

## Scenario Analysis: the Withdrawal Agreement

### Analysis of the Withdrawal Agreement concerning access to cross-border healthcare and related rights post-transition

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Note. This analysis must not be treated as formal legal advice, not least because its authors are not insured to give such advice. Anyone seeking such advice should consult a solicitor.

Note about bilaterals: The Withdrawal Agreement does not explicitly provide for the position of bilateral social security agreements. However, the Agreement provides that it 'shall not affect' domestic law which is more favourable to the beneficiary.<sup>1</sup> In our view, this should be interpreted as meaning that the Withdrawal Agreement applies in preference to any bilateral social security agreements, except where the bilateral agreement is more favourable for the beneficiary. This interpretation would be consistent with the position in EU law.<sup>2</sup>

### Summary gap analysis

#### Residence Rights

Detail of right	Article(s) in WA	Covered? Y/N	Scenario(s)
Residence rights Union citizens and UK nationals within scope - those who have exercised right to reside under Union law, or right as frontier worker under Union law, before 1/1/21	13 (1); 10 (1) (a) (b) (c) (d)	No if UK/EU citizen wishes to reside in different state after 31/12/20	Brian, Sue, Linda
Residence rights conditional on acquiring 'settled status' under national law if state requires it	18	No if settled status not granted	Jack
Residence rights if become economically inactive and do not have independent means of support and access to comprehensive 'sickness insurance'	17 (1) but 13 (1)	No unless 17 (1) overrides 13 (1).	Amanda
Residence rights Family members whether Union citizens or TCNs	13 (2) (3); 10 (1) (e)	Yes. Family members can	Sue

<sup>1</sup> Article 38, Withdrawal Agreement.

<sup>2</sup> Article 8, Regulation 883/2004/EC.

		move to join persons residing in host state even after transition period	
Acquisition of rights under WA for family members whose status changes	17 (1)	No as family members explicitly precluded from becoming Union citizens and UK nationals within scope	Ismail
Continuity of residence	11; 15(3); 13(1) combined with Art 16 Directive 2004/38	No if UK/EU citizen is outside of host state for more than 5 years (for permanent residents) or for more than 6 months (for normal residents)	Brian, Linda
Continuity of residence for family members after death of Union citizen or UK national within scope	13(3); by reference to Article 12 (2) Directive 2004/38	No if Union citizen or UK national dies before one year of residence under the WA	Ismail, Blessing
Permanent Residence - those who have resided in the host member state for 5 years or longer and their family members	15(1) (3)	Yes	Brian, Sue
Continuity of residence for family members after divorce or annulment of marriage with UK or Union Citizen	13(3); by reference to Article 13(2) Directive 2004/38	No if marriage has lasted less than three years (of which at least 1 year is spent in Host State)	Ismail, Blessing
Onward or future movement rights - to move to and reside in another Member State/the UK, or to move back to the original Member State/the UK		No there are no such rights in the WA	Amanda, George, Brian, Sue
UK citizen residing in a host state to enter another member state for work	14(1)	No, there are no rights for this in the WA. Article 14 only	George

		provides for work entry if this is the host state the UK citizen (or family member) has resided in	
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### Social Security Coordination Rights:

<b>Pensions</b>	<b>Article(s) in WA</b>	<b>Covered? Y/N</b>	<b>Scenario(s)</b>
Access to pensions (including the principles of exportability and aggregation)	30 (1) (3); 31 (1) by reference to Regulation 883/2004, Articles 3 (1)(d), 6, 7	No, potentially, for frontier workers, or where other onward movement	George, Brian, Sue, Linda
Principle of aggregation of periods for pensioners	31(1) by reference to Regulation 883/2004, Art 6; 30(3) combined with  10(1)(b), 11,15 (3) or 13(1)	No if permanent residence is lost (after 5 years) or normal residence is lost (after 6 months) because of onward movement	Brian
Principle of exportability for pensioners	31(1) by reference to Regulation 883/2004, Art 7; 30(3) combined with  10(1)(b), 11,15 (3) or 13(1)	No if permanent residence is lost (after 5 years) or normal residence is lost (after 6 months) because of onward movement	Brian, Sue
<b>Healthcare</b>	<b>Article(s) in WA</b>	<b>Covered? Y/N</b>	<b>Scenario(s)</b>
Access to healthcare for resident employed/self-employed people through coordination of social security rules	30 (1) (2) (3); 31(1) by reference to Regulation 883/2004, Arts 17 and 18; 13	No, potentially, if interruption to which state is competent	George
Access to health care for resident pensioners (including frontier workers) through coordination of social security rules	31 (1) by reference to Regulation	Yes	George

	883/2004, Arts 1 (q), 23-30		
Access to health care during a temporary stay in another Member State/UK after the end of transition	31 (1) by reference to Regulation 883/2004, Arts 17, 22, 19, 27	No, not covered by the WA, unless, potentially, the person concerned falls in scope for another reason, eg as frontier worker	George, Sue
Access to planned healthcare or healthcare during a temporary stay in a Member State/UK ongoing at the end of transition	32 (1) (b)	Yes, and also covers reimbursement of costs	Monica
Access to healthcare for family members of residents of host state, whether they move before or after transition	30(1)(b) OR 30(3) combined with 10(1)(e), 31(1) by reference to Regulation 883/2004	Yes	Sue
Access to healthcare for family members of persons who have moved to the host state after 31/12/2020	31(1) by reference to Regulation 883/2004	No, if the person who moved has lost their residence in the previous state they resided	Sue and Brian
Access to healthcare for family members who are neither UK or Union Citizens	30(g)	Yes, even if family member loses 'family member' status e.g. through divorce, they are covered by Article 30(g) i.e. their rights are not lost 'provided they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State'.	Ismail, Blessing

In general:

People covered by Part Two of the Withdrawal Agreement, on Citizens' Rights, have life-long protection under the Withdrawal Agreement, so long as they continue to meet the conditions set out in either or both of Title II on rights and obligations (which includes residence rights; rights of worker and self-employed persons not to be discriminated against on grounds of nationality; recognition of professional qualifications) or Title III on coordination of social security systems. It is essential to determine whether someone falls within the scope of the Withdrawal Agreement in order to determine their rights under it. The scope rules of Title II and Title III are different. Someone may fall within the scope of Title III even if they do not fall within the scope of Title II.

***Scenario 1: Amanda, Ismail, Blessing. Third-country nationals who are spouses of UK/EU citizens, or third-country dependents such as elderly parents, children/stepchildren or university students***

Amanda is a UK national, who qualified in the UK, and for the past 4 years has been living and working in Spain as a medical professional. During this time, she met Ismail, a Nigerian national, who was temporarily in the country, and later married him. Ismail now resides with Amanda in Madrid, and wishes to bring his elderly mother, Blessing, to Spain, in order to provide care for her on a permanent basis.

Under current EU law,<sup>3</sup> and during the transition period,<sup>4</sup> this is allowed. However, due to the COVID-19 pandemic, Ismail's plans have been postponed and will not likely take place until at least January 2021. This will be after the transition period has ended.

Ismail is worried that Blessing will not be permitted to lawfully reside with him in Spain, and is concerned about their ability to access healthcare for Blessing in Spain.

He is also worried about what will happen in the future if, for instance, Amanda were to die, the relationship were to end, or the family were to relocate to another EU country, or to the UK.

**Legal Analysis:**

**Residence rights**

Under Part Two of the Withdrawal Agreement, on Citizens' Rights, 'family members' are defined by reference to EU law, in particular the Citizens Directive.<sup>5</sup> In that context, 'family members' include spouse, registered partner where recognised in relevant national law, children under age 21 of Union citizen or of spouse/partner, dependent children over age 21 of either, and 'dependent direct relatives in the ascending line' of Union citizen or spouse/partner. As a 'dependent direct relative', Ismail's mother falls within the definition of family member. (Family members include only parents or dependent grandparents of the EU/UK citizen and those of their spouse. In this context, brothers, sisters, aunts, uncles and cousins are not included.) The personal scope of the relevant provisions of the Withdrawal Agreement covers family members, irrespective of nationality, of 'UK nationals who have exercised their right to reside in a Member State in accordance with Union law before the end

<sup>3</sup> Directive 2004/38/EC.

<sup>4</sup> Article 127 (1), Withdrawal Agreement.

<sup>5</sup> Article 2, Directive 2004/38/EC.

of the transition period and continue to reside there thereafter'.<sup>6</sup> Amanda moved to Spain before the end of the transitional period, so as long as she continues to reside in Spain, she, and her family members fall within the personal scope of the Withdrawal Agreement. If Amanda moves back to the UK, she will no longer be able to rely on the Withdrawal Agreement. Equally, if Amanda moves to another EU country, or to another EU country and back to Spain, she will no longer fall within the protection of the Withdrawal Agreement, and will be reliant only on any provisions made in a future EU-UK (trade) agreement, or other agreement.

Union citizens and their families who fall within the scope of the Withdrawal Agreement have the right to reside in the host state, so long as they meet the requirements of relevant EU law.<sup>7</sup> Essentially, Article 13 WA acts as a 'corridor' applying the relevant provisions of EU law on residence rights to those who fall within the scope of the Withdrawal Agreement, thus securing continuity of rights for those who acquired them before the end of transition, or were formally in the process of acquiring them, as if the UK had continued to be a Member State of the EU. This approach in the Withdrawal Agreement means that the scope rules are of critical importance, as once someone falls outside the scope of the Agreement, they lose all their entitlements and protections under it forever. Once lost, residence rights under the Agreement cannot be regained.<sup>8</sup>

Amanda has been and is working in Spain, so falls within the relevant provisions of EU law. She has the right to enter and exit Spain without a visa,<sup>9</sup> to reside in Spain<sup>10</sup> as long as she is a worker or self-employed person, or if she ceases to be such, so long as she has 'comprehensive sickness insurance' and sufficient resources to support herself and her family members without recourse to Spain's social assistance system.<sup>11</sup> A change of status, so long as she remains within the personal scope of the Agreement, (eg from employed to economically-inactive, or to retired) does not affect Amanda's rights under the Withdrawal Agreement.<sup>12</sup> As a pensioner, Amanda would in effect be able to show she had sufficient resources, as she would be able to access her pension accrued in the UK (and any EU Member State), relying on the principle of aggregation, and would have access to Spanish healthcare (see further below). But if Amanda became economically inactive before reaching pensionable age, or securing permanent residence rights under the Agreement (see below), she would not be entitled to continue to reside in Spain if she needed to access social assistance from Spain to do so, or if she did not have comprehensive sickness insurance<sup>13</sup> (which might be difficult to secure if Amanda became economically inactive because of ill-health or disability). This interpretation of the text of the Withdrawal Agreement is on the assumption that the scope rules in Article 13 apply in preference to the provision in Article 17

<sup>6</sup> Article 10 (1) (b), Withdrawal Agreement.

<sup>7</sup> Article 13 Withdrawal Agreement, referring to Articles 21, 45 or 49 TFEU and Articles 6 (1), 7 (1), 7 (3), 14, 16 and 17 of Directive 2004/38/EC. 13 Member States opted for a declaratory system for residence rights; the other 14 require UK citizens to apply for a new residence status under the withdrawal agreement; for information see European Parliament Research Service, *EU and UK Citizens' Rights after Brexit: an overview* June 2020, Table pp 10-13 [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/651975/EPRS\\_IDA\(2020\)651975\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/651975/EPRS_IDA(2020)651975_EN.pdf).

<sup>8</sup> See, eg E Spaventa, 'The rights of citizens under the Withdrawal Agreement: a critical analysis' *European Law Review* 2020, 45(2), 193-206.

<sup>9</sup> Article 14, Withdrawal Agreement.

<sup>10</sup> Article 13, Withdrawal Agreement.

<sup>11</sup> Articles 7 and 14, Directive 2004/38/EC.

<sup>12</sup> Article 17, Withdrawal Agreement.

<sup>13</sup> Article 13 (1), Withdrawal Agreement.

to the effect that people 'shall not be affected when they change status', and/or that Article 17 refers only to a change of status between the statuses set out in Article 13.

If Amanda dies, Ismail, and his mother Blessing, will continue to have a right to reside in Spain, so long as each of them has been lawfully residing there for at least one year before Amanda's death.<sup>14</sup> If Amanda and Ismail divorce or annul their marriage, so long as the marriage has lasted at least 3 years, of which at least one year is in Spain, Ismail and his mother will continue to have residence rights in Spain.<sup>15</sup> These entitlements are provided that Ismail and Blessing do not become an 'unreasonable burden' on the Spanish social assistance system.<sup>16</sup> If Ismail were to acquire UK or Spanish nationality after the end of the transition period, he would not fall within the personal scope of the Withdrawal Agreement in his own right,<sup>17</sup> and so, for instance, could not rely on the Withdrawal Agreement for the purposes of residence of a future spouse or partner, or his future children.

After 5 years, Amanda and members of her family who have also been resident for 5 years will acquire the right of permanent residence, and will no longer be required to be a worker/self-employed or self-sufficient.<sup>18</sup> For the purposes of calculating when 5 years is complete, both periods before and after the end of the transitional period (31 December 2020) are to be included.<sup>19</sup>

The Withdrawal Agreement does not give Ismail or Blessing rights to move to and reside in another EU country, or back to Spain having moved to another country, or to the UK.

Amanda's UK qualification must continue to be recognised by Spain.<sup>20</sup>

### **Access to Spanish healthcare**

Access to Spanish healthcare falls within Title III of Part Two of the Withdrawal Agreement, entitled 'Coordination of social security systems'. The general scope<sup>21</sup> and definitional<sup>22</sup> rules of Part Two apply 'without prejudice to Title III' which must be considered a *lex specialis*, in other words it applies, where relevant, in preference to other provisions in the Withdrawal Agreement. The scope rules for Title III are set out in Article 30 WA. They are based on the concept of being 'subject to' relevant social security legislation, which is to be determined by the conflict of law rules in Regulation 883/2004/EC.<sup>23</sup> UK nationals who are 'subject to the legislation of a Member State at the end of the transition period', and their family members,<sup>24</sup> fall within the scope of Title III, so long as they continue, without interruption to be in one of the situations in Article 30 (1) involving both a Member State and the UK at the same time.<sup>25</sup>

<sup>14</sup> Article 12 (2), Directive 2004/38/EC.

<sup>15</sup> Article 13 (2), Directive 2004/38/EC.

<sup>16</sup> Article 14 (1), Directive 2004/38/EC.

<sup>17</sup> Article 17 (1), Withdrawal Agreement.

<sup>18</sup> Article 16 (1), Directive 2004/38/EC.

<sup>19</sup> Article 16, Withdrawal Agreement.

<sup>20</sup> Article 27, Withdrawal Agreement.

<sup>21</sup> Article 10, Withdrawal Agreement.

<sup>22</sup> Article 9, Withdrawal Agreement.

<sup>23</sup> According to the Commission Guidance Note, para 3.1.1, [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/c-2020-2939\\_en.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/c-2020-2939_en.pdf).

<sup>24</sup> Article 31 (1) (b), Withdrawal Agreement.

<sup>25</sup> Article 30 (2), Withdrawal Agreement.

Amanda is a UK national, who, as a worker/self-employed person in Spain, and a lawful resident in Spain, is subject to the social security legislation of Spain. She, and her family members, thus fall within the scope of Title III. Family members are defined in accordance with Regulation 883/2004/EC.<sup>26</sup> Article 1 (i) of that Regulation defines ‘member of the family’ as ‘any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided’; and, for healthcare, ‘any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he resides’. So if the relevant Spanish legislation considers that Ismail, and/or Blessing, are members of Amanda’s family or household for the purposes of access to the Spanish healthcare system, they will be entitled to access healthcare in Spain under the terms of that legislation.

Those who fall within the scope of Title III are covered by the ‘rules and objectives’ of EU law on coordination of social security.<sup>27</sup> The relevant EU law works on the basis of the coordination of social security systems across the EU. These are not harmonised, and Article 168(2) TFEU provides only that Member States will ‘coordinate among themselves’<sup>28</sup> their health policies and programmes. In practice, this coordination is made possible by the Administrative Commission for the Coordination of Social Security Systems, which is made up of one representative from each Member State and the European Commission. The Administrative Commission deals with administration and interpretation of the rules between the Member States by relying on a network of national authorities, which share information, using an electronic system, in relation to coordinating activities.<sup>29</sup> The Withdrawal Agreement provides that the UK will have observer status on the Administrative Commission, and will take part in the Electronic Exchange of Social Security Information and bear the associated costs.<sup>30</sup>

The ‘rules and objectives’ of EU law on coordination of social security include the (uncomplicated<sup>31</sup>) principle that where a person resides in the competent state, they will receive healthcare benefits in kind (medical treatment) according to the legislation of that state. This follows from the very concept of that state being the ‘competent state’, and is a matter of national legislation, not EU law (or Withdrawal Agreement law) per se. Amanda is resident in Spain, and Spain is the competent state, so Amanda, and her family members if covered by the Spanish definition of family members for these purposes, are entitled to receive medical treatment in Spain.

Article 30 (g) provides that Title III applies to

‘nationals of third countries, as well as members of their families and survivors, who are in one of the situations described in points (a) to (e), provided that they fulfil the conditions of Council Regulation (EC) No 859/2003.’

Regulation 859/2003<sup>32</sup> extends the provisions of Regulation 883/2004 to third country nationals, lawfully resident in the territory of a Member State, who are not already covered by

<sup>26</sup> Article 31 (2), Withdrawal Agreement.

<sup>27</sup> Article 31 (1), Withdrawal Agreement.

<sup>28</sup> Article 168 (2), Treaty on the Functioning of the European Union

<sup>29</sup> <http://eulawanalysis.blogspot.com/2018/03/the-implications-of-european-commission.html>

<sup>30</sup> Article 34, Withdrawal Agreement.

<sup>31</sup> F Pennings, *European Social Security Law* (Intersentia, 2010), p 156.

<sup>32</sup> Which was partially repealed by Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality OJ L 344, 29.12.2010, p. 1–3.

those provisions solely on the ground of their nationality.<sup>33</sup> However, it applies *only* where a third country national is 'in a situation which is not confined in all respects within a single Member State'.<sup>34</sup>

Ismail and Blessing may be in a situation which is confined entirely within Spain, as neither of them have crossed an internal EU border: they have links 'only with a third country and a single Member State'.<sup>35</sup> The main purpose of Regulation 859/2003 was to extend protections under EU social security coordination law where third country nationals cross an internal EU border, for example to seek employment in an EU country, where they are lawfully resident, and to claim access to benefits accrued in another EU country. It is not clear from the sparse case law<sup>36</sup> on that Regulation what constitutes being 'confined in all respects within a single Member State'. Does it, for example, include a previous relationship with someone whose nationality, and entitlement to aggregated benefits, involves a different Member State?

Depending on the answer to this question, if Ismail or Blessing were to cease to be within the Spanish concept of 'family member or household member' for the purposes of that legislation (for example, if Amanda and Ismail were to divorce), and were to fall outside the protection of the Spanish legislation solely because of their nationality, they would (potentially) fall within the scope of Title III, by reference to Article 30 (g).

***Scenario 2: George. Frontier workers who live in one country but work in another (and what happens if these arrangements change in future? Eg a UK citizen currently living in France and working in Luxembourg who is offered a job in Germany?)***

George is a UK citizen, and has worked as a doctor in Luxembourg for the past 2.5 years, since leaving the UK, where he worked for 9 years. Throughout the period where he worked in Luxembourg, George has primarily resided in the French department of Moselle, and has commuted to work.

Recently, however, George has received a job offer to work in Saarland, Germany, but this is not set to start until January 2022, a full year after the transition period has ended. George plans to continue residing in France and splitting his time between there and Germany.

George is concerned not only about his right to reside in France, but also his access to EU social security benefits, as he plans to retire in 2025, with his job in Saarland being his last. Given his age, he is also worried about what will happen if he becomes ill and unable to continue working.

**Legal Analysis:**

**Residence rights and non-discrimination rights as a frontier worker**

<sup>33</sup> Article 1, Regulation 859/2003.

<sup>34</sup> Article 1, Regulation 859/2003.

<sup>35</sup> Recital 12, Regulation 859/2003.

<sup>36</sup> Case C-247/09 *Alketa Xhymshiti v Bundesagentur für Arbeit - Familienkasse Lörrach* ECLI:EU:C:2010:698; Case C-465/14 *Raad van bestuur van de Sociale verzekeringsbank v F. Wieland and H. Rothwangl* ECLI:EU:C:2016:820.

George is a frontier worker: a 'Union citizen or UK national who pursues an economic activity in accordance with Article 45 (free movement of workers) or Article 49 (freedom of establishment for self-employed people) in one or more States in which they do not reside'.<sup>37</sup> In EU law, frontier workers fall within the scope of the Treaty rules on free movement, so enjoy rights to be treated equally with national workers accordingly in the 'state of work'.<sup>38</sup> Frontier workers' residence rights for more than three months (and less than 5 years, see below) are covered by Article 7 (1) (b) of Directive 2004/38/EC, which gives residence rights on the territory of another Member State to EU citizens who 'have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence, and have comprehensive sickness insurance cover in the host Member State'. This provision is complicated by the fact that frontier workers are regarded as 'socially insured' in the Member State in which they work, and are entitled to access health care in both that Member State and their Member State of residence.<sup>39</sup> This in effect gives them access to 'comprehensive sickness insurance cover in the host Member State'. While working, frontier workers are unlikely to be a burden on the social assistance system of the host Member State (ie the Member State in which they reside), and even if they cease working, they may be able to access unemployment benefits in the Member State in which they were employed.

UK nationals who are frontier workers who exercised their right to reside in one of more Member States in accordance with EU law before the end of transition fall within the scope of Part Two of the Withdrawal Agreement. Frontier workers are explicitly mentioned in Articles 24-26 WA, as well as the definitions clause,<sup>40</sup> but are not explicitly mentioned in the residence provisions of Articles 13-23 WA. However, as frontier workers enjoy a right of residence in the state of residence under Article 45 TFEU, and Article 7 (1) (b) of Directive 2004/38/EC, they have the right to reside in that state under Article 13 WA. Notwithstanding the lack of explicit provision on residence rights of frontier workers, the conclusion that they fall within the scope of Part Two follows from the fact that they have 'exercised the right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter'.<sup>41</sup> The conclusion that frontier workers fall within the scope of Title II is further supported by Article 26 WA<sup>42</sup> which provides that

The State of work may require Union citizens and United Kingdom nationals who have rights as frontier workers under this Title to apply for a document certifying that they have such rights under this Title. Such Union citizens and United Kingdom nationals shall have the right to be issued with such a document.

It would be illogical for the Withdrawal Agreement to grant a right to be issued with a document certifying that frontier workers have rights if in fact the Withdrawal Agreement gave no such rights.

As George exercised his right to reside in France (as a frontier worker, who is self-sufficient, with comprehensive sickness insurance cover in that he is covered by the Luxembourg health system, because Luxembourg is the 'competent state' for social security purposes) before 31

<sup>37</sup> Article 9 (b), Withdrawal Agreement.

<sup>38</sup> Case C-212/05 *Hartmann* ECLI:EU:C:2007:437.

<sup>39</sup> Articles 17 and 18, Regulation 883/2004.

<sup>40</sup> Article 9 (d), Withdrawal Agreement.

<sup>41</sup> Article 10 (1) (b), Withdrawal Agreement. See also the Commission Guidance Note, para 1.1.3.1 'All possible situations where the right of residence stems from Union free movement rules are covered.' [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/c-2020-2939\\_en.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/c-2020-2939_en.pdf).

<sup>42</sup> See also the Commission Guidance Note, para 2.14, 'Unlike the residence document issued under Article 18(1) of the Agreement, this document does not grant a new residence status – it recognises a pre-existing right to pursue an economic activity in the State of work which continues to exist.'

December 2020, he falls within the scope of the Withdrawal Agreement. He will be entitled to receive a document certifying his residence rights from France, and Luxembourg would be entitled to require him to acquire such a document.

George has a right to reside in France under Article 13 WA (residence rights for more than 3 months and up to 5 years). George does not have a right of permanent residence under the WA, as he has not yet been resident in France for the requisite 5 years.<sup>43</sup> He would acquire that right if he continues to reside in France, taking into account the 3 years he has already accumulated before the end of transition, and the further year working in Luxembourg post-transition, plus one further year.<sup>44</sup> Once George acquired permanent residence status, he would be entitled to reside in France without being subject to the conditions of being employed/self-employed/self-sufficient and not being a burden on France's social assistance system (see further below). Also George would be able to leave France for a period of up to 5 years without losing his permanent residence.<sup>45</sup>

If George becomes unable to work while still employed in Luxembourg, he will be covered by Article 24 (3) WA. This provides that

'Employed frontier workers shall enjoy the right to enter and exit the State of work in accordance with Article 14 of this Agreement and shall retain the rights they enjoyed as workers there, provided they are in one of the circumstances set out in points (a) (b) (c) and (d) of Article 7 (3) of Directive 2004/38/EC, even when they do not move their residence to the State of work.'

If George became temporarily unable to work as a result of illness, he would retain his worker status under Article 7 (3) (a) of Directive 2004/38/EC. This provision would not apply if George became permanently unable to work.

In that case, George would enjoy the right to equal treatment with a Luxembourg worker who became ill and thus permanently unable to work.<sup>46</sup> He would be able to access any unemployment or sickness or invalidity benefits available to Luxembourg workers. So long as this was sufficient to prevent him becoming a burden on the French social assistance system, he would be entitled to continue to reside in France, under the residence provisions of the Withdrawal Agreement.<sup>47</sup>

The Withdrawal Agreement does not provide rights of 'onward movement'. George will have no rights under the Withdrawal Agreement to take up employment in Germany. If he did take up that employment (on the basis of German law), he would nonetheless remain within the scope of the Withdrawal Agreement, as Article 10 (1) (b) covers 'UK nationals who exercised their right to *reside* in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter' (italics added). So long as he remains resident in France, and does not move his residence to Germany (or any other country), George will remain within the scope of the Withdrawal Agreement.

As Spaventa<sup>48</sup> points out, Directive 2004/38 does not provide for permanent frontier worker status. But the Withdrawal Agreement refers to 'periods of legal residence *or work* in

<sup>43</sup> Article 15, Withdrawal Agreement.

<sup>44</sup> Article 15 (1) and (2), Withdrawal Agreement.

<sup>45</sup> Article 15(3) Withdrawal Agreement.

<sup>46</sup> Article 24, Withdrawal Agreement.

<sup>47</sup> Article 13 (1), Withdrawal Agreement.

<sup>48</sup> E Spaventa, 'The rights of citizens under the Withdrawal Agreement: a critical analysis' *European Law Review* 2020, 45(2), 193-206.

accordance with Union law'<sup>49</sup> (italics added) in calculating the qualifying period necessary for permanent residence. George's continued residence in France would keep him within the Withdrawal Agreement's scope, and after 5 years, he would acquire permanent residence status in France under the Withdrawal Agreement.<sup>50</sup>

### **Rights to enter Luxembourg and subsequently Germany to work**

Article 24 (3) WA provides that employed frontier workers have the right to enter and exit the Member State in which they are employed, in accordance with Article 14 WA, which provides for visa-free exit and entry.

George will retain his entitlements to enter Luxembourg to work from January 2021.

The right to enter and exit continues to apply even if the worker ceases to be employed 'provided frontier workers are in one of the situations set out in points (a) (temporary inability to work because of illness or accident) (b) (involuntary employment after at least a year and registers as job-seeker) (c) (for six months only, involuntary employment after less than a year, and registers as job-seeker) and (d) (vocational training related to the employment, or unrelated if involuntary employment) of Article 7 (3) of Directive 2004/38/EC'. This is the case even where the frontier worker does not move residence to the state in which they work.<sup>51</sup>

The Withdrawal Agreement does not grant George rights to enter Germany in order to work.<sup>52</sup> George's move to working in Germany is a future movement, not covered by Title II of Part Two of the Withdrawal Agreement.

### **Social security rights:**

#### **While working**

#### **In Luxembourg**

#### **Scope:**

First it has to be established whether George falls into the personal scope of Title III WA regarding the coordination of social security systems. Article 30 outlines who is covered. This includes

United Kingdom nationals who are subject to the legislation of a Member State at the end of the transition period, as well as their family members and survivors.<sup>53</sup>

<sup>49</sup> Articles 15 and 16, Withdrawal Agreement.

<sup>50</sup> Article 15, Withdrawal Agreement.

<sup>51</sup> Article 24 (3), Withdrawal Agreement.

<sup>52</sup> Article 14, Withdrawal Agreement, grants rights of entry only to a host state in which a UK national is *resident* before the end of transition and continues to reside in thereafter - in this case, France, not Germany.

<sup>53</sup> Article 30 (1) (b), Withdrawal Agreement.

While George is employed in Luxembourg and is contributing to the social security system there, he is 'subject to the legislation' of Luxembourg and is so at the end of the transition period. Hence, as long as he continues in that situation 'without interruption',<sup>54</sup> George falls within the personal scope of Title III WA.

### **Healthcare rights:**

The rules regarding coordination of social security are set out in Article 31 WA, which states that the rules in Regulation (EC) No 883/2004 'shall apply to the persons covered by this title.'<sup>55</sup>

The relevant provisions in Regulation No 883/2004 are Articles 17 and 18. Article 17 provides that

an insured person or members of his family who reside in a Member State other than the competent Member State shall receive in the Member State of residence benefits in kind provided, on behalf of the competent institution, by the institution of the place of residence, ... as though they were insured under the said legislation.<sup>56</sup>

Therefore, George, who resides in France, a Member State other than the competent Member State (Luxembourg), will receive benefits, including sickness benefits,<sup>57</sup> in France as though he were insured under the French legislation. This will be provided for on behalf of the competent institution, Luxembourg, by the institution of the place of residence i.e. France.<sup>58</sup>

George will also be entitled to access to healthcare while in Luxembourg, his place of work. Article 18 of Regulation No 883/2004 states that

the insured person and the members of his family referred to in Article 17 shall also be entitled to benefits in kind while staying in the competent Member State.<sup>59</sup>

George will therefore be entitled to sickness benefits while staying in Luxembourg. This will be provided for by Luxembourg at its own expense, in accordance with the legislation of Luxembourg, as though George were a resident of Luxembourg.<sup>60</sup>

### **In Germany**

#### **Scope:**

It has been established that, under the WA, George will have no rights to take up employment in Germany, nor enter and exit it, following the end of the transition period. It was noted above that George's entitlements under Article 30 (1) WA are conditional on him falling within the

<sup>54</sup> Article 30 (2), Withdrawal Agreement.

<sup>55</sup> Article 31 (1), Withdrawal Agreement.

<sup>56</sup> Article 17, Regulation No 883/2004.

<sup>57</sup> Article 3 (1) (a), Regulation No 883/2004.

<sup>58</sup> Article 17, Regulation No 883/2004.

<sup>59</sup> Article 18 (1), Regulation No 883/2004.

<sup>60</sup> Article 18 (1), Regulation No 883/2004.

scope provisions of the WA ‘without interruption’.<sup>61</sup> But ‘without interruption’ does not necessarily<sup>62</sup> mean without change in status: if a person switches from one of the categories in Article 30 (1) (a)-(g) they remain in scope. If George does take up employment in Germany under German national law and wishes to continue to reside in France, he will still fall within the personal scope of Title III WA. This is because Article 30(3) WA provides that Title III shall apply to

persons who do not, or who no longer, fall within points (a) to (e) of paragraph 1 of this Article but who fall within Article 10 of this Agreement, as well as their family members and survivors.<sup>63</sup>

Since it has been established that George falls within Article 10 WA by way of his continued residence in France then, under Article 30(3) WA, George also falls within the personal scope of Title III WA.<sup>64</sup> The scope rule in Article 30 (3) WA applies for as long as the person concerned continues to have a right to reside in the host State under Article 13 WA, *or* (italics added) a right to work in the State of work under Article 24 or 25 WA.<sup>65</sup> George no longer has a right to work in the State of work (now Germany) under the WA, but he does continue to have a right to reside in France under Article 13 WA.

### **Healthcare rights:**

Since George still falls within the scope of Title III of the WA, even if he stops working in Luxembourg and takes up work in Germany, he will be entitled to certain social security rights, including sickness benefits, in the same way as if he continued working in Luxembourg. This is because his *residence* in France, and the scope rules of Article 10 WA, not his work in Luxembourg, bring him within the scope of Title III of the WA.

This situation is where the interaction between the scope rules in Title III and those elsewhere in the WA becomes difficult to understand, because the rules in Title III derive from the principle (‘single state rule’), derived from EU law, that an individual’s social security entitlements flow from a relationship with a single ‘competent state’.<sup>66</sup>

The ‘rules and objectives’ of Regulation 883/2004 (which by definition include the single state rule) apply to people who fall within the scope of Title III of the WA.<sup>67</sup>

The relevant provisions in Regulation No 883/2004 are Articles 17 and 18. Article 17 provides that

an insured person or members of his family who reside in a Member State other than the competent Member State shall receive in the Member State of residence benefits in

<sup>61</sup> Article 30 (2) Withdrawal Agreement.

<sup>62</sup> The European Commission takes the view that, for instance, ‘without interruption’ ‘has to be understood in such a flexible way that also short periods between two situations are not harmful, for instance a break of for example one month before starting a new contract (by analogy Case C-482/93 *Kraus*)’, see [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/c-2020-2939\\_en.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/c-2020-2939_en.pdf).

<sup>63</sup> Article 30(3) Withdrawal Agreement.

<sup>64</sup> There is no need to consider the special situations set out in Article 32 WA, as these apply only ‘insofar as they relate to persons not or no longer covered by Article 30’.

<sup>65</sup> Article 31 (4), Withdrawal Agreement.

<sup>66</sup> Article 11 (1), Regulation 883/2004.

<sup>67</sup> Article 31, Withdrawal Agreement.

kind provided, on behalf of the competent institution, by the institution of the place of residence, ... as though they were insured under the said legislation.<sup>68</sup>

But which is the 'competent Member State' in George's context? Since George does not have an entitlement to be employed in Germany under the WA, reflected in the change of status of George's entitlement to work in Germany (domestic law, not the WA), does the WA mean that Germany nonetheless is to be regarded as the 'competent Member state' for the purposes of George's social security rights? We consider three possible approaches to interpretation of the WA:

- 1) Since George's relationship with the competent state is not based on the WA in terms of his employment, the coordination rules cease to apply.
- 2) The general coordination rules apply, including those that determine the competent state, even though George's entitlement to work in the competent state is not based on the WA.
- 3) The exceptional coordination rule in Article 11 (3) (e) of Regulation 883/2004 applies to the effect that the state of residence is the competent state.

If the first interpretation is correct, George will be employed in Germany solely under German national law and not under the WA, meaning that Germany cannot be a competent member state for any purpose. Therefore, as there is no competent state to satisfy the requirements of Article 17 of the Regulation, then George will not be able to benefit from the sickness benefits that Article 17 would confer on him in France had there been a competent state. France is not the competent state, as George is a frontier worker, and Regulation 883/2004 provides that, for frontier workers, the competent state is the state of work.<sup>69</sup> George would only have entitlements to access to healthcare in France or Germany on the basis of national law, not under the Withdrawal Agreement.

If the second interpretation is correct, then, although George has no rights to work in Germany under the WA, Germany is nonetheless to be regarded as the competent state for the purposes of Regulation 883/2004 (Articles 11 (3) (a), 17 & 18), since George falls within the scope of Title III WA with regards to social security coordination. Accordingly, George, who resides in France, a Member State other than the competent Member State (Germany), will receive benefits, including sickness benefits,<sup>70</sup> in France as though he were insured under the French legislation. This will be provided for on behalf of the competent institution, Germany, by the institution of the place of residence i.e. France.<sup>71</sup>

If the second interpretation is correct then George will also be entitled to access to healthcare while in Germany, his place of work, under Regulation 883/2004 Article 18. This will be provided for by Germany at its own expense, in accordance with the legislation of Germany, as though George were a resident of Germany.<sup>72</sup>

If the third interpretation is correct, rather than the general rule for determination of the competent state,<sup>73</sup> the exception in Article 11 (3) (e) of Regulation 883/2004 applies. Article 11 (3) (e) provides

<sup>68</sup> Article 17, Regulation 883/2004.

<sup>69</sup> Article 11 (3)(a), Regulation 883/2004.

<sup>70</sup> Article 3 (1)(a), Regulation No 883/2004.

<sup>71</sup> Article 17, Regulation No 883/2004.

<sup>72</sup> Article 18 (1), Regulation No 883/2004.

<sup>73</sup> Article 11 (3)(a), Regulation 883/2004

‘any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.’

George is ‘pursuing an activity as an employed person in a Member State’ (Article 11 (3) (a), so taken literally, he does not fall within Article 11 (3) (e). However, it could be argued that George is not pursuing that activity as an employed person *in the sense of EU law*, therefore Article 11 (3) (a) does not apply. If this interpretation is correct, George will fall outside of the provisions in Article 17 and 18 Regulation 883/2004, as he will be resident in the competent state. George will be entitled to receive healthcare in France, but not in Germany, except necessary healthcare during the course of a stay in Germany.<sup>74</sup> France will be responsible for paying for healthcare provided in France or (if necessary healthcare) in Germany.<sup>75</sup>

### **Once George retires**

#### **Pension entitlements**

Once George retires in France, it has to be determined what his rights will be concerning access to his state pension. Having already determined that George falls into the personal scope of Title III so long as he continues his residence in France,<sup>76</sup> we must then refer to Article 31(1) WA which implements Regulation 883/2004:

The rules and objectives set out in Article 48 TFEU, Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council shall apply to the persons covered by this Title.<sup>77</sup>

Article 1(d) of Regulation 883/2004 covers legislation concerning old-age benefits and therefore George’s pension rights will be governed by this Regulation. The Regulation provides for the right to aggregation of periods,<sup>78</sup> in calculating pension entitlements. Regulation 883/2004, Article 6 provides:

Unless otherwise provided for by this Regulation, the competent institution of a Member State

whose legislation makes:

- the acquisition, retention, duration or recovery of the right to benefits,
- the coverage by legislation, or
- the access to or the exemption from compulsory, optional continued or voluntary insurance,

<sup>74</sup> Article 19, Regulation 883/2004.

<sup>75</sup> This interpretation is consistent, by analogy, with the Commission’s interpretation of the rules in its Guidance Note, p 38 [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/c-2020-2939\\_en.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/c-2020-2939_en.pdf).

<sup>76</sup> George must continue his residence in France on a permanent basis to continue being within the scope of the Withdrawal Agreement.

<sup>77</sup> Article 31 (1), Withdrawal Agreement.

<sup>78</sup> Article 6, Regulation 883/2004.

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.<sup>79</sup>

Under EU law, the principle of aggregation means that those applying to receive state pensions who have had to contribute to the social security system of a State for a minimum period of time (10 years in the UK,<sup>80</sup> 5 years in Germany<sup>81</sup> and 10 years in Luxembourg<sup>82</sup>) may take into account and aggregate periods of employment completed in any Member State. If the UK had remained in the EU, George would have benefitted from this right of aggregation of periods because, although he would have only contributed to the social security system of Luxembourg for 3.5 years, UK for 9 years and Germany for 3 years, he would still have received a state pension for all of these periods of employment from the competent state.<sup>83</sup>

In principle, the competent state for the purposes of pension provision is usually the state in which the person last worked. This principle follows from the general rules in Regulation 883/2004, to the effect that the 'competent institution' is the 'institution in which the person concerned is insured at the time of the application for the benefit'.<sup>84</sup> Under EU law, when someone retires and seeks a pension, they do so from the state in which they last worked, as the place where they are insured at the date of retirement. In George's instance, that would have been Germany, under ordinary EU law.

But which is the competent state for a frontier worker like George under the Withdrawal Agreement? As above, the question as to whether, and if so how, the principle of aggregation under the Withdrawal Agreement applies to frontier workers who move their place of work from one Member State to another post-transition, is moot. We again consider four possible interpretations:

- 1) Since George's relationship with Germany is not based on the WA, the coordination rules cease to apply.
- 2) The general coordination rules apply, including those that determine the competent state, even though George's entitlement to work in Germany is not based on the WA.
- 3) The general coordination rules apply, but to the effect that the last state in which George worked under the WA (Luxembourg) is the competent state.
- 4) The exceptional coordination rule in Article 11 (3) (e) of Regulation 883/2004 applies to the effect that the state of residence (France) is the competent state.

The first interpretation is the most punitive. It would mean that, when George applies to Germany to receive his state pension, this would be governed only by German national law. Germany would have no obligation to take into account his previous periods of employment in the UK or Luxembourg and accumulate them. Hence, only his employment in Germany would be taken into account and in that case, since George worked in Germany for only 3 years, this would not satisfy the minimum 5 year employment period to qualify for a state

<sup>79</sup> Article 6, Regulation 883/2004.

<sup>80</sup> <https://www.gov.uk/new-state-pension/how-its-calculated#:~:text=You'll%20need%2035%20qualifying,10%20and%2035%20qualifying%20years.&text=You%20have%2020%20qualifying%20years,record%20after%205%20April%202016.>

<sup>81</sup> <https://ec.europa.eu/social/main.jsp?catId=1111&langId=en&intPagelId=4554.>

<sup>82</sup> <https://ec.europa.eu/social/main.jsp?catId=1120&langId=en&intPagelId=4684.>

<sup>83</sup> Article 6 uses the term 'competent institution'. A competent institution belongs to the competent member state, see Article 1(s), Regulation 883/2004.

<sup>84</sup> Article 1 (q), Regulation 883/2004.

pension in Germany.<sup>85</sup> Therefore, under this interpretation, George would not receive a state pension for his employment in Germany at all.

If this interpretation is correct, George would have no entitlements under the Withdrawal Agreement to access his pension accrued both before and after the transition period. He would have to rely on any bilateral agreements between the relevant states. This interpretation is contrary to the spirit of the Withdrawal Agreement, Part Two, which seeks to secure 'reciprocal protection for Union citizens and for UK nationals ... where they had exercised free movement rights before a date set in this Agreement, ... recognising also that rights deriving from periods of social security insurance should be protected'.<sup>86</sup> For this reason, this is unlikely to be the correct interpretation of the terms of the Withdrawal Agreement.

If the second interpretation is correct then this means that George's pension entitlements would be governed by Germany's competent institution, Germany being the last place he worked. Germany would be obliged to take into account, under Article 6 of the Regulation, the pension rights George accumulated in all his places of employment, which would be the UK, Luxembourg and Germany. Under this interpretation, the competent state for the purposes of George's pension would be Germany, even though George did not work in Germany under an entitlement granted by the Withdrawal Agreement. This is a logical consequence of the scope rules for Title III being different from those for Title II, and the application of EU law's system of coordination of social security by the Withdrawal Agreement to those falling within the scope of Title III.

It is arguable that Luxembourg is the 'competent state' for George's pension entitlements under the Withdrawal Agreement, because Luxembourg is the last state in which George worked in reliance on the Withdrawal Agreement. Under Regulation 883/2004, Article 6, Luxembourg would have an obligation to aggregate his period of employment in Luxembourg with his previous period of employment in the UK. Luxembourg would have no obligation under the Withdrawal Agreement<sup>87</sup> to include George's period of employment in Germany.

Finally, as noted above, it is possible under Regulation 883/2004, Article 11 (3)(e) that France is the competent state. This would be an extraordinary interpretation, given that George has never worked in France, and so has not accumulated pension entitlements in France at all.

### **Healthcare entitlements as a pensioner**

George's healthcare entitlements as a pensioner depend on the competent member state. The member state competent for George's pension may not be the same member state competent for sickness benefits. Again, we have to consider the different possible interpretations of the relevant provisions. The general rules in Regulation 883/2004, to the effect that the 'competent institution' is the 'institution in which the person concerned is insured at the time of the application for the benefit'.<sup>88</sup>

Articles 23-30 of Regulation 883/2004 make specific provision for pensioners' entitlement to healthcare. Articles 23, 24 and 25 provide various circumstances where healthcare must be

<sup>85</sup> <https://ec.europa.eu/social/main.jsp?catId=1111&langId=en&intPagId=4554>.

<sup>86</sup> Recital 6, Withdrawal Agreement.

<sup>87</sup> We do not consider the possible application of bilateral agreements in this context, noting only that Article 8, Regulation 883/2004 provides that any more favourable bilateral agreements shall apply instead of the Regulation.

<sup>88</sup> Article 1 (q), Regulation 883/2004.

provided by the state in which the pensioner resides, on behalf of the competent state. Article 23 applies only where the Member State of residence is one of two or more Member States from which the pensioner receives their pension. As George has not accrued pension entitlements from France, it seems unlikely that Article 23, in combination with Article 31 (1) WA, applies. Entitlements under Article 24 and 25 assume a competent state other than the state of residence.

As noted above, it is possible under Regulation 883/2004, Article 11 (3)(e) that France is the competent state. If it is correct that France is the 'competent member state' for the purposes of access to sickness benefits, George will be entitled to access healthcare in France, at the expense of France, as if he were a pensioner whose pension was payable solely under French legislation.<sup>89</sup> If France were the competent member state, George will no longer be able to rely on the Withdrawal Agreement to access healthcare in Germany, as he will no longer be a frontier worker, and so no longer be able to rely on Regulation 883/2004/EC, Article 18, combined with Article 31 (1) WA. He would be entitled to access healthcare that became medically necessary during a stay in Germany on the basis of Regulation 883/2004/EC, Article 19 and Article 27.

However, if Germany is the competent state, George will still be able to access healthcare from the French national health system, under Regulation 883/2004, Articles 17 and 22, combined with Article 31 (1) WA. Article 17 entitles an insured person who resides in a Member State other than the competent Member State to sickness benefits in kind in the Member State of residence, as if they were insured in the Member State of residence. Those benefits are provided on behalf of the competent state.<sup>90</sup> This provision is enhanced for pensioners in Article 22 of the Regulation. A pensioner who ceases to be entitled to benefits in kind in the legislation of the state last competent remains entitled to benefits in kind under the legislation of the Member State in which s/he resides.<sup>91</sup> Therefore, even after George retires, he will still receive such benefits in the state of his residence i.e. France, provided on behalf of Germany.

Additionally, according to Article 22 (2) of the Regulation, again in combination with Article 31 (1) WA, in the event of George being awarded a pension by Germany, Germany will be the competent state responsible for paying for healthcare which becomes 'necessary on medical grounds' during a visit to another Member State (other than France), relying on Regulation 883/2004/EC, Article 19 and Article 27, combined with Article 31 (1) WA.

Regulation 883/2004, Article 22 refers to the 'Member State last competent'. If, as noted above, Luxembourg is the 'Member State last competent', because it is the last competent state against which George has entitlements under the Withdrawal Agreement, George could claim healthcare in France, provided on behalf of Luxembourg.

Support for this interpretation is perhaps found in Article 32 (2) WA, which provides that the provisions of Regulation 883/2004 on sickness benefits apply to people receiving benefits under Article 32 (1)(a) WA ('special situations covered'). Article 32 (1)(a) WA provides that UK nationals no longer covered by Article 30 WA who 'have been subject to the legislation of a Member State before the end of transition' are covered by Title III for the purposes of aggregation of periods, and rights deriving from such periods. On their face, however, these provisions do not apply to George's access to sickness benefits, as sickness benefits are not dependent upon aggregation of periods.

<sup>89</sup> Article 23, Regulation 883/2004 combined with Article 31(1), Withdrawal Agreement.

<sup>90</sup> Article 17, Regulation No 883/2004.

<sup>91</sup> Article 17, Regulation No 883/2004.

It is difficult to discern the basis of George's entitlements to healthcare under the Withdrawal Agreement, but at least part of that difficulty relates to the opacity of the rules in Regulation 883/2004.

***Scenario 3: Brian, Sue. UK pensioner residents who move, e.g. from France to Spain, after 1/1/21***

Brian, 59, is a UK national who has lived in France for 6 years and is now a lawful resident there. During his time in France, he has worked as a nurse at a local hospital in Paris. Brian moved to France in the last part of his career, after working for more than 30 years as a nurse for the NHS in the UK. He has contributed to both the UK and the French social security systems and is planning to move to Spain to retire in February 2021. Under current EU law Brian would be able to move to Spain and enjoy his pension there, which would be borne in part by the UK and in part by France, since he has contributed to the social security systems of both countries.

However, following the UK's withdrawal from the European Union, and given that the transition period will end on the 31 December 2020, Brian wants to know whether he will be able to move to Spain, reside there, and claim both his UK and French state pensions.

Brian's elderly mother, Sue, who has lived and worked in the UK all her life, has recently developed mild/moderate Alzheimer's Disease. As Brian is her only relative, Sue wishes to follow Brian so that he can care for her. Under current EU law, Sue, as an EU citizen would be able to reside in Spain as Brian's dependent relative (if she meets the conditions of dependency), or in her own right as long as she has sufficient resources not to be a burden on Spain's welfare and health care system. Further, at least for the first few months, as a short term *visitor* to Spain, under EU law, Sue could benefit from reciprocal healthcare and would thus be entitled to receive emergency healthcare under the same conditions as Spanish citizens.

If Brian stays in France and Sue joins him there, or if Brian and Sue move to Spain in February 2021, Sue is concerned as to her residence rights, her access to healthcare and to her pension.

Brian and Sue are not sure if Spain would work out as their new home. They would like to keep the option of returning to the UK open, as Sue will not sell her family home in the UK while being in Spain with Brian. Sue and Brian would like reassurance that they will be able to receive their pensions and that Sue will be able to access the NHS if they were to return to the UK.

**Legal Analysis:**

**Brian:**

**What rights does Brian have under the provisions of the Withdrawal Agreement?**

**For the purposes of residence in Spain or France**

**Does Brian fall within the personal scope of Title 1, Part Two of the WA?**

First, we have to consider whether Brian falls under the personal scope of Title 1, Part Two of the WA for the purposes of his residence rights. Article 10(1)(b) WA specifies that those who fall under the scope of Part Two, Title 1 are

United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter.<sup>92</sup>

Since Brian is a UK national and has exercised his right to reside in France in accordance with Union law<sup>93</sup> for 6 years before the 31st December 2020 then so long as he continues to reside in France thereafter he will satisfy the requirements to fall within the personal scope of Part Two, Title 1 of the WA.

Furthermore, if Brian moves to lawfully reside in Spain before the 31st December 2020 and continues to reside there thereafter then he will also fall within the personal scope of Part Two, Title 1 of the WA.

However, Brian will not fall under the personal scope of Part Two, Title 1 of the WA if he moves to lawfully reside in Spain after the 31st December 2020 since he would not have resided there 'before the end of the transition period'.

### **What are Brian's residence rights in France and Spain?**

#### **France:**

Next we have to consider what Brian's residence rights are should he continue to stay in France. Article 15(1) WA states that

Union citizens and United Kingdom nationals, and their respective family members, who have resided legally in the host State in accordance with Union law for a continuous period of 5 years...shall have the right to reside permanently in the host State under the conditions set out in Articles 16, 17 and 18 of Directive 2004/38/EC.<sup>94</sup>

As Brian has legally resided in France for a period of 6 years, as a worker under Article 16 of Directive 2004/38/EC, and thus satisfies the requirements under Article 15(1) WA, he will have gained the right to permanently reside in France.

However, Brian does not wish to remain in France since he wants to move to and retire in Spain. His rights to enter and reside in Spain will however be dependent on whether he moves before or after the end of the transition period.

#### **Spain before 31st December 2020:**

If Brian wishes to move to Spain before the 31st December 2020 then, since it has been established he would fall under the personal scope of Part Two, Title 1 WA in such

<sup>92</sup> Article 10 (1)(b), Withdrawal Agreement.

<sup>93</sup> In accordance with Article 7 (1)(a) of European Parliament and Council Directive 2004/38.

<sup>94</sup> Article 15 (1), Withdrawal Agreement.

circumstances, he will be able to lawfully enter Spain under Article 14(1) WA which states that

Union citizens and United Kingdom nationals...who reside in the territory of the host State in accordance with the conditions set out in this Title shall have the right to leave the host State and the right to enter it, as set out in Article 4(1) and the first subparagraph of Article 5(1) of Directive 2004/38/EC with a valid passport or national identity card.<sup>95</sup>

Since Brian is a UK national and will reside in the territory of Spain in accordance with the conditions set out in Title 1 WA (discussed below), he will have the right to enter Spain before 31st December 2020 so long as he has a valid identity card or passport.

In order to lawfully reside in Spain once he enters he will have to satisfy the residence rights requirements set out in Article 13(1) WA which dictate that

Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of Directive 2004/38/EC.

The starting point for Brian's residence in Spain is Article 21(1) TFEU which outlines the general right to freedom of movement for union citizens:

Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States.<sup>96</sup>

However, there are some limitations on this right to free movement. Brian will have to satisfy one of the requirements set out in Article 7(1) of Directive 2004/38 in order to lawfully reside in Spain for a period of longer than 3 months. This includes either being a worker/self-employed person,<sup>97</sup> having sufficient resources,<sup>98</sup> being a student with sickness insurance,<sup>99</sup> or being a family member of any of the former.<sup>100</sup> Since Brian will no longer be a worker and will be moving to Spain as a pensioner he will have to satisfy the requirement of having 'sufficient resources' under Article 7(1)(b) TFEU whereby the Union citizen must

have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during the period of residence and have comprehensive sickness insurance cover in the host Member State.<sup>101</sup>

Therefore, in order to lawfully reside in Spain, Brian will have to prove that he has sufficient resources for himself and any family members he wishes to bring with him, and he must also obtain comprehensive sickness insurance.

Hence, by satisfying the personal scope requirements under Article 10(1)(b) WA, the residence requirements under Article 13(1) WA and the entry requirements under Article 14(1)

<sup>95</sup> Article 14 (1), Withdrawal Agreement.

<sup>96</sup> Article 21 (1), Treaty on the Functioning of the European Union.

<sup>97</sup> Article 7 (1)(a), European Parliament and Council Directive 2004/38.

<sup>98</sup> Article 7 (1)(b), European Parliament and Council Directive 2004/38.

<sup>99</sup> Article 7 (1)(c), European Parliament and Council Directive 2004/38.

<sup>100</sup> Article 7 (1)(d), European Parliament and Council Directive 2004/38.

<sup>101</sup> Article 7 (1)(b), European Parliament and Council Directive 2004/38.

WA, Brian will be able to enter and reside in Spain provided that he does so before the 31st December 2020.

### **Spain after 31st December 2020:**

As already established, in terms of residing in Spain after the end of the transition period, Brian does not fall within the personal scope of Part Two, Title 1 of the WA and therefore will not be able to benefit from either the entry rights or the residence rights therein. Hence, if Brian wishes to move to Spain after the 31st December 2020 then, as things currently stand, his right to enter and reside in Spain will solely depend on Spanish national law.

### **What are the effects on his French residence rights, if he goes to Spain for 5 months, to see how it works out, and then comes back to France?**

As Brian qualifies for permanent residency in France under Article 15(1) WA, once acquired, his right of permanent residence will not be lost unless he leaves France for 'a period exceeding 5 continuous years' (Article 15(3) WA). Therefore, Brian can leave France for up to 5 years and when he comes back he will still be a lawful permanent resident of France.<sup>102</sup>

### **UK residence rights**

As a UK national Brian may exit, enter and reside in the UK without any restrictions under domestic UK law.

### **For the purposes of access to his pension**

#### **In France**

In order to determine his rights to accessing his pension, we have to consider whether Brian falls within the scope of Part Two, Title 3 of the WA governing the coordination of social security systems. Article 30(1) WA specifies who falls under such scope including

United Kingdom nationals who are subject to the legislation of a Member State at the end of the transition period, as well as their family members and survivors.<sup>103</sup>

Since Brian has worked in France and contributed to its social security system for 6 years, he will thus be entitled to receive an old-age benefit from France. Therefore, as he will be socially insured by the State of France he is consequently 'subject to the legislation' of France and will continue to be at the end of the transition period. Therefore he falls within the personal scope of Part Two, Title 3 of the WA.

Having determined that Brian falls into the personal scope, we must then refer to Article 31(1) WA which implements Regulation 883/2004:

<sup>102</sup> Articles 15 (3) and 11, Withdrawal Agreement. Note that the 5 year period is more generous than the equivalent period under Article 16(4) Directive 2004/38/EC, which provides that the right of permanent residence shall be lost through absence from the host Member State for more than two consecutive years.

<sup>103</sup> Article 30 (1)(b), Withdrawal Agreement.

The rules and objectives set out in Article 48 TFEU, Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council shall apply to the persons covered by this Title.<sup>104</sup>

Article 1(d) of Regulation 883/2004 covers legislation concerning old-age benefits and therefore Brian's pension rights will be governed by this Regulation.

One of the rights that Brian will benefit from under Article 6 of Regulation 883/2004 is the right to aggregation of periods:

Unless otherwise provided for by this Regulation, the competent institution of a Member State

whose legislation makes:

- the acquisition, retention, duration or recovery of the right to benefits,
- the coverage by legislation, or
- the access to or the exemption from compulsory, optional continued or voluntary insurance,

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.<sup>105</sup>

This means that when Brian applies to receive his pension in France, France will have to take into account the pension rights Brian accumulated both in the UK and France. Without this principle, those applying to receive state pensions will have had to contribute to the social security system of a State for a minimum period of time- in the case of France this is 10 years. Therefore, Brian will benefit from this right of aggregation of periods because, although he has only contributed to the social security system of France for 6 years, he will still receive a state pension from France since, under Article 6 of Regulation 883/2004 and Article 31(1) WA, France must take into account his contributions to the UK social security system and treat it as though it was a 'period completed under the legislation' of France.

Therefore, so long as Brian remains a resident in France his social security rights such as his pension will be protected by the WA.

## **In Spain**

### **Before 31st December 2020:**

If Brian moves to Spain before the end of the transition period he will still fall into the personal scope of Part Two, Title 3 of the WA as provided by Article 30(3) WA:

<sup>104</sup> Article 31 (1), Withdrawal Agreement.

<sup>105</sup> Article 6, Regulation 883/2004.

This Title shall also apply to persons who do not, or who no longer, fall within points (a) to (e) of paragraph 1 of this Article but who fall within Article 10 of this Agreement, as well as their family members and survivors.<sup>106</sup>

Since we have established that Brian falls within Article 10(1)(b) of the WA if he moves to Spain before 31st December 2020 then under this provision Title 3 will apply to him. This means that he will benefit from the same pension rights as if he were to remain in France, including the right to aggregation of periods. As Brian will not be working in Spain, he would just have to apply to the Spanish pension authority who would forward his claim to the last place he worked (France). His entitlement to his pension would then be dealt with in the same manner as it would be now were he in France.

### **After 31st December 2020:**

However, if Brian permanently moves to Spain after the end of the transition period he will not fall under the personal scope of Part Two, Title 3 of the WA under the provision of Article 30(1) WA since he will not be contributing to the social security system of Spain and thus will not be 'subject to the legislation' of Spain.

However, Brian might nonetheless fall within the personal scope of Title 3 as provided for by Article 30 (3) WA. This legal argument relies on the following interpretation of Article 30 (3) WA, which, as noted above, provides:

This Title shall also apply to persons who do not, or who no longer, fall within points (a) to (e) of paragraph 1 of this Article but who fall within Article 10 of this Agreement, as well as their family members and survivors.<sup>107</sup>

Brian could argue that he falls within the scope of Article 10(1)(b) WA, combined with Article 11 and 15 (3) WA:

United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter.<sup>108</sup>

The right of permanent residence acquired under Directive 2004/38/EC before the end of the transition period shall not be treated as lost through absence from the host State for a period specified in Article 15 (3).<sup>109</sup>

Once acquired, the right of permanent residence shall be lost only through absence from the host State for a period exceeding 5 consecutive years.<sup>110</sup>

For the first five years of him moving to Spain, Brian will not have lost his permanent residence in France, and he therefore will be protected by the WA. This is because he has exercised his right to reside in France, and acquired permanent residence there, before the end of the

<sup>106</sup> Article 30 (3), Withdrawal Agreement.

<sup>107</sup> Article 30 (3), Withdrawal Agreement.

<sup>108</sup> Article 10 (1)(b), Withdrawal Agreement.

<sup>109</sup> Article 11, Withdrawal Agreement.

<sup>110</sup> Article 15 (3), Withdrawal Agreement.

transition period. So for the first 5 years of him being away from France, Brian will still fall within Article 10(1)(b) WA and, because of that, within Article 30(3) WA.

Therefore, despite moving to Spain, Brian could argue that he will actually fall into the personal scope of Title III of Part Two of the Withdrawal Agreement for five years. He will therefore benefit from the rights implemented by Article 31(1) WA. These include the right to aggregation of periods of work for the purposes of pension entitlement. Brian would have to rely on his permanent residence status in France, and claim his pension from the French authorities. As noted above, under Article 6 of Regulation 883/2004 and Article 31(1) WA, France must take into account Brian's contributions to the UK social security system and treat it as though it was a 'period completed under the legislation' of France.

After 5 years however, Brian will no longer satisfy the requirement of continuing his residence in France under Article 10(1)(b) WA and will thus no longer be protected by the provisions of the WA.

### **What if Brian only lived in France for one year before 01/12/20?**

If Brian were not a permanent resident of France under Article 15(1) WA due to not living there for 5+ years then he would be a resident under Article 13(1) WA instead. This allows for residence subject to the conditions of Directive 2004/38, including Article 16(1) of the Directive. Article 16(1) provides that

continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year.<sup>111</sup>

Therefore, Brian will be considered a resident of France and will fall under Article 10(1)(b) WA and therefore under Article 30(3) WA for the first 6 months of him moving to Spain. After that he will lose his residence in France and no longer fall within the scope of the WA. Hence, Brian would have access to his pensions rights while in Spain for only the first 6 months of him living there.

### **In the UK**

#### **If he goes to Spain, for 5 months, and then comes back to the UK**

If Brian goes to Spain for any period of less than 5 years and then comes back to the UK then, as explained in the above paragraph, his pension rights will be protected by the provisions of the WA up until he has lost his permanent residence in France through being absent from France for 5 years (Articles 11 and 15(3) WA).

If Brian were not a permanent resident then the same would apply but for a period of 6 months rather than 5 years.<sup>112</sup>

<sup>111</sup> Article 16 (1), European Parliament and Council Directive 2004/38.

<sup>112</sup> Article 13 (1), Withdrawal Agreement combined with Article 16(1), European Parliament and Council Directive 2004/38.

### **If he comes back to the UK from France when he retires and stays in the UK**

Again, as a permanent resident of France, Brian's pension rights will be protected by the WA until he has been absent from France for 5 years. Hence if he wishes to permanently move back to the UK then after 5 years have passed his pension rights will no longer be protected under the WA. There would at that point be no obligation under the Withdrawal Agreement<sup>113</sup> for the UK to treat the time Brian worked in France as part of his working life for the purposes of pension entitlement.

### **Sue: What rights does Sue have under the provisions of the Withdrawal Agreement?**

#### **For the purposes of residence in Spain or France**

Specifically in her own right, Sue does not fall under the provisions of Article 10 WA as she is a UK national and has not exercised her right to either reside or as a frontier worker in an EU Member State,<sup>114</sup> unless she does so before 31 December 2020.

Therefore, as Sue is not within the scope of Article 10, Articles 13-16 will not apply when she is considered in her own right. On this basis she would be unable to move to and reside in France or Spain relying on the WA.

#### **As a dependent of Brian**

As a dependent direct relative in the ascending line of Brian, Sue falls within Article 10(e) WA,<sup>115</sup> as she is a 'family member of the persons referred to in points (a) to (d)'. Brian falls under point (b) as he is a United Kingdom national who has exercised his right to reside in a Member State (France) in accordance with Union law before the end of the transition period, and continues to reside there. Sue has residence rights with Brian under Article 13 (2) WA, provided Brian meets the conditions set out there (employment/self-employment/student/independent means). Sue only has residence rights for as long as Brian remains resident in France.

As Brian has lived in France for more than 5 years, Sue is entitled to permanent residence in France.<sup>116</sup> This means that Sue can leave France for up to 5 years, without losing permanent residence status.<sup>117</sup>

Sue will not fall within the scope of the WA if Brian moves to Spain after 31 December 2020 (see further analysis above).

<sup>113</sup> There might, of course, be domestic legal obligations that apply.

<sup>114</sup> Articles 10 (1)(b) and 10 (1)(d), Withdrawal Agreement.

<sup>115</sup> Article 10 (e), Withdrawal Agreement; Article 2(2)(d), European Parliament and Council Directive 2004/38/EC.

<sup>116</sup> Article 15 (1), Withdrawal Agreement.

<sup>117</sup> Articles 11 and 15(3), Withdrawal Agreement.

### **For the purposes of access to healthcare (before 31 December 2020)**

Currently, until the end of the transition period (31 December 2020), Sue as a UK national still enjoys cross-border healthcare under EU law.

This means that if Sue were to move to either France or Spain before the end of the transition period, this would provide her with healthcare rights in that country until the end of the transition period, provided that she remains legally resident there and that she is drawing a UK state pension. If Sue were to receive treatment in France or Spain, she would be treated as if she were a French or Spanish national, under the principle of non-discrimination, due to the UK being the ‘competent’ state for her pension.

### **In France, if Brian is resident in France, and Sue moves after 31 December 2020**

Once the transition period ends, however, Sue’s rights to claim reciprocal healthcare will be subject to the provisions of the Withdrawal Agreement. As noted above, this is complex, as the Withdrawal Agreement creates two groups, those who have the rights to reside (Art. 13), be employed (Art.24) or self-employed (Art. 25), and to be treated equally (Art 23), and a different group of people who do not fall into the former category, but have rights under the coordination of the social security provisions.

Access to French healthcare falls within Title III of Part Two of the Withdrawal Agreement, entitled ‘Coordination of social security systems’. The scope rules for Title III are set out in Article 30 WA. They are based on the concept of being ‘subject to’ relevant social security legislation, which is to be determined by the conflict of law rules in Regulation 883/2004/EC.<sup>118</sup> UK nationals who are ‘subject to the legislation of a Member State at the end of the transition period’, and their family members,<sup>119</sup> fall within the scope of Title III, so long as they continue, without interruption to be in one of the situations in Article 30 (1) involving both a Member State and the UK at the same time.<sup>120</sup>

If the correct interpretation of Article 30 (1) (b) is that the *family member* does not have to be ‘subject to the legislation of a Member State at the end of the transition period’, as a family member of Brian, Sue would fall within the scope of Title III. Even if this were not the case, Sue would fall within the scope of Title III under the provision in Article 30 (3), because Sue has residence rights under Article 10 (1) (e) WA.

The provisions of Regulation 883/2004/EC<sup>121</sup> thus apply to Sue, including the rules on access to healthcare. As with Amanda’s family members, discussed above, the question of whether Sue is a family member of Brian is determined by national law.<sup>122</sup> Those who fall within the scope of Title III are covered by the ‘rules and objectives’ of EU law on coordination of social security.<sup>123</sup> These include the principle that where a person resides in the competent state, they will receive healthcare benefits in kind (medical treatment) according to the legislation of that state.

<sup>118</sup> According to the Commission Guidance Note, para 3.1.1, [https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/c-2020-2939\\_en.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/c-2020-2939_en.pdf).

<sup>119</sup> Article 31 (1)(b), Withdrawal Agreement.

<sup>120</sup> Article 30 (2), Withdrawal Agreement.

<sup>121</sup> Article 31 (1), Withdrawal Agreement.

<sup>122</sup> Article 1 (i), Regulation 883/2004.

<sup>123</sup> Article 31 (1), Withdrawal Agreement.

If Sue remains resident in the UK, she would not be covered by the WA for healthcare during a short visit to Brian in France.

### **In Spain, if Brian moves to Spain**

If Brian successfully argues that, despite moving to Spain, he keeps his permanent residence in France, he then falls into the personal scope of Title III of Part Two of the Withdrawal Agreement for five years. He will therefore benefit from the rights implemented by Article 31(1) WA. Those rights include rights of family members to receive healthcare in the Member State of residence as if they were covered by that Member State's healthcare system.<sup>124</sup>

### **In the UK, if Sue moves to France or Spain and then moves back to the UK**

Similarly, if Sue and Brian were to move to France or Spain, then back to the UK, for the first five years, they could access healthcare under the Withdrawal Agreement. This is on the basis that France is the Member State providing Brian's pension (see above).

### **For the purposes of access to her pension**

#### **In France**

Under the Withdrawal Agreement there are no entitlements to receive a pension if the pensioner moved after 31 December 2020 and is not otherwise within the scope of the Withdrawal Agreement. But Sue falls within the scope of Title III,<sup>125</sup> so she would be covered as Brian's family member. That means that the rules and objectives of Regulation 883/2004 apply.<sup>126</sup> Those rules include the principle of exportability of pensions.<sup>127</sup> Sue would thus be entitled to export her UK pension to France.

#### **In Spain**

If Brian successfully argues that, despite moving to Spain, he keeps his permanent residence in France, he then falls into the personal scope of Title III of Part Two of the Withdrawal Agreement for five years. He will therefore benefit from the rights implemented by Article 31(1) WA. Those rights include rights of family members to access pensions under Regulation 883/2004 (see above).

<sup>124</sup> Article 17, Regulation 883/2004/EC.

<sup>125</sup> Articles 30 (2) and 10, Withdrawal Agreement.

<sup>126</sup> Article 31 (1), Withdrawal Agreement.

<sup>127</sup> Article 7, Regulation 883/2004/EC.

***Scenario 4, Linda. UK citizens resident in an EU MS (or vice-versa) who go abroad (eg Canada) for a few years and then come back to the EU/UK***

Linda is a UK national who was a lawful resident of Germany for 4 years. After receiving a job opportunity in Canada in September 2020, Linda moved to Toronto to work there as a healthcare professional. She worked in Toronto for 3 and a half years before deciding that life in Canada was not for her. It is now March 2024 and Linda wishes to return to Germany to continue her residence there, however following the UK's withdrawal from the European Union, Linda is concerned about her rights in Germany as a UK Citizen under the Withdrawal Agreement.

**Legal Analysis:**

**What rights does Linda have under the provisions of the Withdrawal Agreement?**

**For the purposes of residence in Germany after returning from Canada**

**Does Linda fall within the personal scope of Title 1, Part Two of the WA?**

First, we have to consider whether Linda falls under the personal scope of Title 1, Part Two of the WA for the purposes of her residence rights. Article 10(1)(b) WA specifies that those who fall under the scope of Part Two, Title 1 are

United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter.<sup>128</sup>

Linda is a UK national and has exercised her right to reside in Germany in accordance with Union law for 4 years before the 31st December 2020 and must continue to reside in Germany thereafter in order to be covered by Article 10(1)(b) WA. However, Linda will be in Canada from September 2020 to March 2024 and therefore it must be established whether she satisfies the requirements for continued residence in Germany after the transition period.

Article 13(1) WA outlines the residence rights that Union and UK citizens are entitled to under the WA. It states that

Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in...Article 16(1) or Article 17(1) of Directive 2004/38/EC.<sup>129</sup>

Accordingly, Article 16(1) of Directive 2004/38/EC provides that

continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year.<sup>130</sup>

Therefore, Linda will be considered a resident of Germany and will fall under Article 10(1)(b) WA for the first 6 months of her being absent from Germany i.e. in Canada. After 6 months,

<sup>128</sup> Article 10 (1)(b), Withdrawal Agreement.

<sup>129</sup> Article 13 (1), Withdrawal Agreement.

<sup>130</sup> Article 16 (1), European Parliament and Council Directive 2004/38/EC.

she will lose her residence in Germany and no longer fall under Article 10(1)(b) WA and thus under the personal scope of Part Two, Title 1 of the WA. Given this, Linda's continuous stay in Canada for 3 and a half years would have caused her to lose her German residence status.

### **For the purposes Linda's social security rights under the WA after returning from Canada**

#### **Does Linda fall within the scope of Part Two, Title 3 of the WA?**

Since Linda does not fall under the scope of Part Two, Title 1 WA in terms of residence rights, she will also not fall within the Scope of Part Two, Title 3 of the WA governing the coordination of social security systems. This is because Article 30(3) WA states that Title 3

shall also apply to persons who...fall within Article 10 of this Agreement, as well as their family members and survivors.<sup>131</sup>

Therefore, not only will Linda not be able to reside in Germany after her return from Canada under the WA, she will also not be able to benefit from the protection of social security rights under the WA such as access to healthcare or pensions.

Therefore, Linda's residence and social security rights will be dependent solely on German national law.

### ***Scenario 5. Monica: UK Citizen who wants to go to the EU for a short stay but will need pre-planned healthcare***

Monica, 58, is a UK citizen who lives in the UK and has been on dialysis for 7 years now. Monica's son, Jack, works and permanently resides in Germany with his wife and child. Monica has not seen her son and his family for a long time and would like to go and stay with them in September for two weeks. While in Germany, Monica will require a dialysis treatment three times a week. Monica is worried that under the Withdrawal Agreement, she will not be able to access such planned healthcare.

#### **What rights does Monica have under the provisions of the Withdrawal Agreement?**

#### **Does Monica fall within the personal scope of Title 1, Part Two of the WA?**

While Monica does not fall within the scope of Title 1 by way of Article 30 WA, she does so by way of the special situations covered in Article 32 WA. Article 32(1) states that

The following rules shall apply in the following situations to the extent set out in this Article, insofar as they relate to persons not or no longer covered by Article 30.<sup>132</sup>

<sup>131</sup> Article 30 (3), Withdrawal Agreement.

<sup>132</sup> Article 32(1), Withdrawal Agreement.

One of the situations covered is that of a person who has 'requested authorisation to receive a course of planned healthcare treatment' in another Member State/UK, before the end of the transition period (31 December 2020).<sup>133</sup>

Therefore, as long as Monica requests authorisation from the competent State before 31 December 2020, the UK, to receive healthcare in Germany, she will fall within the scope of the social security coordination part of the Withdrawal Agreement.

### **Will Monica be able to access pre-planned healthcare in Germany?**

After having established that she falls within the scope of the relevant part of the Withdrawal Agreement, so long as she has requested authorisation before the end of transition, whether Monica will have access to kidney dialysis treatment while in Germany is determinable by Article 32(1)(b) WA. This states that

the rules set out in Articles 20 and 27 of Regulation (EC) No 883/2004 shall continue to apply to persons who, before the end of the transition period, had requested authorisation to receive a course of planned health care treatment pursuant to Regulation (EC) No 883/2004, until the end of the treatment. The corresponding reimbursement procedures shall also apply even after the treatment ends. Such persons and the accompanying persons shall enjoy the right to enter and exit the State of treatment...<sup>134</sup>

Therefore, so long as Monica requested authorisation to receive kidney dialysis in Germany from the UK before the 31/12/2020 pursuant to Regulation No 883/2004, then she will have access to that treatment pursuant to Article 20 of the Regulation. Article 20 of Regulation 883/2004 states that

1. ...an insured person travelling to another Member State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent institution.
  
2. An insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving the treatment appropriate to his condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though he were insured under the said legislation. The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he cannot be given such treatment within a time-limit which is medically justifiable, taking into account his current state of health and the probable course of his illness.<sup>135</sup>

Therefore, after receiving authorisation from the UK, Monica will be provided with kidney dialysis treatment by the German healthcare institution, provided for on behalf of the UK. This treatment must be provided for in accordance with German legislation, as though Monica were insured under German legislation. While there is no strict obligation for the UK to provide authorisation, it has to do so if the treatment in question is provided for by the State Monica resides and if she cannot receive it in a time-limit in the UK which is medically justifiable. Therefore, as long as Monica is receiving kidney dialysis in the UK, which she must be, then

<sup>133</sup> Article 32(1)(b), Withdrawal Agreement.

<sup>134</sup> Article 32(1)(b), Withdrawal Agreement.

<sup>135</sup> Article 20 (1) and (2), Regulation 883/2004.

she will receive authorisation since she would not be able to go 2 weeks without receiving such dialysis.

Note that Article 32(1)(b) WA provides that the person must merely request authorisation before the end of the transition period. Therefore, even if Monica wishes to visit her family in Germany after 31/12/2020, she will be able to do so as long as she requested the dialysis treatment before that date.

The wording of Article 32(1)(b) WA does not explicitly cover a situation where, if planned healthcare were authorised, it would include an ongoing course of treatment of indeterminate duration. Article 32(1)(b) WA states that persons will be entitled to receive such healthcare so long as they request to receive, before the end of the transition period, 'a course of planned healthcare treatment'. If a 'course' of treatment includes ongoing dialysis for an indeterminate duration, then Monica would be able to receive it every time she goes to Germany. However, if a 'course' of treatment means only a planned series of visits to a specific dialysis clinic/hospital only for the duration of Monica's stay (two weeks), then it would mean she would have to receive authorisation on each occasion she went to Germany for a new, separate course of treatment. Thus, under this interpretation, she would no longer be able to request authorisation after 31/12/2020 under the WA.

The latter interpretation is, in our view, the correct one. A 'course of planned healthcare' treatment would indicate a treatment for a specific amount of time and to start and end on specific dates i.e. for the two weeks in September during which Monica will be in Germany. A more indeterminate entitlement to seek authorisation for 'a course of planned healthcare treatment' at unknown times and not specified at the time authorisation was sought is unlikely to be intended by the wording of the Withdrawal Agreement. In any event, in practice the competent healthcare system (here the UK's) would have to give such indeterminate and open-ended authorisation in response to a request before 31 December 2020. We are not aware of a Member State that would give such authorisation: the UK certainly would not.

### ***Scenario 6: Jack. Residence rights conditional on acquiring 'settled status' under national law if required by state***

Jack and his wife, Hannah, are retirees, who have resided in Spain for the past six years. Having just purchased a property, they plan to spend the foreseeable future there, past the end of the transition period.

It is now February 2021, and the Spanish government have introduced new legislation, requiring all non-EU citizens to apply for a new, digital residence document if they wish to live in Spain.

Jack wishes to know whether he is already covered by the Withdrawal Agreement, as he has lived in Spain for more than five years, and also if he is required to apply for a new residence document. He wishes to know what he must do and what his rights are under the Withdrawal Agreement.

### **What are Jack and Hannah's rights under the Withdrawal Agreement?**

As Jack and Hannah moved to Spain before the end of the transition period, as long as they continue to reside in Spain, they fall within the personal scope of the Withdrawal Agreement. If they move back to the UK, they will no longer be able to rely on the Withdrawal Agreement. Equally, if they move to another EU country, or to another EU country and back to Spain, they will no longer fall within the protection of the Withdrawal Agreement, and will be reliant only on any provisions made in a future EU-UK (trade) agreement, or other agreement.

However, if Spain chooses to introduce national legislation, which requires UK nationals to apply for a new residence status, Jack will be subject to the provisions in Article 18.<sup>136</sup>

Article 18 allows Member States to introduce a new residence status, which confers rights under Title II on UK nationals. For persons residing in the Member State before the end of the transition period, the deadline for submitting the application must be no later than 30 June 2021.<sup>137</sup> Member States may require resident UK nationals to have document evidencing such status, which may be in a digital form. In order to reside in Spain and acquire such residence status, Jack must apply in accordance with the relevant Spanish law.

<sup>136</sup> Article 18, Withdrawal Agreement.

<sup>137</sup> Article 18 (1) (b), Withdrawal Agreement.