustrative statutory instrument (SI), published on 4 September 2020 to assist the House of Lords at Committee stage with its scrutiny of the Clause 5 power. A supporting fact sheet was also issued to aid Parliament's understanding of how the Clause 5 power is intended to be used. The draft SI demonstrated that retained EU regulations will be modified to the extent that they are no longer required to deliver social security coordination in a negotiated outcome. Modification of retained EU regulations is required due to those regulations being reliant on the reciprocity with other EU member states to be effective. The power at Clause 5 provides the Government with the power to amend these rules in an appropriate way to reflect the outcome of negotiations.

The Government has also made clear its intentions on future SSC policy through the publication of guidance on gov.uk for UK nationals thinking of moving to the EU after the end of the transition period. UK nationals checking the EU transition checker who state they plan to move to the EU (except Ireland) will be directed to this guidance. The Department for Work and Pensions (DWP) has received three letters from citizens with future plans to move to the EU via their MPs, with questions about future arrangements. The DWP policy questions covered in these representations are rules related to pensions and the exportability of Employment and Support Allowance.

The Government would like to take this opportunity to reassure the Committee that the Government cannot use the power in Clause 5 to make amendments or changes to the rights of those in scope of the Withdrawal Agreement. Whilst the power allows the Government the power to modify retained social security coordination regulations, the rights of those within scope of the Withdrawal Agreement are protected under s.7A and 7B of EUWA, which is not being repealed. These provisions operate on a separate legal mechanism to that of s.3 of EUWA and retain the SSC regulations for the purposes of those within scope of the Withdrawal Agreement.

Power to modify legislation other than the Retained SSC regulations

As noted in the Committee's report, Clause 5 provides the power to modify secondary legislation, primary legislation and retained EU legislation other than the SSC regulations. However, the power can only be used in this way where such modifications are supplementary, incidental, consequential, transitional, transitory or is a saving provision to other legislation which arise from changes to the SSC regulations. The modifications which can be made through Clauses 5(3) and (4) are essential to ensure that the Government can address technical matters and prevent inoperabilities or inconsistencies arising and to ensure it can cover any unintended consequences arising from changes made to the retained SSC regulations. As the Committee will appreciate, this is not an uncommon issue in the complex area of social security co-ordination legislation.

The power provided by Clause 5 (4), which has to be read through 5 (3) (c) is there to ensure consistency across the statute book. It does not constitute the wholesale transfer of power from the EU to Ministers, or an attempt to bypass Parliament, as the Committee's report suggests. Clause 5 cannot be used to initiate policy changes outside of those to retained SSC policy. For example, the Government could not use this power to stop the payment of UK state pensions in the EU for EU Citizens, as set out in the Committee's report at paragraph 34. The state pension is payable worldwide under long-standing domestic legislation which is not affected by this Clause.

Ongoing need for the power

One of the concerns identified in the Committee's report is the lack of a time limit on the powers provided by Clause 5 (1) of this Bill. There are two main reasons such a time limit has not been included in this legislation.

Firstly, SSC arrangements with non-EU countries are already made and revised using secondary legislation. In line with the wider purpose of this Bill, this power brings arrangements for EU and EEA/EFTA countries in line with non-EU and EEA/EFTA states. Time limiting the Clause 5 power would mean that the Government would have to use primary legislation each time it wanted to make even minor changes to any remaining retained SSC rules once the power had expired. This could constitute a huge drain on Parliamentary time for limited benefit.
Secondly, contrary to the report's suggestion that this power is designed to prevent scrutiny of future SSC arrangements, all regulations made under Clause 5 are subject to the draft affirmative procedure and therefore require a debate in both Houses before they can become law. There will be further scrutiny of the outcome of the negotiations with the EU before the implementation of any deal reached on SSC.

The Government does not anticipate regularly needing to use this power in the context of a deal scenario however there may be a need to make modifications to retained SSC regulations in the event of a no-deal scenario, for example if the Government were to retain aspects for a temporary period and modify it again in future. This is a hypothetical, but illustrative scenario. Ultimately, the Government needs the flexibility to respond to the final outcome of the negotiations and provide the necessary technical amendments.

<u>Consultation on SSC</u>
The power at Clause 5 is intended to be used in order to modify retained SSC regulations in order to meet the terms of a negotiated outcome with the EU. The Government has consistently set out that it seeks an agreement with the EU on social security coordination and that such a deal will reflect the agreements the UK has with countries outside the EU. There have been several publications to this effect, including the Government's approach to negotiations document, published on 27 February and draft legal text published 19 May.

The SSC regulations are designed to operate on the basis of reciprocity between EU member states and outside of the EU the principle of reciprocity is widely recognised as the basis on which international arrangements on social security are operated. The UK is negotiating a new reciprocal agreement with the EU, and unlike policy changes in other circumstances, changes arising from a new agreement will have a degree of uncertainty until agreed with the EU and its member states. These powers are needed to ensure that the Government is able to give effect to the new agreement with the EU, or to respond to the absence of an agreement with the EU, as efficiently as possible.

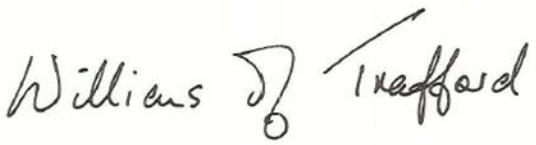
The Government is committed to bringing its arrangements with the EU in line with that of non-EU countries and has been negotiating consistently with that objective. The Government has consulted with the Social Security Advisory Committee (SSAC) on the draft regulations, which are designed and drafted to that end and will continue to liaise with SSAC as they are finalised. As already set out, statutory instruments made under Clause 5, are subject to the draft affirmative procedure, meaning they will be further scrutinised by Parliament and in particular the Joint Committee on Statutory Instruments.

The Government thanks the Committee for its consideration of Clause 5. It is the Government's view that these powers are justified and necessary in this context and the Government has been transparent in communications with citizens and with Parliament about its plans to use them.

We are copying this letter to members of the Delegated Powers and Regulatory Reform Committee, and to Kevin Foster MP, Bill Minister in the Commons and Justin Tomlinson MP who leads on Clause 5 social security co-ordination provisions in the Commons from the Department of Work and Pensions.

We are also copying this letter to Lord Rosser, Lord Kennedy, Baroness Hamwee and Lord Judge.

A copy of this letter will be placed in the libraries of both Houses.



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