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The EU and Social Security

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Introduction

The EU does not harmonise social security provision in Member States – they are free to determine their own – but provides co-ordination to ensure that a person working in another EU Member State has the same rights to social security, and the same obligations, as the nationals of the state where they are covered.

To avoid people who are exercising the right of the free movement of workers within the EU being disadvantaged, the EU Member States (plus Norway, Iceland, Lichtenstein and Switzerland) have agreed that there should be some co-ordination of social security rules.

This principle of non-discrimination is simple to express but complex to implement as the social security systems of EU Member States vary a great deal. Partly because of this complexity, disputes about the interpretation of EU social security legislation are not unusual.

This briefing note explains the current rules on social security entitlements for EU citizens living or working in another Member State and highlights two of the current areas of dispute in the interpretation of these rules by the UK.

Social Security: the EU's Rules

EU legislation on social security requires unanimity in the Council of Ministers. The last substantive changes (mainly concerned with administration) were made in 2009. The underlying principles have remained the same since the EU was founded.

Four basic principles apply to social security entitlement in the EU:

- 1) A person is covered by the legislation of one country at a time, so they only pay contributions in one country. The decision as to which country's legislation applies is made by the relevant social security institutions, a claimant can't choose;
- 2) A person has the same rights and obligations as the nationals of the country where they are covered – the principle of non-discrimination;
- 3) When a person claims a benefit, their previous periods of insurance, work or residence in other countries are taken into account if necessary;
- 4) If a person is entitled to a cash benefit from one country, they may generally receive it from that country even if they are living in a different country – the principle of exportability.

The legislation makes clear that the purpose of social security co-ordination is to protect the rights of people from one EU Member State working in another Member State. Currently, an estimated 11.3 million EU citizens work in another Member State (2.3 per cent of the EU

population) and over a million people cross a border every day in order to go to work – for example, people living in Northern Ireland and working in the Irish Republic.

If a person lives and works in the same country they will be covered by that country's social security system. If they live in one country and work in another, returning to their place of residence at least once a week, they are designated a cross-border (or frontier) worker and are covered by the country where they work. Those sent by an employer to work for up to 24 months in another Member State, will be covered by their home country. Those who work in more than one country or are self-employed are covered by other rules.

UK Social Security & EU Nationals

The entitlements of EU nationals from other Member States with a right to reside (see below) in the UK are:

- if they are seeking work – EU nationals looking for work in the UK and who meet the tests that would apply to British citizens can claim income-based Jobseeker's Allowance, Housing Benefit and Council Tax Benefit but not assistance with housing or homelessness;
- if they are working – they are entitled to all the same in-work benefits as British citizens;
- if they are out of work due to illness or accident – they can claim out of work benefits including income-related Employment & Support Allowance;
- if they are permanent residents – an EU citizen resident in the UK for five years will normally become a permanent resident at that point and then be entitled to claim for all benefits and for assistance with housing or homelessness on the same terms as any resident British citizen;
- if they are family members of the above – certain family members, such as a spouse and dependent children, will also be covered if the EU migrant is entitled to claim.

Calculating the numbers who do actually claim and what that costs is extremely difficult. From 1 May 2011 those working in the UK from the eight new Members of the EU from 1 May 2004 became entitled to claim for benefits on the same basis as other EU nationals.¹ Media reports in the UK have often focused on the entitlement of those nationals working in the UK to child benefit; such claims are of course based on the parent(s) of the child being National Insurance contributors through working in the UK.

Areas of Dispute

The UK, along with France and some other EU Member States, has since 1994 had a test of habitual residence before accepting certain benefit claims; this was further tightened in 2004 with the introduction of the test of a right to reside in the UK which effectively meant that non-British and non-Irish EU nationals could not claim some benefits until they had been in the UK for five years. The right to reside test forms part of the habitual residence test.

The case of a Latvian pensioner (Ms. Galina Patmalniece) went to the Supreme Court because her claim to a UK state pension had been denied on the grounds that she did not

¹ Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta and Poland

have a right to reside in the UK. Ms. Patmalniece's claim was that the only reason her claim was refused was because of her nationality and it was therefore discriminatory and as such contrary to EU law. She lost her case when the Court upheld the decision in March 2011, rejecting the suggestion that denying her claim was direct discrimination even though it accepted that it was indirect discrimination.

The Commission had already expressed its unhappiness with the right to reside test being applied to EU nationals by the UK authorities and in September 2011 the Commission took the view that the UK's residence test breached EU law. Discussions are continuing on the issue, not least because 12 other Member States had already expressed concern about the effects of EU rules on their country's social security system. It is not clear whether the Commission will proceed with infringement proceedings against the UK over the right to reside test.

Disabled UK nationals living elsewhere in the EU have long been in dispute with the UK Government about another aspect of the habitual residence test – its effect on their ability to claim Disability Living Allowance (DLA), carer's allowance and attendance allowance. The UK stopped such DLA claims in 2001 on the grounds that a person was not habitually resident in the UK unless they were resident here for at least 26 weeks out of 52. The Court of Justice ruled that such benefits were "exportable" under EU law in 2007 but the UK Government retained the 26-week rule until 2010 when it agreed to make backdated payments to claimants denied these benefits since 2007 but would not accept new claims.

Future Developments

Social security will remain a controversial area but despite high profile claims of "benefit tourism" into the UK by nationals of other EU Member States there is little evidence of this. Other Member States offer more generous social security systems than the United Kingdom and restrictions on the ability of people from the new Member States of 2004 to live and work across the EU have now been lifted meaning that the downward trend in migration to the UK from these countries will probably continue and may accelerate as people seek work in other Member States (notably Germany).

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★ Senior European Experts

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