LEGAL ANNEX

INTRODUCTION

1. The Treaty on the European Economic Community (EEC) was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. The EC Treaty had a number of economic objectives including establishing a European common market. Since 1957 there have been a series of Treaties extending the objectives of what is now the European Union beyond the economic sphere. The amending Treaties are:

    - The Single European Act (1 July 1987), which provided for the completion of the single market by 1992;

    - The Treaty on European Union – the Maastricht Treaty (1 November 1993);

    - The Treaty of Amsterdam (1 May 1999), the Treaty of Nice (1 February 2003) and the Treaty of Lisbon (1 December 2009), which made a number of changes to the institutional structure of the EU.

2. Following these changes, there are now two main Treaties which set out the competences of the European Union:

    - The Treaty on European Union (TEU);

    - The Treaty on the Functioning of the European Union (TFEU).

3. The Union must act within the limits of the competence conferred on it by the Member States. Articles 3-6 TFEU set out the categories of exclusive, shared and supporting competencies into which EU policies and actions fall. Article 2(2) TFEU provides that in areas of shared competence the Member States must exercise their competence to the extent that the EU has not exercised its competence.

4. The free movement of persons/the internal market is an area of shared competence. This means that to the extent that the EU has enacted legislation relating to the free movement of persons, the UK does not have competence to act other than in accordance with that legislation. Where Union citizens and family members are clearly exercising Treaty free movement rights, the obligations imposed on the Member States in which they reside are largely set out in the EU's primary law and secondary legislation.

5. Where their rights and obligations under Union law are more contentious, this remains subject to fast-evolving case law of the European Court of Justice ("CJEU"). Similarly, social security and welfare benefits provision intended to complement the provisions on free movement of workers is an area of shared competence and where the EU has enacted legislation to that end, the UK does not have competence to act other than in accordance with that legislation.

6. The legal annex to the Call for Evidence document does not cover developments after April 2013 such as major cases referred to the CJEU or legislative proposals presented to the Council by the Commission.

THE EU LEGISLATIVE PROCESS

7. Some Treaty Articles, including some of those promoting free movement, are of direct effect in themselves. Others provide the legal base on which secondary EU legislation made by the European Parliament and Council can be founded. Secondary legislation may delegate power to the Commission to make further legislation.[1] In the social security field the Treaty has traditionally only given the power for the EU to coordinate the social security systems of the member state. This is done by means of directly applicable EU Regulations which don't generally require national implementing legislation.

SECTION 1: DEVELOPMENT OF COMPETENCE

A. FREE MOVEMENT OF PERSONS

8. Article 2 of the **Treaty of Rome** set out the objectives of the EEC: to establish a common market and economic and monetary union in order to promote development of economic activities, social cohesion, high levels of employment and social protection and to raise the standard of living in the Member States. Article 3(1)(c) EEC provided that the Community aspired to "the abolition, as between Member States, of obstacles to freedom of movement for…persons".

9. The free movement of workers was one of the fundamental foundations of the EC Treaty. At Article 48 EEC (now Article 45 TFEU), provision was made for the free movement of labour, allowing workers who were nationals of the Member States to move freely across borders with their families to seek and take up employment in other Member States. This included a prohibition on discrimination based on nationality between workers as regards employment, remuneration and other conditions of work and employment.

10. However, the **Treaty of Rome** did not provide a general right of free movement for all EC nationals. Free movement rights were confined to those who exercised economic activity[2]. In order to qualify the individual had to be both a national of a Member State and be engaged in economic activity as a worker, a self-employed person, a company, branch or agency, or as a provider or receiver of services. Those falling within this scope enjoyed and continue to enjoy the right to free movement subject to derogations on the grounds of public policy, public security and public health, as well as a specific exception for employment in the public service.

[1] Articles 288 to 290 TFEU

[2] Articles 48 to 50 EEC provided for the free movement of workers, Articles 52 to 58 concerned the right to establishment and Articles 59 to 66 provided for the freedom to provide services.

11. Underpinning the relevant provisions within the Treaty was the general principle of non-discrimination on the ground of nationality: the EEA migrant must enjoy the same treatment as nationals in a comparable situation[3]. This continues to be a cornerstone of the four freedoms (persons, services, goods and capital), as does the general principle that the Treaty provisions are engaged only when there is movement between states and free movement provisions cannot be applied to wholly internal situations in a Member State.

12. The competence conferred by the original EEC Treaty in relation to the free movement of persons has changed and evolved in subsequent Treaties (the **Maastricht Treaty** in particular) and secondary legislation and as a result of case law. The relevant legislative and voting procedure has also evolved in relation to the adoption of measures concerning the free movement of persons, moving generally from a requirement for unanimity in relation to the relevant Articles to the ordinary legislative procedure and qualified majority voting in the **Lisbon Treaty**, facilitating the means by which legislation can be made in this area of competence.

13. In the late 1960s, two key measures implemented the rights of free movement for workers. Directive 68/360[4] was repealed with effect from April 30 2006 and replaced by provisions contained in Directive 2004/38/EC ("the Free Movement Directive"). This gave rights to migrant workers, the self-employed and other migrant citizens including students and those of independent means. Regulation 1612/68[5] has now been replaced by Regulation 492/2011.

14. In 1990 the Community adopted three directives[6] which conferred a general right of movement and residence on the retired, students and those with independent means, provided that they had sufficient resources and medical insurance. This reflected the gradual change which had been taking place in relation to the link between economic activity and free movement from the idea of migrants as factors of production to the idea of migrants as individuals with rights against the host Member State.

15. The **Maastricht Treaty** (The Treaty on European Union) explicitly introduced the concept of Union citizenship into the EC Treaty in 1992, together with a number of associated rights. This included the right to move and reside freely in the territory of the Member States subject to limitations and conditions laid down in the Treaties and in EU secondary legislation. It created the European Union and

[3] Article 7 EEC

[4] Freedom of movement for workers within the Community

[5] Abolition of restrictions on movement and residence within the Community for workers of Member States and their families

[6] Council Dirs: 90/364/EEC on the rights of residence for persons of sufficient means, 90/365/EEC on the rights of residence for employees and self-employed who have ceased their economic activity and 90/336/EEC on the rights of residence for students.

formalised the recognition of the status of "citizen of the Union", with the associated rights and duties, for every national of a Member State. The case of Baumbast[7] effectively confirmed the severance of the absolute link between migration and the need to be economically active.

B. SOCIAL SECURITY AND ENTITLEMENT TO WELFARE BENEFITS IN CROSS BORDER SITUATIONS

16. From the outset the **Treaty of Rome** contained a provision on social security: Article 51 EEC, intended to complement the provisions on free movement of workers. The aim of the provision was not to harmonise social security systems, but rather to negate the effect of rules within national social security systems which might act as a barrier or disincentive for workers and their families moving between Member States. Article 51 (now Article 48 TFEU) required the Council to provide for the coordination of social security for migrant workers and their dependants. This coordination consists of two key principles: first the need to put in place measures to provide for aggregation of insurance periods; second the principle that benefits should be paid to people resident in the territories of other member states (export).

17. In the **Treaty of Rome**, provisions adopted with this legal basis required the Council to act unanimously on a proposal from the Commission. The **Amsterdam Treaty** introduced the co-decision procedure but the requirement for unanimous voting continued. Under the **Lisbon Treaty**, actions under Article 48 TFEU are subject to the Ordinary Legislative Procedure and qualified majority voting.The competence in this area largely remained unchanged until its amendment by the **Lisbon Treaty** when it was explicitly extended to provide for co-ordination of social security for employed and self-employed workers and their dependants.

18. An "emergency brake" procedure was also introduced at Lisbon in Article 48 TFEU, applicable in circumstances where a Member State declares that a draft legislative act affects "important aspects of its social security system", or "would affect the financial balance of that system". In these circumstances, it can request the matter be referred to the European Council. This suspends the legislative procedure. The European Council must then decide within four months whether to refer the proposal back to the Council, to take no action or to request the Commission to submit a new proposal. Where no action is taken, the act is deemed not to have been adopted. In a further potential extension of EU competence, the **Lisbon Treaty** also made provision for Article 21(3) TFEU to be used to adopt measures concerning social security and social protection for the purpose of enabling citizens of the Union to move and reside freely within the European Union, albeit that any such measure will subject to a special legislative procedure involving consultation of the European Parliament and unanimous voting in Council. Unlike Article 48 TFEU there is no indication in Article 21(3) that it is limited to coordination of national social security schemes and it could

[7] C-413/99

therefore in principle form a basis for harmonisation of social security. To date no legislation has been proposed or adopted using this legal basis in relation to social security.

SECTION 2: CURRENT STATE OF COMPETENCE

19. For the purposes of this Call for Evidence, the main Treaty Articles relevant to the EU's and the UK's competence in relation to the free movement of persons and associated provision in relation to social security and welfare benefits provision in cross border situations are:

    - Article 18 (non-discrimination on the grounds of nationality)
    - Articles 20 & 21 TFEU (as they relate to nationality, citizenship and free movement of persons);
    - Articles 45-48 TFEU (free movement of workers); and,
    - Articles 49-53 TFEU (as they relate to the freedom of establishment of self-employed persons).

20. The CJEU has determined that Article 20 & 21(1) on the right of citizens to move and reside freely within the Union, Article 45 on the free movement of workers and Article 49 TFEU on the freedom of establishment are all directly effective. This means that the relevant Treaty provisions not only provide the framework for the free movement of workers but also provide specific rights that can be relied on by individuals before their national courts and authorities to assert specific rights in the absence of secondary legislation. Further, Article 45 can have both vertical and horizontal effect, meaning that the Article 45 prohibition of discrimination based on nationality between workers of the Member States in areas such as employment, remuneration and other conditions of work applies not only to acts of a public authority but also to private employers[8].

21. Provisions on the free movement of persons, social security, the free movement of workers, and self-establishment in respect of self-employed persons apply fully in respect of Gibraltar. They do not apply to the Crown dependencies.

22. A further point to note is that the competence in relation to cross-border "social security" must be understood as including both social security and healthcare. The term "social security" for the purposes of EU law includes both sickness benefits in cash and sickness benefits in kind and applies also to state healthcare provision.

23. Member States remain free to determine the details of their own social security (and healthcare) systems: they decide what the contribution levels should be: what benefits are available; and what the level of benefits provided shall be. In principle, Member States are also free to determine the conditions of entitlement to benefits. However, care has to be exercised to ensure that entitlement

[8] As confirmed in the case of Angonese v Cassa di Risparmio di Bolanzo (Case C-281/98)

conditions do not discriminate, directly or indirectly, against persons exercising their rights of free movement and do not create obstacles to free movement, breaching the principle of free movement of workers[9] (see further below on the free movement of workers, jobseekers and self-employed persons).

A. THE RIGHT TO MOVE AND RESIDE FREELY WITHIN THE UNION (ARTICLES 20 & 21 TFEU)

24. The current competence of the EU in this area has been extended by significant developments in the case law.

i. Cases involving UK nationals

25. In certain circumstances, the family members of UK nationals may benefit from free movement rights in the same way they would if the UK national were an EEA national. This principle was established in the case of Surinder Singh[10] where it was held that a national of a Member State must not be deterred from exercising free movement rights by facing conditions on return to the national's own Member State which are more restrictive than EU law. The UK accepts this position in certain limited circumstances, specified in the Immigration (European Economic Area) Regulations 2006[11].

ii. Cases falling outside the Free Movement Directive: derivative rights

26. Article 21 TFEU can also be relied on by certain individuals not already covered by primary and secondary legislation as a directly effective source of free movement rights.

27. This was confirmed in the case of Chen[12], which held that Article 18 (now Article 21) and Directive 90/364 (subsequently repealed and replaced by Directive 2004/38/EC) confer on a "self sufficient"[13] child who is a national of a Member State, a right to reside for an indefinite period in that State. Further, a parent who is that child's primary carer has a right of residence under Union law derived from the EEA national child's right to reside and is not required to apply for leave to enter and remain in the UK.

28. Recent judgments have further developed the principle that Member States lack the power to deprive EU citizenship of its essential substance. In the recent case

[9] Bosman Case C-415/93

[10] Case C-370/90, as interpreted and expanded upon by the CJEU in the case of Eind C-291/05

[11] S.I. 2006/1003 (as subsequently amended – see later), regulation 9(2)

[12] C-200/02

[13] In this case this means a child who is covered by comprehensive sickness insurance and is in the care of a non-EEA national having sufficient resources for that child not to become a burden on the public finances of the host Member State.

of Ruiz Zambrano v Office National de L'Emploi[14] the CJEU confirmed that national measures which deprive a Union citizen of the genuine enjoyment of the substance of his/her rights as a Union citizen are precluded by Article 20 TFEU[15].

29. The cases of Ibrahim[16] and Teixeira[17], which established a further category of derivative rights of residence outside the Free Movement Directive in reliance on Regulation 492/2011 are mentioned later in this annex. The law is developing rapidly in this area and the question of the division of competence between the UK and the EU is likely to be further refined as the case law evolves.

iii. Non-discrimination on the grounds of nationality

30. Article 18 TFEU prohibits discrimination on grounds of nationality provided that the person subject to the discrimination and the subject matter fall within the scope of the Treaties. This is a fundamental principle of EU law.

31. Union citizenship provides the EU law nexus through which Union citizens can gain the protection of Article 18 TFEU. However, the prohibition on discrimination on the grounds of nationality remains subject to any special provisions contained in the Treaties and secondary EU legislation.

32. The UK's position is that a person can only fall within the scope of Article 21 TFEU and thus gain the protection of Article 18 TFEU if they comply with the limitations and conditions in the Free Movement Directive. The CJEU has been prepared to require Member States to provide all Union citizens with non discriminatory access to minimum forms of social assistance in reliance on that principle[18]. It has also held that measures which would enhance the exercise of the right to move and reside freely in another Member State fell within the scope of Article 18[19].Protections against discrimination include protections against indirect discrimination, where a provision is likely to affect Union citizens disproportionately in the exercise of their Treaty rights (e.g. the ability of those exercising Treaty rights to satisfy a particular condition is intrinsically more difficult). The CJEU has made it clear that it is not necessary to prove that a

[14] C-34/09 [2011] E.C.R. I-0000

[15] This case established the principle if the removal of the primary carer from the host member state would necessitate the EU citizen child for whom they care leaving the territory of the Union, the third country national primary carer could derive a lawful right to reside in the host member state under Union law from their relationship to the child.

[16] Case C-310/08

[17] Case C-480/08

[18] Trojani (Case C-456/02)

[19] Bickel and Franz (Case C-274/96): these Union citizens fall within scope as the recipients of services.

provision does in fact affect a substantially higher proportion of migrant workers: it is sufficient that a provision is liable to have such an effect[20].

33. The CJEU has repeatedly emphasised, however, that a finding of discrimination on the grounds of nationality will not necessarily mean that Article 18 has been contravened. To justify such an action, the Member State will have to demonstrate that any condition is. "based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions"[21].

iv. Prohibition on obstacles to free movement

34. Workers are able to rely on Article 45(2) TFEU and Regulation 492/2011 as the basis for comprehensive protections against discrimination which go beyond the protections offered by Article 18. They are explicitly protected from discrimination between workers of the Member States as regards employment, remuneration and other conditions of work and employment by Article 45(2). Where someone has ceased to be employed but retains worker status, that person remains within the scope of the Treaty in terms of the relevant protections against discrimination.

35. In addition, the CJEU has confirmed that the principle of equal treatment applies to work seekers in matters relating to access to employment (Article 1, Regulation 492/2011). Work seekers also have a right to benefits intended to facilitate access to employment in the labour market of a Member State. This was based on the principle that following the establishment of citizenship of the Union, it was not longer possible to exclude benefits of a financial nature from the scope of Article 45(2)[22].

36. The scope for action in deciding qualification conditions for benefits is also constrained to the extent that the UK cannot unjustifiably create obstacles to citizens moving from or to, or residing in Member States. The UK is therefore obliged to ensure that our rules concerning entitlement to social security comply with the right to move and reside freely within the territory of the Member States given by Article 21 TFEU. The Court has found, for example, that Article 21 was infringed in the following circumstances: a failure to give child-raising credits for the purposes of an old-age pension where a person was residing in another Member State at the time of child-raising[23]; a residence requirement for entitlement to unemployment allowance[24]; a presence condition for the (now-

[20] O'Flynn v Chief Adjudication Officer (C-237/94) [1996] E.C.R. I-2617

[21] Bickel and Franz (Case C-274/96)

[22] Collins v Secretary of State for Work and Pensions (C-138/02)

[23] Doris Reichel-Albert (Case C-522/10)

[24] Albeit that the requirement was justified. (C-406/04 De Cuyper)

phased out) UK short-term incapacity benefit in youth[25]. It is clear from this developing area of CJEU case-law that the UK's competence to determine entitlement conditions for social security benefits can be limited by Article 21 TFEU.

B. FREE MOVEMENT OF WORKERS (ARTICLES 45 – 48 TFEU)

i. Workers

37. The CJEU has made it clear that the definition of worker is a matter for EU law and not for national law[26]. The UK cannot therefore define who is a worker for the purposes of Article 45 TFEU: it has to apply the concepts that have been set down by the jurisprudence of the Court. To be considered a worker, a person must pursue effective and genuine economic activity under the direction of someone else, although activities on such a small scale as to be regarded as purely marginal and ancillary are excluded[27]. A person working part-time, or earning a very low income, can still be considered as a "worker" for the purposes of EU law[28]. The application of the equal treatment rule in Article 45(2) TFEU means that such persons will be entitled to in-work benefits in the same way as UK nationals.

38. Workers have the right, derived directly from the Treaties, to enter another Member State and to reside and pursue an economic activity there. A migrant worker exercising rights under the Treaties is able to start working before completing any formalities to obtain residence documentation because their right of residence is a fundamental right derived from the Treaties[29]. Further detail is provided in Regulation 492/2011.

39. A worker who loses his job will, for a certain period of time, retain worker status for the purposes of EU law[30]. EU nationals who retain worker status must be treated equally on the basis of Article 45(2) TFEU and the UK rules on access to benefits must also take this category of person into account. Although the EU concept of 'worker' is well established there are still uncertainties about who can be included in the category and there is a currently reference pending before the CJEU[31] on this issue.

ii. Jobseekers

[25] Stewart (C-503/09)

[26] Hoekstra (Case 75/63), Levin (Case 53/81)

[27] Lawrie-Blum (Case C-66/85)

[28] Levin (Case C-53/81) & Kempf (Case C-139/85)

[29] ITC Innovative Technology Center GmbH Case C-208/05

[30] Article 7(3), Directive 2004/38

[31] Saint Prix v Secretary of State for Work and Pensions [2012] UKSC 49

40. In Case C-292/89 ex parte Antonissen, the CJEU held that the scope of Article 45 TFEU included persons who were seeking employment. It held that such jobseekers had a right to remain in the Member State for as long as they could provide evidence they were looking for employment and had a genuine chance of being engaged. This principle is now integrated into the Free Movement Directive[32].

iii Impact of the definitions of worker and jobseeker on access to welfare benefits in the UK for EEA nationals and their family members

41. The UK has made access to certain benefits conditional on migrants having a legal right of residence. Therefore concepts such as who is a worker or the rights of jobseekers under Article 45 TFEU, have direct consequences for those social security rules. The CJEU has also held that, where a jobseeker can demonstrate a genuine link with the employment market of the state where he was looking for work, Article 45(2) TFEU requires that he be given equal treatment as regards benefits of a financial nature intended to facilitate access to the host state's labour market.

C. ESTABLISHMENT OF SELF-EMPLOYED PERSONS (ARTICLES 49 – 53 TFEU)

42. Article 49 TFEU ensures that Member States afford nationals of other Member States the same treatment in relation to establishment as they do to their own nationals. It applies to all national persons and to companies. This report is only concerned with its impact on the UK's competence in relation to self-employed persons. Article 49 prohibits any discrimination based on nationality which hinders the taking up or pursuit of such activities.

i. Self-employed persons

43. A self-employed person must be engaged in economic activity and their activities must be genuine and effective rather than marginal and ancillary, including the provision of services in return for some sort of remuneration[33]. This has been held to include a wide variety of different activities including, for example, residence in a religious community where the services provided to its members may be regarded as indirect remuneration for their work[34]. The activity cannot be purely internal, it must have a cross-border character. Union law will not apply in purely national situations. The concept of establishment requires the pursuit of an economic activity through a fixed establishment in another Member State without foreseeable limit to its duration[35]. Whether or not activities amount to

[32] Article 14(4)(b)

[33] Jany v Staatssecretaris van Justitie (C-268/99)

[34] Steymann v Staatssecretaris van Justitie (196/87)

[35] The Queen v Secretary of State for Transport Ex p Factortame Ltd (C-221/89)

establishment must be determined taking into account duration of the provision of the service, regularity and continuity.

44. The provisions permit all types of self-employed activity to be pursued on the territory of any other Member State. Whilst the rights afforded to the self-employed are largely the same as those for workers the CJEU recently confirmed that certain rights are confined only to workers and do not extend to the self employed.[36]

iii. Measures to facilitate self-employment

45. Article 53 aims to make it easier for persons to take up and pursue self-employed activities. It provides that the European Parliament and the Council will issue directives concerning the mutual recognition of diplomas and other formal qualifications. The aim is to reconcile freedom of establishment with the application of national professional rules justified by the general interest of Member States. Where a directive has not been adopted for a particular profession under this provision, a person subject to European Law still cannot be denied the practical benefit of the freedom of establishment.

D. MAJOR PIECES OF EU LEGISLATION

i. DIRECTIVE 2004/38: THE FREE MOVEMENT DIRECTIVE

46. The key piece of EU legislation in relation to the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States is Directive 2004/38/EC (the Free Movement Directive). This marked the consolidation of citizens' rights in EU legislation. The Directive is designed to regulate the conditions in which Union citizens and their families exercise their right to move and reside freely within the Member States and restrictions on these rights on grounds of public policy, public security or public health.

47. In the case of Metock[37], the CJEU made it clear that the Directive should not be interpreted restrictively and that its objectives must not be interpreted so as to deprive them of their effectiveness The particular impact of the case in terms of the UK's competence was its clear assertion that a member state should not be imposing additional requirements on those seeking to rely on free movement rights in addition to those set out in the existing legislation (the Free Movement Directive).

48. The underpinning principle of the Directive is that the longer an individual resides in the host member state, the more rights s/he enjoys. The Directive distinguishes between three groups of migrants: those entering the host state for up to three months, those entering for up to five years and those resident beyond five years. It sets out the circumstances in which those rights can be restricted

[36] Czop C-147/11 (paragraphs 30-33)

[37] C-127/08

including the relevant thresholds to be satisfied in order to refuse admission, issue an exclusion order, deport someone or refuse to issue them with residence documentation.

49. EEA nationals, their family members[38], their dependents (defined as those who need the support of the principal in order to meet their living needs[39]) and extended family members (if they have been issued with an appropriate residence document under the Directive) can all benefit from the Free Movement Directive. As set out above, in certain circumstances the family members of UK nationals may also rely on such rights[40]. There are also circumstances in which family members of EEA nationals may retain a right of residence notwithstanding that the family relationship with the EEA national comes to an end[41] and they may remain in the UK for as long as they retain such a right.

50. The Directive's significance in terms of access to welfare benefits is due largely to the general guarantee of equal treatment with nationals of the relevant Member State at Article 24. This guarantees equal treatment to EU nationals who are resident in accordance with the Directive and to their family members (who can be non-EU nationals) with a right of residence in the Member State concerned. However, there is an explicit derogation from the principle of equal treatment at Article 24(2). This means that Member States are not obliged to grant social assistance to EU citizens and their family members except for workers, the self-employed or work seekers. While in a Member State before achieving a permanent right of residence, other Member State nationals are not entitled to social assistance of the host State. In addition, Article 14(1) of the Directive states that EU citizens, who become an unreasonable burden on the social assistance system of the host Member State in the first three months of residence, lose their right of residence. The CJEU has also held[42] that benefits of a financial nature intended to facilitate access to the labour market cannot be regarded as "social assistance" within the meaning at Article 24(2). Thus, where EU work seekers can show a link to the UK labour market, they will be entitled to jobseeker's allowance.

<u>ii REGULATION 492/2011</u>

51. Regulation 1612/68 was recently replaced with a new codified Regulation Regulation 492/2011 which contains a range of rights for migrant workers and their family members. There is a strong focus on the importance of non-discrimination. Article 5 provides, for example, that the same assistance should be given to nationals of other Member States as is given to host country

[38] See Article 2 of the Directive

[39] Jia Case C-1/05

[40] Surinder Singh Case C-370/90 & Eind Case C-291/05

[41] See Articles 12, 13 & 14 of the Directive

[42] *Vatsouras* (Cases C-22/08 and C-23/08),

nationals. The Regulation is strictly confined to workers and work seekers and does not give rights to the self-employed or to EU citizens generally.

52. Article 7(2) guarantees workers "the same social and tax advantages as national workers" from the first day of the worker's employment in the host state. The CJEU has held that the term "social advantage" covers all advantages, whether or not linked to a contract of employment, that are generally granted to national workers primarily because of their objective status as workers or by virtue of the fact of their residence on the national territory, where their extension to workers who are nationals of other Member States seems likely to facilitate their mobility within the EU[43]. It covers both financial benefits and non-financial ones and the Court has found that the term covers welfare benefits in their broadest sense[44].

53. Article 7(2) therefore guarantees access to the full range of welfare benefits available to UK nationals to EU migrants working in the UK and in that sense it covers a wider class of benefits than the EU social security regulation. It covers frontier workers, meaning that benefits have to be paid to workers, who work in the UK but live in other Member States[45]. Article 7(2) does not confer rights directly on family members of workers, but it does confer a right to benefits that the worker can obtain for his family[46]. It applies to both direct discrimination and indirect discrimination. This means that the UK has to design the entitlement conditions for its benefits carefully, making sure that unjustifiable residence conditions are not attached.

54. Article 10 states that the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the national of that State if such children are residing in its territory. In terms of significant case law impacting on the UK's competence in this area, in the cases of Ibrahim[47] and Teixeira[48] the applicants argued that they had a right to reside under Article 12 of Regulation 1612/68 (Article 10 of the current Regulation). The CJEU said that the children of a national of a Member State who works or has worked in the host State and the parent who is their primary carer could claim a right of residence on the sole basis of Article 12 without that right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State. It

[43] Martinez-Sala Case C-85/96

[44] Such as a child-raising allowance (Case C-85/96 Martinez-Sala), a funeral payment (Case C-237/94 O'Flynn), a redundancy payment (Case C-57/96 Meints) and a disability subsistence payment (Case C-287/05 Hendrix)

[45] Meints Case C-57/96

[46] Lebon Case C-316/85

[47] Case C-310/08

[48] Case C-480/08

confirmed that the derivative right of residence of the parent, acquired as a result of the Union citizen's right, ends when the child reaches the age of majority unless the child continues to need the presence and care of that parent in order to complete his/her education.

iii DIRECTIVE 2005/36: MUTUAL RECOGNITION OF QUALIFICATIONS

55. Directive 2005/36 on the recognition of qualifications was adopted in part on an Article 53 legal basis. It provides for a system for mutual recognition of qualifications which applies to both the employed and the self-employed so as to allow the holder of those qualifications access to that profession. It provides for a scheme for temporary mobility and also applies to professionals wishing to establish themselves in another Member State on a more permanent basis. It also includes provisions on knowledge of languages and academic titles. An automatic recognition system for professional qualifications applies for seven specified professions.

iv LEGISLATION ADOPTED ON THE BASIS OF ARTICLE 48 TFEU: REGULATIONS 883/2004 & 987/2009

56. In 2010 two new "modernised" EU social security regulations came into force: Regulation (EC) No 883/2004 on the coordination of social security systems; and the "implementing regulation", Regulation (EC) No 987/2009. These regulations, were based on Articles 42 and 308 EC (Articles 48 and 352 TFEU). They replace previous regulations[49] and contain basic rights and principles. Perhaps the most important of the principles is that the payment of benefits should not generally be subject to a condition that the recipient resides in the state responsible for payment (the export principle). Due to the need to keep the Regulations in line with changes to Member State social security systems, there are regular miscellaneous amendments to them. The scope of the EU coordination regulations has widened over the years due to legislative change and CJEU judgments. There are no specific domestic law provisions implementing Regulations 883/2004 or 987/2009. These are directly applicable EU Regulations.

Material Scope

57. The list of branches of social security now covered by the EU social security coordination rules can be found at Article 3(1) of Regulation (EC) No 883/2004.

58. Article 3(5) states that the Regulation does not apply to social and medical assistance; these terms are not defined but the CJEU has interpreted social

[49] Regulations No 3/58 and No 4/58 concerning the coordination of social security systems between Member States were adopted and came into force on 1st January 1959. These two Regulations were replaced in 1971 with two new Regulations, Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72.

assistance as a type of benefit relating to something that is not a social security risk[50].

59. The Regulation also applies "special non-contributory cash benefits". This is a category of benefits which have features of both social security and social assistance[51]. These benefits are usually means tested or provide specific protection for the disabled. Unlike most categories of benefit these benefits, which are closely linked to the social and economic conditions in the paying state, are not subject to the normal export rule meaning that they are not required to be paid outside the territory of the paying state. The UK currently lists four benefits as special non-contributory benefits in Annex X of Regulation (EC) No 883/2004: State Pension Credit; Income-based Allowance for Jobseekers; Income-based Employment and Support Allowance; and Disability Living Allowance (mobility component).

60. The exception to the export principle for this class of benefits has led to a number of references to the CJEU, seeking clarification about whether national benefits were correctly classified as special non-contributory cash benefits. For example in 2007 the CJEU found that UK attendance allowance, care allowance and the care component of Disability Living Allowance were wrongly listed as special non-contributory cash benefits and should therefore be paid outside of the territory of the paying state[52] under the rules applicable to sickness benefits.

Personal scope

61. Regulation No 1408/71 originally applied to employed persons, their family members and survivors and to refugees and stateless persons (and their family members and survivors). The personal scope of the Regulation was gradually extended by Regulation (EC) No 1390/81 to bring other categories within its scope.

62. A new definition of personal scope was inserted into Article 2 of the new "modernised" Regula*tion (EC) No. 88*3/2004: to come within its scope it is necessary to show only that the person is a national of a Member State (or a stateless person or refugee residing in a Member State), who is or has been "subject to the legislation of a Member State".

Equal Treatment

63. Article 4 of Regulation (EC) No 883/2004 contains a rule of equal treatment, which sets out that persons within the scope of the Regulation shall enjoy the same rights and obligations under the legislation of a Member State as nationals

[50] For example, benefits related to housing needs (e.g. UK Housing Benefit) and to the risk of poverty (eg. UK Income Support) are considered to be social assistance and therefore excluded from the scope of the coordination regulations.

[51] Sometimes referred to a "hybrid" benefits

[52] Case C-299/05

do. The CJEU has found that this prohibits both direct and indirect discrimination[53] in relation to social security benefits. However, EU law[54] appears to allow for the possibility of justifying treating migrants differently from home state nationals in respect of access to "social assistance". Thus the scope of the term "social assistance" is significant in this context and is currently the subject of a reference to the CJEU in the case of Brey[55], in which the UK is intervening.

Decisions of the Administrative Commission for the Coordination of Social Security Systems

64. The remit of the current committee, now known as the Administrative Commission for the Coordination of Social Security ("Administrative Commission"), can be found in Articles 71-72 of Regulation (EC) No 883/2004. The Administrative Commission is empowered to adopt Decisions and Recommendations on how provisions of the Regulation should be interpreted by the Member States. The CJEU, has held that the Decisions of the Administrative Commission do not have the force of law and are thus neither binding nor an authoritative guide to the interpretation of the social security coordination rules[56].

E. MAJOR PROPOSED PIECES OF EU LEGISLATION

i. Proposal for legislation based on Article 45

Equal treatment for workers exercising free movement rights

The Commission, in its 2012 Work Programme, indicated it would propose a Directive to promote and enhance mechanisms for the effective implementation of the principle of equal treatment for EU workers and members of their families exercising their right to free movement. A new proposal was adopted by the Commission in April 2013 concerning the enforcement of rights given by Article 45 TFEU and by Regulation (EU) 492/2011, with a particular focus on the prevention of discrimination.

ii. Proposals for legislation based on Article 48

Revising the EU social security coordination regulations

65. The Commission announced as part of its 2012 Work Programme that it intended to bring forward proposals to revise certain aspects of Regulations (EC) No 883/2004 and No 987/2009. Recent indications suggest it will consider a

[53] Borawitz Case C-124/99

[54] e.g. Directive 2004/38

[55] Case C-140/12

[56] van der Vecht Case 19/67

simplification of the rules on coordination of unemployment benefit and examine the need for a legislative system of coordination for long-term care benefits.

Occupational Pensions and worker mobility

66. Regulation (EC) No 883/2004 applies to old-age pensions provided for in legislation. It does not generally apply to occupational pensions provided by employers in the context of a contractual relationship. Nonetheless, barriers to portability of occupational pensions between Member States form obstacles to the free movement of workers. Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community provides for basic equal treatment as regards preservation of occupational pension rights in the case of persons who have moved to other Member States and requires payment of supplementary pensions to be made on the territory of other Member States. In 2007 the Commission put forward a more far-reaching proposal regarding the portability of occupational pensions based on Article 42 EC (now Article 48 TFEU) and Article 308 (now Article 352 TFEU) which met resistance from a number of Member States. An amended proposal was re-launched for further discussion in the Council in late 2012.

F. UK IMPLEMENTATION

Immigration (European Economic Area) Regulations 2006

67. The UK has implemented the Free Movement Directive by way of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") made under section 2(2) of the European Communities Act 1972[57]. The Regulations take the following format:

- Definitions of the various concepts which appear in the Regulations including definitions of the categories of person who may derive rights under the Regulations appear in Part 1;
- Rights of admission and residence are dealt with in Part 2;
- Residence documentation is dealt with in Part 3;
- Refusal of admission and removal is dealt with in Part 4; and
- Procedure and appeals are dealt with in Parts 5 & 6 respectively.

68. In order to give effect to the CJEU decisions in Chen, Ibrahim & Teixeira and Zambrano, the Regulations have been amended to confer derivative rights of

[57] The Immigration (European Economic Area) Regulations 2006 (S.I. 2006/1003) have been successively amended by the following instruments: The Immigration (European Economic Area) (Amendment) Regulations 2009 (S.I 2009/1117); The Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011 (S.I. 2011/544) The Immigration (European Economic Area) (Amendment) Regulations 2012 (S.I. 2012/1547) and, The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012 (S.I. 2012/2560)

entry and residence on those meeting the relevant conditions[58]. The other relevant provision of domestic law to note is section 7 of the Immigration Act 1988 which states that: *"A person shall not under the [Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitle**d to do so by virtue** of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972."*

G. SIGNIFICANT CASES PENDING IN THE CJEU

i. Interpretation of the Free Movement Directive: role of time in prison

69. There are currently two references to the CJEU in relation to the role of time in prison as it relates to the acquisition of rights and/or protections under the Directive[59]. Both are significant in terms of their potential impact on the ability of the UK to deport EEA nationals (and family members) who pose a threat to public policy/public security and, in one case[60], the circumstances in which someone who has spent time in prison in the UK can acquire a right of permanent residence and the associated benefits which come with that status.

ii. Definition of a "worker"

70. There is currently a preliminary reference to the CJEU concerning whether a person who gives up work or looking for work because of some physical constraint can remain a worker under Article 45[61].

iii Whether special non-contributory benefits falling within the scope of Regulation 883/04 can be "social assistance" for the purposes of Directive 2004/24

71. There is currently a reference from an Austrian Court which concerns the application of a "right to reside" condition for access to a means tested benefit . The underlying issue is whether a person having access to such a benefit constitutes a burden on the "social assistance system" of the host state for the purposes of Directive 2004/38. The Court is considering whether the benefit in question constitutes "social assistance". This case could have implications for the UK's right to reside condition for means tested benefits.

H. ACCESSION STATES' FREE MOVEMENT RIGHTS

72. Under the Accession Treaty signed in Luxembourg on 25th April 2005 Bulgaria and Romania (generally referred to as the EU2) acceded to the EU on 1st January 2007. Croatia will accede on 1 July 2013.

[58] Regulations 11 & 15A

[59] MG Case C-400/12 & Onuekwere Case C-378/12

[60] Onuekwere Case C-378/12

[61] Saint Prix v Secretary of State for Work and Pensions [2012] UKSC 49

73. The Luxembourg Accession Treaty includes a labour market derogation that provides that during a transitional period following accession, the existing Member States can derogate from the free movement of worker provisions in Article 39 EC Treaty and Articles 1 to 6 of Regulation 1612/68[62]. The labour market derogation can extend to a total of up to seven years.

74. There are two limits on the restrictions that may be imposed by national measures. First, there is a standstill clause – the restrictions must not result in conditions for access to a Member State's labour market that are more restrictive than those in place on the date of signature of the accession treaty. Secondly, there is a preference clause – accession State workers are to be given preference over third country national workers as regards access to a Member State's labour market. The Treaty Croatia signs will contain similar provisions.

75. The EU2 countries (Bulgaria and Romania) are currently subject to full work permit requirements consistent with those that applied pre-accession and their access to lower skilled employment is confined to quota based schemes which prevent them from working before they have authorisation and restrict their rights to claim income related benefits by restricting the circumstances in which they can be considered to be jobseekers in this 12 month period, and the associated right to reside in the UK. These restrictions are currently in force until the end of 2013, the maximum period permitted under the Accession Treaty. The scheme includes highly skilled workers and students with registration certificates. EU2 family members of other EEA nationals may not fall within the EU2 regime.

76. When Croatia accedes to the EU on 1st July 2013, there will be transitional controls in place to ensure that Croatian workers will be subject to a Worker Authorisation Scheme.

77. The schemes link an accession worker's right to reside in the UK as a worker to their compliance with the restrictions. Work seekers do not have a right to reside. The accession schemes have UK-wide application.

[62] The following links are to the labour market derogation in the 2003 Accession Treaty applying to the Czech Republic and to the derogation in the 2005 Accession Treaty applying to Bulgaria –

http://eur-lex.europa.eu/en/treaties/dat/12003T/htm/L2003236EN.080300.htm

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:157:0278:0301:EN:PDF