

# **Comparison of the EU and UK negotiating draft legal texts concerning access to cross-border healthcare and related rights post-transition**

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## Summary comparing key relevant aspects of the positions of the UK and EU:

Compatible	Potentially compatible	Not compatible
Access to necessary health-care		
during short visits not for business purposes	Eligibility document to access necessary health-care during short visits not for business purposes	
	Certain healthcare treatments must be pre-agreed e.g. kidney dialysis	
Right of temporary entry on business grounds and access to necessary health care while in host state on business grounds		Power to impose visa requirement for short term visits involving paid activity
Access to necessary health care while in state of work for frontier workers		
No obligation to extend visas on medical grounds		
Principle of exportability of pensions		Pensioners who retire abroad (in one of the Parties) receive healthcare abroad so long as would be entitled to such healthcare under the legislation of the country granting their state pension
Principle of aggregation of periods		
		Processes for practical implementation and administration based on EU law/ new set of processes
Not enforceable by individuals		

**Note:** this analysis does not take account of any rights that might be held under the Withdrawal Agreement. Please see the accompanying paper HGAB, *Scenario Analysis: Access to Crossborder Healthcare and Related Rights under the Withdrawal Agreement* June 2020. The EU position is explicit on the relationship between the two Agreements: 'Article FINPROV.2: Relation to the Withdrawal Agreement This Agreement shall apply without prejudice to the Withdrawal Agreement.' The UK position contains no similar provision.

**Further note:** neither draft text makes provision about the relationship between this Agreement and bilateral social security agreements. EU law provides that it takes precedence over such bilaterals except where the bilateral agreement is more favourable for the beneficiary.<sup>1</sup>

## Scenario 1: Isabella (visitor to UK, non-emergency treatment/ambulant care)

Isabella is an Italian citizen, resident in Spain, who is on a four-week holiday with her husband in London in June 2021. Three weeks into their holiday, while in London, Isabella trips and hurts her ankle. Isabella feels slight pain and discomfort, however she is still able to walk.

What are Isabella's rights under the proposed future EU-UK relationship to receive treatment from the NHS?

### UK position

#### 1. Does Isabella fall within the personal scope of either the UK Draft FTA or the UK Draft Agreement on Social Security?

As a tourist, Isabella would not fall within the UK Draft FTA.

Assuming that Isabella is covered by the Spanish health care system ('subject to the legislation of one or more Party'), she would however fall within the personal scope of the UK Draft Agreement on Social Security.<sup>2</sup>

#### 2. What are Isabella's rights to healthcare under the UK Draft Agreement on Social Security?

Article 27 of the UK Draft Agreement on Social Security, provides that the UK shall afford healthcare to a Union eligible person<sup>3</sup> during a stay by the person in the UK on terms no less favourable than those that would apply to a UK where the following criteria are met.

The healthcare must be medically necessary, in the opinion of the institution providing the healthcare, having regard to the nature of the healthcare and the expected length of the stay.<sup>4</sup>

Secondly, the person must not travel to the UK for the purpose of receiving that healthcare<sup>5</sup>. Thirdly, a valid Union eligibility document must be produced in respect of the person<sup>6</sup>.

Isabella did not travel to the UK to receive healthcare, but might not satisfy the requirement that treatment is judged to be medically necessary. Although Isabella feels slight pain and discomfort, she is not only still able to walk but also will be returning back to Spain after a week. Therefore treating Isabella's ankle would probably be regarded as not medically necessary by the NHS institution seeing her, although this will be a matter of the institution's opinion. Thus, it is likely that Isabella would not have any healthcare rights under the UK Draft Agreement on Social Security in this situation.

### EU position

#### 1. Does Isabella fall within the personal scope of the Protocol on Social Security Coordination within the EU Draft FTA?

Article MOBI.SSC.2 of the Protocol outlines who falls within its personal scope. This includes 'persons benefiting from the mobility provisions under Title XI Mobility of Natural Persons.'<sup>7</sup> Thus, it must be established whether Isabella satisfies the requirements of Article MOBI.4:

The Parties shall provide for reciprocal visa-free travel for citizens of the Union and citizens of the UK when travelling to the territory of the other party for short stays... which shall be at least 90 days.<sup>8</sup>

<sup>2</sup> UK Draft Social Security Agreement, Article 2.

<sup>3</sup> A union eligible person must have a union eligibility document. See UK Draft Social Security Agreement, Article 26.

<sup>4</sup> UK Draft Social Security Agreement, Article 27(a).

<sup>5</sup> UK Draft Social Security Agreement, Article 27(b).

<sup>6</sup> UK Draft Social Security Agreement, Article 27(d). Isabella would need a valid Union eligibility document, details of which are not specified. It is possible that the UK would recognise EHICs for this purpose.

<sup>7</sup> EU Draft Social Security Protocol, Article MOBI.SSC.2(a).

<sup>8</sup> EU Draft FTA, Article MOBI.4(1).

Since Isabella is a Union citizen and is in the UK for only a short stay of four weeks, she falls within the visa-free travel requirements and thus falls within the personal scope of the EU Draft Protocol on Social Security.

## **2. What are Isabella's healthcare rights under the EU Draft Protocol on Social Security Coordination?**

Under Article MOBI.SSC.15 of the Protocol, Isabella would be entitled to 'sickness benefits'<sup>9</sup> 'which become necessary on medical grounds during' her stay in the UK.<sup>10</sup> Isabella did not travel to the UK to receive healthcare, but, again, may not satisfy the requirement that treatment is judged to be medically necessary due to how minor her injury is and the fact that she will be returning to Spain in a week.

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<sup>9</sup> EU Draft Social Security Protocol, Article MOBI.SSC.3(a).

<sup>10</sup> EU Draft Social Security Protocol, Article MOBI.SSC.15.

## Scenario 2: Dani (temporary service provider in UK, hospital care needed after visa ends)

Dani is a Spanish citizen, who runs a business which sells specialist medical equipment to hospitals across Europe. Part of his business also includes the installation of this equipment, which Dani oversees himself, as he has the requisite professional qualifications. It is February 2021, and Dani secures a contract to supply and install medical equipment in a new NHS trust hospital, as this equipment cannot be supplied by a UK-based company on terms as competitive as Dani is offering.

### What are Dani's rights under the proposed future EU-UK relationship to move to the UK?

Dani subsequently moves to the UK on a temporary visa of 90 days. However, as Dani is coming to the end of his stay, he falls ill and is admitted to intensive care in an NHS hospital. Dani is recovering, but his doctors advise that he be kept in hospital for another week, although his visa ends in 3 days.

What are Dani's rights under the proposed future EU-UK relationship to receive medical treatment in the UK, and also his right to extend his visa to receive urgent medical care?

### UK position

#### 1. Does Dani fall within the personal scope of either the UK Draft FTA or the UK Draft Agreement on Social Security?

Dani would fall within Article 11.2(2) of the UK Draft FTA as a 'contractual services supplier', which is defined by Article 11.1. This is because he is a natural person who is being contracted by an enterprise (the respective NHS trust) in the UK, despite having no establishment there, and he is supplying an installation service which requires his presence in the UK on a temporary basis, to fulfil the contract.

Dani would also fall within the scope of the UK Draft Agreement on Social Security, which covers 'persons who are, or have been, subject to the legislation of one or more Party'.<sup>11</sup> Since Dani is ordinarily a Spanish resident, he is subject to the legislation of Spain concerning NHS healthcare.

#### 2. What are Dani's rights under the UK Draft FTA?

Article 11.2.1 would allow natural persons meeting UK immigration requirements who provide a service to enter and stay in the UK for business purposes on a temporary basis and would ensure transparency in the process for granting the right to enter and stay. Under Article 11.3 (1), the UK would be obliged to grant Dani rights to entry and temporary stay, so long as he complied with UK immigration measures. Article 11.4 provides that there must be transparency in relation to 'making publicly available information relating to the entry and temporary stay by natural persons for business purposes of the other Party. Such information shall be made publicly available no later than 180 days after the entry into force of this Agreement'. This would allow the UK to make a specific set of circumstances surrounding Dani's time in the UK, with which he must comply. The UK would be permitted to require a visa.<sup>12</sup> However, Article 11.10.4 provides that this period must not be more than 12 months in any 24 month period or for the duration of the contract, whichever is less. Dani would have a minimum right to stay in the UK for the duration of the contract, unless it was more than a 12 month period.

However, Article 11.10.4 also provides that 'either party may extend this length of stay at their discretion, up to a maximum of 24 months'. This provision is permissive, not mandatory. Dani would have no entitlement to have his visa extended under the terms of the Agreement. In order to extend his lawful stay in the UK, he would have to rely on domestic law, and the discretionary powers given to the UK to extend a visa, in that regard.

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<sup>11</sup> UK Draft Social Security Agreement, Article 2.

<sup>12</sup> UK Draft FTA, Article 11.4.2(a).

There is no express provision in the UK Draft FTA for extending an entitlement to stay (whether with or without a visa) on medical grounds. However, Article 11.4.2(f) (Transparency) does provide that both parties must make publicly available the information relating to conditions for any available extensions or renewal.<sup>13</sup> This must be made available no later than 180 days after the entry into force of this Agreement<sup>14</sup>, and therefore, by the time Dani is seeking to move to the UK, these conditions would be available to him.

### 3. What are Dani's rights to healthcare under the UK Draft Agreement on Social Security?

Article 27 provides that the UK shall afford healthcare to a Union eligible person during a stay by the person in the UK on terms no less favourable than those that would apply to a UK where the following criteria are met.

Firstly, the healthcare is medically necessary, in the opinion of the institution providing the healthcare, having regard to the nature of the healthcare and the expected length of the stay.<sup>15</sup> Secondly, the person did not travel to the UK for the purpose of receiving that healthcare<sup>16</sup>. Dani would satisfy these requirements as he needs urgent life-saving treatment, for an illness which happened whilst he was in the UK, and is in no way related to his application for a temporary stay in the UK.

The final two criteria require that in a case where healthcare is listed in Annex B, the person obtained agreement in advance from the institution providing the healthcare<sup>17</sup>, and a valid Union eligibility document is produced in respect of the person<sup>18</sup>. Dani would need a valid Union eligibility document, details of which are not specified. It is possible that the UK would recognise EHICs for this purpose. Dani does not require any pre-arranged treatment under Annex B<sup>19</sup>, so he would have access to emergency healthcare in the UK.

## EU position

### 1. Does Dani fall within the scope of the EU Draft Protocol on Social Security Coordination?

Article MOBI.4.1 of the EU Draft FTA states that both Parties will provide visa-free travel when their citizens travel to the territory of the other party for short stays (as defined in the Parties' domestic legislation), which shall be at least 90 days in any 180 day period.<sup>20</sup> Dani's intended stay would fall under this provision, as his stay is only 90 days. If this were the case, he would therefore not require a visa.

However, Article MOBI.4.2 goes on to provide that:

'Member States may individually decide to impose a visa requirement on citizens of the UK carrying out a paid activity during their short-term visit in accordance with Article 6(3) of Regulation (EU) 2018/1806 of the European Parliament and the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

'For that category of persons, the UK may decide to impose a visa requirement on the citizens of each Member State individually, in accordance with its domestic legislation.'<sup>21</sup>

In order to understand Article MOBI.4.2, we need to consider Regulation 2018/1806.

Regulation 2018/1806 lists the third countries whose nationals require a visa when crossing the external borders of the EU, and also the third countries whose nationals are exempt from this requirement. Article 3(1)<sup>22</sup> of the Regulation provides that nationals of countries listed in Annex I<sup>23</sup>

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<sup>13</sup> UK Draft FTA, Article 11.4.2(f).

<sup>14</sup> UK Draft FTA Article 11.4.1.

<sup>15</sup> UK Draft Social Security Agreement, Article 27(a).

<sup>16</sup> UK Draft Social Security Agreement, Article 27 (b).

<sup>17</sup> UK Draft Social Security Agreement, Article 27(c).

<sup>18</sup> UK Draft Social Security Agreement, Article 27(d).

<sup>19</sup> UK Draft Social Security Agreement, Annex B.

<sup>20</sup> EU Draft FTA, Article MOBI.4.1.

<sup>21</sup> EU Draft FTA, Article MOBI.4.2.

<sup>22</sup> Regulation (EU) 2018/1806, Article 3(1).

<sup>23</sup> Regulation (EU) 2018/1806, Annex I.

of the Regulation (a list of over 100 countries) shall be required to be in possession of a visa when crossing the external borders of the Member States.

The exceptions to this rule are found in Article 4, which provides that nationals of third countries listed in Annex II<sup>24</sup> (a list of some 60 of the countries listed in Annex I) shall be exempt from the requirement set out in Article 3(1) for stays of no more than 90 days in any 180-day period,<sup>25</sup> and also exempts certain categories of people (local border traffic permit holders; school children on school visits) who otherwise fall within Annex I<sup>26</sup>.

Article 6 also provides further exceptions to the visa requirement in Article 3, as well as exceptions to the exemptions found in Article 4.

Article 6(3), which is required to be taken into account in Article MOBI.4.2, provides that 'a Member State may provide for exceptions from the exemption from the visa requirement provided for in Article 4 as regards persons carrying out a paid activity during their stay.'<sup>27</sup> This double negative (exceptions from an exemption) essentially means that Member States are able to require a visa for people who are carrying out a paid activity, despite the fact that they would otherwise fall under the exemptions set out in Article 4. This will likely have the most effect on nationals who fall under Annex II and are in the Member State on a short stay basis.

At present the UK is not included in Regulation 2018/1806, and we do not yet know if the UK will be listed in Annex II by amending the Regulation, once the transition period ends. If the UK were not so listed, the power in Article MOBI.4.2 to impose a visa requirement on citizens carrying out a paid activity during a short term visit would not apply to Dani.

However, the reference to Regulation 2018/1806 in Article MOBI.4.2 suggests that the EU is likely to include the UK in the Annexes to that Regulation. If the UK were to be listed in Annex II, Article 6(3) and Article MOBI.4.2 would allow each Member State to individually impose a visa requirement on UK citizens carrying out a paid activity during their short-term stay. If Spain were to impose such a visa requirement, the UK would be permitted, under Article MOBI.4.2, to reciprocate, and in turn require a visa for Spanish citizens coming to the UK on a short-stay basis to carry out a paid activity. On this basis Dani would require a visa to enter the UK.

## **2. What are Dani's rights to access healthcare under the EU Draft Protocol on Social Security Coordination?**

Article MOBI.SSC.2.1.b states that social security provisions apply to 'persons benefiting from the mobility provisions under Title XI Mobility of Natural Persons'<sup>28</sup>. Dani would fall within Article MOBI.4.1 (in Title XI), so he would also fall within the scope of the social security provisions.

As Dani falls under the scope of the social security provisions, Article MOBI.SSC.15 of the Draft Protocol on Social Security Coordination would apply to him. Article MOBI.SSC.15 covers where UK and EU citizens may receive healthcare benefits when on a visit ('stay') to the other jurisdiction. It would allow persons covered by the health system ('the competent institution') of the UK/an EU Member State staying in an EU Member State/the UK to be entitled to healthcare benefits which become necessary on their stay, which are provided on behalf of the competent institution (usually the NHS of the state of residence) by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though the persons concerned were insured under the said legislation<sup>29</sup>. Therefore, so long as Dani is covered by the Spanish health system, he would be able to receive healthcare in the UK, as if he were covered by (part of) the UK health system, after falling ill.

There is no express provision in the EU Draft FTA, or Draft Protocol on Social Security Coordination, for extending an entitlement to stay (whether with or without a visa) on medical grounds.

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<sup>24</sup> Regulation (EU) 2018/1806, Annex II.

<sup>25</sup> Regulation (EU) 2018/1806, Article 4(1).

<sup>26</sup> Regulation (EU) 2018/1806, Article 4(2).

<sup>27</sup> Regulation 2018/1806, Article 6(3).

<sup>28</sup> EU Draft FTA, Article MOBI.SSC.2.1(b).

<sup>29</sup> EU Draft FTA, Article MOBI.SSC.15.

## Scenario 3: Susan (UK resident, dialysis treatment on visit to EU)

Susan, 58, is a UK citizen who lives in the UK and has been on dialysis for 7 years now. Susan's son, Eric, works and permanently resides in Germany with his wife and child. Susan has not seen her son and his family for a long time and would like to go and stay with them in the New Year (January 2021) for two weeks. While in Germany, Susan will require dialysis treatment three times a week. Susan is worried that under the new agreement between the UK and the EU, she will not be able to access such planned healthcare.

### UK position

#### 1. Does Susan fall within the personal scope of either the UK Draft FTA or the UK Draft Agreement on Social Security?

As a visitor not providing a business service, Susan would not fall within the personal scope of Chapter 11 of the UK Draft FTA as she does not satisfy the requirements. Susan does however fall within the scope of the UK Draft Agreement on Social Security, which covers 'persons who are, or have been, subject to the legislation of one or more Party'.<sup>30</sup> Since Susan is ordinarily a resident of the UK, she is subject to the legislation of the UK concerning NHS healthcare. Susan thus falls within the personal scope of the UK Draft Social Security Agreement.

#### 2. What are Susan's healthcare rights under the UK Social Security Agreement?

Under Article 28 of the Draft Social Security Agreement, 'a Member State shall afford healthcare to a UK eligible person during a stay'<sup>31</sup> under certain conditions. If the person required healthcare that is listed in Annex B of the agreement, which includes kidney dialysis,<sup>32</sup> then the person must obtain an agreement in advance from the institution providing the healthcare.<sup>33</sup> Susan would have to ensure is that she is 'a UK eligible person', and that she has a 'UK eligibility document' issued by the UK indicating her eligibility for healthcare abroad.<sup>34</sup> There is no obligation under the Agreement to provide such a document, nor details on who would be entitled to such a document: this would be solely a matter of UK law. If Susan were able to secure this document, she would also have to ensure she has an agreement in advance obtained from the German healthcare institution that would be providing her dialysis treatment. If she did not obtain such an agreement, she would not be able to access the treatment.

If Susan did obtain agreement in advance, and secured a 'UK eligibility document', under Article 29 (2) of the Draft Social Security Agreement, the UK would be obliged to reimburse Germany for the costs of the dialysis, at a cost not exceeding that applicable if the dialysis had been received by someone covered by the German health system,<sup>35</sup> with the exception of any charges which German nationals receiving dialysis would normally incur. Susan would have to incur those latter charges herself. The question of how the reimbursement of costs would take place in practice is left for later agreement.<sup>36</sup>

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<sup>30</sup> UK Draft Social Security Agreement, Article 2.

<sup>31</sup> UK Draft Social Security Agreement, Article 28.

<sup>32</sup> UK Draft Social Security Agreement, Annex B(1).

<sup>33</sup> UK Draft Social Security Agreement, Article 28(c).

<sup>34</sup> UK Draft Social Security Agreement, Article 26.

<sup>35</sup> UK Draft Social Security Agreement, Article 29 (3).

<sup>36</sup> UK Draft Social Security Agreement, Article 29 (4).

## EU position

### 1. Does Susan fall within the personal scope of the Protocol on Social Security Coordination within the EU Draft FTA?

Article MOBI.SSC.2 of the Protocol outlines who falls within its personal scope. This includes 'persons benefiting from the mobility provisions under Title XI Mobility of Natural Persons.'<sup>37</sup> Thus, it must be established whether Susan falls within Title XI. Title XI provides that

the Parties shall provide for reciprocal visa-free travel for citizens of the Union and citizens of the UK when travelling to the territory of the other party for short stays... which shall be at least 90 days.<sup>38</sup>

Since Susan will be travelling to Germany for only a short stay of two weeks, she would fall within the visa-free travel requirements and thus within the personal scope of the EU Draft Protocol on Social Security.

### 2. What are Susan's healthcare rights under the EU Draft Protocol on Social Security Coordination?

Under Article MOBI.SSC.15 of the Protocol, Susan would be entitled to 'sickness benefits'<sup>39</sup> 'which become necessary on medical grounds during' her stay in Germany.<sup>40</sup> Unlike in the UK's Draft Agreement, there is no mention here of whether certain procedures that need to be pre-planned, such as kidney dialysis, fall within this definition. Therefore it is difficult to interpret whether Susan would in fact be able to have her dialysis treatment under this Agreement, since it would need to 'become necessary on medical grounds during' her stay. The key words '*become*' and '*during*' may indicate that the need for healthcare cannot be pre-existing and must emerge during the stay. Under such an interpretation, kidney dialysis would not fall within this provision, and Susan would have no entitlement to receive the kidney dialysis under the Agreement.

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<sup>37</sup> EU Draft Social Security Protocol, Article MOBI.SSC.2(a).

<sup>38</sup> EU Draft FTA, Article MOBI.4(1).

<sup>39</sup> EU Draft Social Security Protocol, Article MOBI.SSC.3(a).

<sup>40</sup> EU Draft Social Security Protocol, Article MOBI.SSC.15.

## Scenario 4: Tom (UK pensioner moves to Spain)

Tom, 65, is a UK national who has worked as an NHS nurse in the UK for 20 years. Before that, he worked in Portugal for 10 years. In March 2021, Tom retires and moves to Spain where he becomes a permanent resident under Spanish national law. Shortly after his move to Spain, Tom starts to develop Alzheimer's Disease and needs to seek treatment. Tom is worried about whether he will be able to access healthcare treatment in Spain under the UKEU Agreement. He is also concerned as to whether he will be able to access his UK state pension in Spain. Tom's family are worried about Tom's access to the NHS if he returns to the UK to visit them, for example, for an extended holiday, or if the family decide to bring Tom home for treatment.

### UK position

#### 1. Does Tom fall within the personal scope of either the UK Draft FTA or the UK Draft Agreement on Social Security?

As a pensioner, Tom would not fall within the personal scope of Chapter 11 of the UK Draft FTA as he does not satisfy the requirements. Tom may however fall within the scope of the UK Draft Agreement on Social Security, which covers 'persons who are, or have been, subject to the legislation of one or more Party'.<sup>41</sup> Although Tom may not be 'subject to the legislation' of Spain, he 'has been' subject to the legislation of the UK, and of Portugal, and thus this is sufficient for him to fall under the personal scope of the Agreement.

#### 2. If Tom does fall within its personal scope, what are Tom's healthcare rights under the UK Draft Social Security Agreement?

Article 26 of the Draft Social Security Agreement defines the term 'stay' for the purposes of Chapter 4 on Necessary Healthcare. It defines stay to mean 'temporary residence'.<sup>42</sup> This indicates that Tom's permanent residency and retirement in Spain does not amount to a 'stay' and therefore he will not be covered by Chapter 4 of the Draft Social Security Agreement on Necessary Healthcare.

He would only have entitlements to healthcare under Spanish national law.

#### 3. If Tom does fall within its personal scope, is Tom able to access his UK and Portuguese state pensions under the UK Draft Social Security Agreement?

Article 17 of the UK Draft Social Security Agreement provides for the principle of exportability.

This means that:

1. A person who would be entitled to receive an old age pension under the legislation of one Party...shall be entitled to receive that old age pension whilst they are in the territory of another Party.
2. Where, under the legislation of one Party, an increase of any old age pension would be payable to a person...it shall be payable while they are in the territory of another Party.<sup>43</sup>

Therefore, since the UK requires at least 10 years of employment in order to receive a state pension,<sup>44</sup> Tom would be entitled to receive a State pension from the UK following his 20 years of employment and contributions to the UK social security system. Accordingly, he would also be entitled to receive that pension in the territory of Spain. Furthermore, if Tom's pension were to be updated yearly under UK legislation, this increase would also be paid to him while in Spain.

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<sup>41</sup> UK Draft Social Security Agreement, Article 2.

<sup>42</sup> UK Draft Social Security Agreement, Article 26.

<sup>43</sup> UK Draft Social Security Agreement, Article 17.

<sup>44</sup> <https://www.gov.uk/new-state-pension/how-its-calculated#:~:text=You'll%20usually%20need%20at,10%20and%2035%20qualifying%20years.>

In terms of his employment and contributions to the social security system in Portugal, Portugal requires at least 15 years of employment and contributions to qualify for a state pension.<sup>45</sup> Since Tom only worked 10 years in Portugal, under Portuguese law, he would not be entitled to a state pension from Portugal.

However, Tom would be able to rely on Article 16 of the UK Draft Social Security Agreement. This provides that pensioners who fall within the scope of the Agreement would benefit from the principle of aggregation of periods. The principle of aggregation means that:

1. A competent institution of a Party shall...take into account equivalent periods of insurance, employment, self-employment or residence completed under the legislation of any other relevant Party as though they were completed under its own legislation.<sup>46</sup>

This means that when Tom applies to receive his pension at the last place he worked, i.e. the UK, then the UK would have to take into account his previous 10 year period of employment in Portugal, completed under the legislation of Portugal, as though he completed this period under the UK legislation. In other words, the UK would aggregate his period of 20 years of employment in the UK together with his period of 10 years of employment in Portugal and calculate his state pension based on the total of 30 years. This provision, coupled with the principle of exportability, would allow him to receive a State pension, commensurate with his employment in the UK and Portugal, whilst retired in Spain.

## EU position

### 1. Does Tom fall within the personal scope of the Protocol on Social Security Coordination within the EU Draft FTA?

Article MOBI.SSC.2 of the Protocol outlines who falls within its personal scope. This includes

‘Union or UK citizens who receive a pension or pensions under the legislation of one or more Parties.’<sup>47</sup>

Since Tom is a UK citizen who receives a pension under the legislation of the UK, he would fall within the scope of the Protocol.

### 2. What are Tom’s healthcare rights under the EU Draft Protocol on Social Security Coordination?

Article MOBI.SSC.1 refers to Article 1 of Regulation 883/2004 for its definitions. Regulation 883/2004 defines the term ‘stay’ to mean ‘temporary residence.’<sup>48</sup> This indicates that Tom’s permanent residence and retirement in Spain does not amount to a ‘stay’ and therefore he would not be covered by Article MOBI.SSC.15 on matters concerning benefits, including sickness benefits, which are only relevant to ‘stays’.

However, while Tom would not fall under Article MOBI.SSC.15 regarding necessary healthcare during short stays, Tom would be entitled to sickness benefits under Article MOBI.SSC.19 as a pension claimant. Article MOBI.SSC.19 states that

A person who receives a pension...under the legislation of one or more Parties and who is not entitled to benefits in kind under the legislation of the Party of residence shall nevertheless receive such benefits for himself/herself and the members of his/her family, in so far as he/she would be entitled thereto under the legislation of the Party or of at least one of the Parties competent in respect of his/her pensions, if he/she resided in that Party.<sup>49</sup>

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<sup>45</sup> <https://ec.europa.eu/social/main.jsp?catId=1125&langId=en&intPagId=4740>.

<sup>46</sup> UK Draft Social Security Agreement, Article 16.

<sup>47</sup> EU Draft Social Security Protocol, Article MOBI.SSC.2(b).

<sup>48</sup> Regulation 883/2004, Article 1(k).

<sup>49</sup> EU Draft Social Security Protocol, Article MOBI.SSC.19(1).

Tom is a person who receives a pension under the legislation of the UK. If he were not entitled to sickness benefits under the legislation of the Party of his residence, that is Spain, under Article MOBI.SCC.19, he would nevertheless be entitled to receive healthcare ('sickness benefits') in Spain so long as he would be entitled to receive healthcare under the legislation of the Party competent in respect of his pensions i.e. the UK, if he resided in the UK. Therefore, since Tom would have access to the NHS as a pensioner residing in the UK, he would have access to healthcare in Spain under this provision. These healthcare costs would be borne by the UK.<sup>50</sup>

The UK position does not have an equivalent provision to this.

### **3. Is Tom able to access his UK and Portuguese state pensions under the EU Draft Protocol on Social Security Coordination?**

Article MOBI.SSC.7 of the Protocol provides for the principle of exportability:

1. The Parties shall ensure the application of the principle of exportability of cash benefits in accordance with paragraph 2.<sup>51</sup>

Therefore, since Tom would be entitled to receive an old age pension in the UK following his 20 years of employment and contributions to the UK social security system, he would also be entitled to receive that pension in the territory of Spain.

Again, the position in terms of his employment in Portugal is akin to the UK position. Portugal requires at least 15 years of employment and contributions to qualify for a state pension.<sup>52</sup> Since Tom only worked 10 years in Portugal, he would not be entitled to a state pension under Portuguese law, and therefore would not be entitled to receive that pension in Spain either.

However, Tom would be able to rely on Article MOBI.SSC.6 of the EU Draft Social Security Protocol. This provides that pensioners who fall within the scope of the agreement will benefit from the principle of aggregation of periods. Article MOBI.SSC.6 provides that

'The competent Party shall...take into account periods of insurance, employment, selfemployment or residence in the other Party as though they were periods completed under the legislation which it applies.'<sup>53</sup>

This provision means that when Tom applies to receive his pension from the last place he worked, i.e. the UK, then the UK would have to take into account his previous 10 year period of employment in Portugal, completed under the legislation of Portugal, as though he completed this period under the UK legislation. In other words, the UK would be obliged to aggregate his period of 20 years of employment in the UK together with his period of 10 years of employment in Portugal and calculate his state pension based on the total of 30 years. This, coupled with the principle of exportability, would allow Tom to receive a State pension taking into account his employment in the UK and Portugal whilst retired in Spain.

### **4. What are Tom's healthcare rights in the UK if he returns for temporary visits to see his family, or if the family decided to bring him home to receive treatment?**

Although Tom is a national of the UK, as a permanent resident of Spain he would no longer automatically be entitled to medical treatment under normal NHS rules. This is because the NHS is a residence-based healthcare system.<sup>54</sup> Therefore, to access the NHS other than on terms that apply to visitors to the UK,<sup>55</sup> he would have to gain such rights under the UK-EU agreement.

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<sup>50</sup> EU Draft Social Security Protocol, Article MOBI.SCC.19(2)(a).

<sup>51</sup> EU Draft Social Security Protocol, Article MOBI.SSC.7.

<sup>52</sup> <https://ec.europa.eu/social/main.jsp?catId=1125&langId=en&intPagId=4740>.

<sup>53</sup> EU Draft Social Security Protocol, Article MOBI.SSC.6.

<sup>54</sup> <https://www.nhs.uk/using-the-nhs/healthcare-abroad/moving-abroad/planning-yourhealthcare/#:~:text=If%20you're%20moving%20abroad%20on%20a%20permanent%20basis%2C%20you,card%20to%20access%20healthcare%20abroad.>

<sup>55</sup> For example to A&E.

## UK position

### 1. Does Tom fall within the personal scope of either the UK Draft FTA or the UK Draft Agreement on Social Security?

As a visitor, not providing a service, Tom would not fall within the personal scope of Chapter 11 of the UK Draft FTA as he does not satisfy the requirements. Tom may however fall within the scope of the UK Draft Agreement on Social Security, which covers 'persons who are, or have been, subject to the legislation of one or more Party'.<sup>56</sup> Tom 'has been' subject to the legislation of the UK, and also of Portugal, and thus would fall within the personal scope of the Agreement.

### 2. What are Tom's healthcare rights on a visit to the UK under the UK Draft Social Security Agreement?

Under Article 27 of the Draft Social Security Agreement, 'the UK shall afford healthcare to a Union eligible person during a stay'<sup>57</sup> under certain conditions. One of these conditions is that if the person requires healthcare that is listed in Annex B of the agreement (kidney dialysis, oxygen therapy, asthma treatment, echocardiography in case of autoimmune diseases and chemotherapy) then that person can receive such pre-planned treatment subject to the agreement of the UK. However, since the treatment of Alzheimer's is not covered by Annex B, and, otherwise, pre-planned healthcare i.e. travelling to the UK for the purpose of medical treatment is not permitted,<sup>58</sup> then Tom would not be able to receive Alzheimer's treatment in the UK under the Agreement.

However, this does not mean Tom would have no access to the NHS at all during his stay. Article 27(a) of the UK Social Security Agreement provides that a Union eligible person during his stay in the UK is entitled to healthcare that is 'medically necessary, in the opinion of the institution providing the healthcare.' Therefore, if Tom, during his temporary stay in the UK were to suddenly require healthcare that is deemed 'medically necessary' then he would have access to such healthcare. He would also have to be a 'Union eligible person' for this and have a 'Union eligibility document' to show such eligibility.<sup>59</sup>

## EU position

### 1. Does Tom fall within the personal scope of the Protocol on Social Security Coordination within the EU Draft FTA?

Article MOBI.SSC.2 of the Protocol outlines who falls within its personal scope. This includes

'for the purposes of Article MOBI.SSC.15, Union or UK citizens during a stay in one of the Parties, other than the competent Party.'<sup>60</sup>

Since Tom is a UK citizen, and will be visiting the UK, a Party other than the competent party (in this case Spain), then he would fall under Article MOBI.SSC.2 and thus would fall within the personal scope of the Protocol on Social Security Coordination.

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<sup>56</sup> UK Draft Social Security Agreement, Article 2.

<sup>57</sup> UK Draft Social Security Agreement, Article 28.

<sup>58</sup> UK Draft Social Security Agreement, Article 27(b).

<sup>59</sup> UK Draft Social Security Agreement, Article 26.

<sup>60</sup> EU Draft Social Security Protocol, Article MOBI.SSC.2(a).

## 2. What are Tom's healthcare rights under the EU Draft Protocol on Social Security Coordination?

Under Article MOBI.SSC.15 of the Protocol, Tom would be entitled to 'sickness benefits'<sup>61</sup> 'which become necessary on medical grounds during' his stay in the UK.<sup>62</sup> Unlike in the UK's Draft Agreement, there is no mention here of whether certain procedures that need to be preplanned such as kidney dialysis fall within this definition. Therefore it is difficult to interpret whether Tom would be able to receive his Alzheimer's treatment under this agreement, since it will need to 'become necessary on medical grounds during' his stay. Perhaps the key words here are '*become*' and '*during*', indicating that the need for healthcare cannot be pre-existing and must emerge during the stay. Under such an interpretation, treatment for Alzheimer's that had already presented as a medical condition before Tom arrived in the UK would not fall within this provision. Tom would only have access to treatment that became 'necessary on medical grounds during' his stay.

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<sup>61</sup> EU Draft Social Security Protocol, Article MOBI.SSC.3(a).

<sup>62</sup> EU Draft Social Security Protocol, Article MOBI.SSC.15.

## Scenario 5: Gloria (UK resident frontier worker; non-UK resident child)

Gloria, a UK national, has lived in Ashford, Kent, UK all her life. In January 2021, she begins working for a company established in Brussels. Gloria travels to Brussels for a few days at a time regularly on the Eurostar. While on the Eurostar going to Brussels, Gloria experiences chest pains. Although the chest pains have now stopped, she would like to be seen in a Belgian clinic.

Gloria's 16 year old daughter, Eva, who ordinarily lives with her father in Canada, sometimes visits Gloria in Brussels. Gloria would like to know whether Eva would be entitled to healthcare in Belgium if she falls ill while there.

### UK position

As an employee of the Brussels-based company, Gloria would not fall within the scope of Chapter 11 of the UK's draft FTA. She would, however, fall within the scope of the draft Agreement on Social Security Coordination, which covers 'persons who are, or have been, subject to the legislation of one or more Party'. As someone ordinarily resident in the UK, Gloria is 'subject to' the UK legislation concerning access to NHS treatment.

Gloria was not travelling to Belgium for the purpose of receiving healthcare, and the healthcare is not listed within Annex B, and so she would be entitled to receive healthcare that is 'medically necessary', so long as she was able to produce a document showing her eligibility to be treated by the English NHS.<sup>63</sup> The determination of 'medical necessity' would be a matter for the Belgian clinic. The Belgian clinic might take the view that Gloria's stay is short, and the chest pains have stopped, therefore she is not entitled to treatment in the Belgian system as there is no 'medical necessity'. Gloria would have to access the English NHS when she returned to Kent.

Eva is not 'subject to' the UK legislation, so does not fall within the scope of the draft Agreement on Social Security Coordination.

### EU position

So long as Gloria did not stay in Belgium for more than 90 days in any 180 day period, she would fall within the scope of Title XI.<sup>64</sup> As such, she would be covered by the Protocol on Social Security Coordination,<sup>65</sup> which covers 'sickness benefits'.<sup>66</sup> Gloria would be 'an insured person' (in the English NHS) 'staying in a Party [Belgium] other than the competent Party [the UK]' and so would be entitled to 'benefits in kind' (healthcare) 'which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay'.<sup>67</sup> Gloria would be entitled to treatment on the same terms as Belgian nationals, as if she were covered by the Belgian national health system.<sup>68</sup>

Eva would not be considered as a family member under the provisions on the Protocol on Social Security Coordination. This is because 'members of families' are defined in accordance with the definitions in Article 1 of Regulation 883/2004/EC.<sup>69</sup> Article 1 (i) defines family members as a person defined or recognised as a member of the family (or household) by the legislation under which benefits are provided. The relevant country is that with the 'competent institution' - in short, the country which pays the benefits: in Gloria's case, the UK. As Eva is not 'ordinarily resident' in the UK, unless the healthcare service sought fell within the list of services provided free of charge irrespective of country of normal residence,<sup>70</sup> she would not fall within the scope of the relevant UK legislation.

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<sup>63</sup> UK Draft Social Security Agreement, Article 28.

<sup>64</sup> EU Draft FTA, Article MOBI-SSC.1.

<sup>65</sup> EU Draft FTA, Article MOBI-SSC.2 (a).

<sup>66</sup> EU Draft FTA, Article MOBI.SSC.3.

<sup>67</sup> EU Draft FTA, Article MOBI.SSC.15.

<sup>68</sup> EU Draft FTA, Article MOBI.SSC.15.

<sup>69</sup> Article MOBI.SSC.1.

<sup>70</sup> See the National Health Service (Charges to Overseas Visitors) Regulations 2015 and Guidance on overseas visitors hospital charging regulations 2015, as amended.

## Processes

The EU's coordination of social security provisions (including access to cross-border healthcare and provisions on aggregation and portability of pensions for EU migrants) is based on a complex but well established set of administrative arrangements, overseen by an Administrative Commission made up of representatives of the EU Member States.<sup>71</sup> Put simply, EU law requires Member States to reimburse each other for social security benefits for which they are responsible, and to cooperate and share necessary information to do so.

## UK position

The UK's draft Agreement on social security coordination imposes reciprocal obligations on the UK/EU Member State to reimburse the EU Member State/UK for the costs of healthcare provided under Articles 27 and 28 (medically necessary healthcare, in the view of the institution providing the healthcare, so long as the person receiving the healthcare did not travel for the purpose of receiving that healthcare, unless the healthcare became necessary during a voyage or flight).<sup>72</sup> For certain specific types of healthcare (kidney dialysis; oxygen therapy; special asthma treatment; echocardiography in case of chronic autoimmune diseases; chemotherapy<sup>73</sup>) the institution providing the healthcare must agree in advance to provide it.<sup>74</sup> A 'valid eligibility document' must be produced:<sup>75</sup> this would presumably be something equivalent to a EHIC.

The UK proposes that a Joint Committee be established<sup>76</sup> composed of representatives of the UK and EU, responsible for implementation and application of the Agreement.<sup>77</sup> The Joint Committee would have power to take decisions by mutual agreement, about the implementation and application of the agreement, and those decisions would be binding on the EU and UK.<sup>78</sup> The UK and EU would be obliged to establish necessary administrative arrangements for coordination of social security through the Joint Committee, and to comply with those arrangements.<sup>79</sup> There would be an obligation to exchange up-to-date information about relevant legislation implementing the Agreement,<sup>80</sup> and to provide administrative assistance to each other free of charge.<sup>81</sup> The UK proposal entails a 'duty of mutual information and cooperation', complying with principles of good administration, such as timely administrative responses, to secure the application of the Agreement.<sup>82</sup> Further procedures or administrative arrangements could be agreed between the EU and UK, provided those did not adversely affect the rights or obligations of 'any individual or individuals concerned': a nonregression clause.<sup>83</sup> That said, the UK and EU would retain the power to amend the Agreement by agreement.<sup>84</sup> Such agreement would enter into force after the EU and UK made necessary amendments in their domestic law, which they would notify through diplomatic notes.<sup>85</sup> This power raises questions of transparency. Further, either the UK or the EU would retain the power to terminate the Agreement by notifying the other.<sup>86</sup>

The UK envisages an obligation to share data necessary for 'the application, administration or enforcement of this Agreement'.<sup>87</sup>

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<sup>71</sup> Regulation 883/2004/EC, Articles 71 and 72.

<sup>72</sup> UK Draft Social Security Agreement, Article 29.

<sup>73</sup> UK Draft Social Security Agreement, Annex B.

<sup>74</sup> UK Draft Social Security Agreement, Article 28 (c).

<sup>75</sup> UK Draft Social Security Agreement, Article 29 (4).

<sup>76</sup> UK Draft Social Security Agreement, Article 37.

<sup>77</sup> UK Draft Social Security Agreement, Article 31 (1). Its rules of procedure are to be set out in Annex C, see Article 31 (6).

<sup>78</sup> UK Draft Social Security Agreement, Article 31 (2).

<sup>79</sup> UK Draft Social Security Agreement, Article 30 (1).

<sup>80</sup> UK Draft Social Security Agreement, Article 30 (2).

<sup>81</sup> UK Draft Social Security Agreement, Article 30 (3).

<sup>82</sup> UK Draft Social Security Agreement, Article 30 (5).

<sup>83</sup> UK Draft Social Security Agreement, Article 30 (6).

<sup>84</sup> UK Draft Social Security Agreement, Article 36 (1).

<sup>85</sup> UK Draft Social Security Agreement, Article 36 (2).

<sup>86</sup> UK Draft Social Security Agreement, Article 40 (2).

<sup>87</sup> UK Draft Social Security Agreement, Article 32.

## EU position

The EU's basic position in terms of the processes of implementation of the provisions of any agreement on social security coordination is that the relevant provisions of Regulation 987/2009 (the implementing provision for coordination of social security *within* the EU) 'should apply respectively' 'for the purposes of this Protocol' (ie the protocol on social security).<sup>88</sup>

The EU envisages an obligation on each Party to fully reimburse healthcare provided by an institution in another Party under the sickness benefits provisions.<sup>89</sup> Reimbursements would be determined in accordance with Regulation 987/2009, on production of proof of actual expenditure or on the basis of fixed amounts where actual expenditure is not appropriate, or on the basis of waivers. This would be directly equivalent to the provisions under EU law.

The EU proposes a Partnership Council,<sup>90</sup> comprising representatives of the EU and UK, to supervise and facilitate the implementation and application of the Agreement as a whole. The Partnership Council is to work through specialised committees. However the EU does not propose a specialised committee on coordination of social security.<sup>91</sup> Rather, it proposes that the UK will take part in the existing mechanisms for social security coordination in the EU. For instance, the EU proposes that the UK will take part in the Electronic Exchange of Social Security Information, and bear its share of the costs associated.<sup>92</sup>

The Protocol requires that both the EU and the UK will be responsible for making sure that processing of data necessary under the Protocol is 'in accordance with the Union provisions on the protection of nature persons with regard to the processing and the free movement of personal data.'<sup>93</sup> This provision not only sets EU data protection standards as a regulatory 'floor' for the Protocol, but also assumes dynamic alignment of UK rules with EU rules over time.<sup>94</sup>

There would be an obligation to share information about domestic measures implementing the Agreement and changes in national legislation that 'may affect implementation of this Agreement'.<sup>95</sup> There would also be an obligation of mutual information and cooperation to ensure the Agreement is correctly implemented. This obligation would apply to the 'institutions and persons covered by the Agreement'.<sup>96</sup> This includes principles of good administration, such as timely responses to queries, and giving persons concerned the information they need to exercise the rights that the Agreement confers on them.<sup>97</sup> The EU also envisages a duty on persons covered to communicate to the necessary authorities any relevant changes of circumstance,<sup>98</sup> and a failure to do so may attract a proportionate response from the domestic system, equivalent to similar situations in the relevant domestic law.<sup>99</sup> 'As a rule,' administrative assistance would be given free of charge, but reimbursable expenses could be established by the Partnership Council.<sup>100</sup>

The EU draft text envisages a duty to accept documents in the official languages of the EU.<sup>101</sup>

## Enforceability

EU law on coordination of social security, and the provisions on social security coordination in the Withdrawal Agreement, are 'directly effective' and thus enforceable before domestic courts or tribunals by the relevant individuals. Neither the UK nor the EU seeks equivalent enforceability of the provisions in the future EU-UK relationship.

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<sup>88</sup> EU Draft Text on New Partnership, Article MOBI.SCC.67.

<sup>89</sup> EU Draft Text on New Partnership, Article MOBI.SCC.30.

<sup>90</sup> EU Draft Text on New Partnership, Article INST.1.

<sup>91</sup> EU Draft Text on New Partnership, INST.2.

<sup>92</sup> EU Draft Text on New Partnership, MOBI.SCC.66 (2).

<sup>93</sup> EU Draft Text on New Partnership, Article MOBI.SCC.59 (2).

<sup>94</sup> Thanks to Dr N Fahy for pointing this out.

<sup>95</sup> EU Draft Text on New Partnership, MOBI.SCC.58 (1).

<sup>96</sup> EU Draft Text on the New Partnership, MOBI.SCC.58 (4).

<sup>97</sup> EU Draft Text on the New Partnership, MOBI.SCC.58 (4).

<sup>98</sup> EU Draft Text on the New Partnership, MOBI.SCC.58 (4).

<sup>99</sup> EU Draft Text on the New Partnership, MOBI.SCC.58 (5).

<sup>100</sup> EU Draft Text on New Partnership, MOBI.SCC.58 (2).

<sup>101</sup> EU Draft Text on the New Partnership, MOBI.SCC.58 (7).

## UK position

The UK seeks to explicitly prohibit enforcement of the Agreement by individuals in national legal systems, and to provide that there is to be no right of action in national law for breaches of the Agreement.<sup>102</sup> Disputes are to be resolved by the relevant 'competent authorities'; or, failing that, by the proposed Joint Committee,<sup>103</sup> composed of representatives of the UK and EU, responsible for implementation and application of the Agreement.<sup>104</sup>

## EU position

In the last 10–15 years, where the EU has intended that an Agreement with a third country is not to have direct effect, it is explicit on the matter.<sup>105</sup> The EU makes such explicit provision in one of four ways: a general clause on direct effect in the 'general and final' provisions of the Agreement; a clause stating that any dispute resolution panel's rulings 'shall not create any rights or obligations for natural or legal persons'; a clause in the schedules of commitments on services stating that rights and obligations 'shall have no self-executing effect and thus confer no rights directly to natural or juridical persons'; or a provision in the Council Decision which approves that Agreement.

The EU draft FTA provides for a dispute settlement procedure, involving an arbitration tribunal, if the UK and EU have been unable to settle a dispute under the Agreement through the Partnership Council,<sup>106</sup> established by the Agreement and comprising representatives of the EU and the UK.<sup>107</sup> The EU draft text explicitly states that 'The decisions and rulings of the arbitration tribunal shall... not create any rights or obligations with respect to natural or legal persons.'<sup>108</sup> However, there is provision in the draft for the exclusion of this provision: 'This Title shall apply, unless otherwise provided in this Agreement or in the supplementing agreement, with respect to disputes between the Parties concerning the interpretation and application of this Agreement or any supplementing agreement.'<sup>109</sup>

There is nothing in the general and final provisions of the EU's Draft Text about direct effect.<sup>110</sup> It would seem from the dispute resolution provisions that the EU intends the Agreement not to be directly effective in general, but it is still possible that the EU would like to secure direct effect for some parts of it. Entitlements of natural persons (human beings) might be such a part, but without any explicit text to that effect, it seems unlikely.

Given the alignment of the two negotiating positions on this matter, we can expect that any entitlements under the Agreement will not be enforceable by individuals through national courts. In this regard, the position under the future relationship is significantly worse for individuals than those who fall within the scope of the Withdrawal Agreement.<sup>111</sup>

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<sup>102</sup>UK Draft Social Security Agreement, Article 34.

<sup>103</sup>UK Draft Social Security Agreement, Article 37.

<sup>104</sup>UK Draft Social Security Agreement, Article 31 (1).

<sup>105</sup>Aliki Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' 51 (4) Common Market Law Review (2014) 1125–1158.

<sup>106</sup>EU Draft FTA, INST.30.

<sup>107</sup>EU Draft FTA, INST.1.

<sup>108</sup>EU Draft FTA, INST.30.2.

<sup>109</sup>EU Draft FTA, Article INST.9.1.

<sup>110</sup>EU Draft FTA, FINPROV.1-FINPROV.10.

<sup>111</sup> See Hervey, Miernik, Murphy, 'How is Part Two of the Withdrawal Agreement (citizens' rights) enforceable in the courts?' 28 May 2020, <http://eulawanalysis.blogspot.com/2020/05/>.

## Annex: Overview of relevant parts of UK and EU positions and excerpts from texts

### 1. Scope

#### 1.1 UK position

##### Chapter 11 of Draft FTA: Persons entering and staying in the UK for business purposes

Article 11 applies to ‘measures adopted or maintained by a Party concerning the temporary entry and stay into its territory of key personnel, contractual service providers, independent professionals and short-term business visitors.’<sup>112</sup> This ‘reflects the preferential trading relationship between the Parties as well as the mutual objective to facilitate trade in services and investment by allowing temporary entry and stay to natural persons for business purposes and by ensuring transparency in the process’<sup>113</sup>.

##### Definitions:

**Contractual service suppliers** – ‘natural persons employed by an enterprise of one Party that has no establishment in the territory of the other Party and that has concluded a bonafide contract(s) to supply a service or services to a consumer(s) of the other Party that requires the presence on a temporary basis of its employees in the territory of the other Party in order to fulfil the contract(s) to supply a service or services’<sup>114</sup>.

E.g. building a hospital or health infrastructure; maintaining medical equipment; company established in the EU providing health or social care services in the UK on a temporary basis

**Independent professionals** – ‘natural persons engaged in the supply of a service and established as self-employed in the territory of a Party who have no establishment in the territory of the other Party and who have concluded a bona fide contract to supply a service to a consumer of the other Party that requires the presence of the natural person on a temporary basis in the territory of the other Party in order to fulfil the contract to supply a service’<sup>115</sup>.

E.g. locums from EU countries who are contracted to provide temporary health care services in the UK.

**Key personnel** means business visitors for establishment purposes, investors or intracorporate transferees<sup>116</sup>:

**Business visitors for establishment purposes** are natural persons working in a managerial or specialist position who are responsible for setting up an enterprise but who do not engage in direct transactions with the general public and do not receive remuneration from a source located within the territory of the host Party.

**Natural persons for business purposes** means key personnel, contractual service suppliers, independent professionals, or short-term business visitors who are citizens of a Party.

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<sup>112</sup> UK Draft Working Text, Article 11.2(2)

<sup>113</sup> UK Draft Working Text, Article 11.2(1)

<sup>114</sup> UK Draft Working Text, Article 11.1

<sup>115</sup> UK Draft Working Text, Article 11.1

<sup>116</sup> UK Draft Working Text, Article 11.1

## Scope of UK Draft Agreement on Social Security Coordination

Article 2 defines the scope of the Draft Agreement, and applies to:

- (a) persons who are, or have been, subject to the legislation of one or more Party;
- (b) a member of the family of a person falling within sub-paragraph (a) but only to the extent that such a person is entitled to a right under Chapter 3 of this Agreement.

Rights under Chapter 3 are old age pension provisions. Article 18 includes the 'general provisions'; these include:

1. Where a person has been subject to the legislation of more than one Party, each Party shall determine whether that person satisfies the conditions for entitlement to old age pension under its legislation when it receives the person's claim for such pension, unless the person has expressly requested deferment of the award of old age pension under the legislation of that Party.
2. Where the person satisfies the conditions for entitlement to old age pension under the legislation of more than one Party to which they have been subject, the competent institution of each Party shall calculate the person's entitlement to such old age pension in accordance with Article 19.
3. Where the person satisfies the conditions for entitlement to an old age pension under the legislation of at least one Party but does not simultaneously satisfy or no longer satisfies such conditions under the legislation of any other Party (or Parties), or has expressly requested deferment of such award, the competent institution of the Party shall calculate their entitlement to the old age pension in accordance with paragraph 4 and Article 19.

Article 1 – 'Member of the family' means:

- (a) in relation to the UK, the spouse, civil partner, former spouse or former civil partner as recognised by the legislation under which old age pension is provided.
- (b) The same applies in relation to Member States.

UK position severs the question of visa-free entry and stay from the question of social security coordination.

Summary: UK position very narrow in terms of short stay access - few instances of relevance to NHS contexts. People within scope would have access to UK NHS / and vice versa only for necessary healthcare.

### 1.2 EU position

#### Scope of Title XI: Mobility of Natural Persons

MOBI.1 Objective – To provide mobility arrangements between the Parties, to ensure the full reciprocity of these arrangements and non-discrimination among the Member States, and to ensure the coordination of social security systems of the Parties<sup>117</sup>.

MOBI.3(1) 'Mobility arrangements established in or on the basis of this Agreement shall be based on the principles of non-discrimination between the Member States of the Union, the equal treatment of all Union citizens and full reciprocity between the Parties'

Article MOBI.4 provides the requirements for Visa-free travel<sup>118</sup>:

1. The Parties shall provide for reciprocal visa-free travel for citizens of the Union and citizens of the UK when travelling to the territory of the other party for short stays of a maximum duration as defined in the Parties' domestic legislation, which shall be at least 90 days in any 180-day period.
2. Member States may individually decide to impose a visa requirement on citizens of the UK carrying out a paid activity during their short-term visit in accordance with Article 6(3) of Regulation (EU) 2018/1806 of the European Parliament and the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

For that category of persons, if a Member State individually decides to impose a visa requirement on UK citizens coming for a short stay for business purposes, the UK may decide to impose a visa requirement on the citizens of each Member State individually, in accordance with its domestic legislation.

3. This applies to holders of a valid ordinary passport.
4. As regards the French Republic, the provisions of this Article shall apply only to the European territory of the French Republic.
5. As regards the Kingdom of the Netherlands, the provisions of this Article shall apply only to the European territory of the Kingdom of the Netherlands.

EU approach – the reason for the stay is not determinative – what matters is the duration (90 days in 180 day period).

### **Scope of EU Protocol on Social Security Coordination**

MOBI.SSC.2 provides the scope of the proposed social security coordination provisions: The protocol applies to the following persons, as well as the members of their families and their survivors<sup>119</sup>:

- (a) For the purposes of Articles 3 to 67 of this Protocol, persons benefiting from the mobility provisions under Title XI Mobility of Natural Persons.
- (b) For the purposes of Articles MOBI.SSC 7 and 18 to 26 of this Protocol, Union or UK citizens who receive a pension or pensions under the legislation of one or more Parties.
- (c) For the purposes of Article MOBI.SSC 15, Union or UK citizens during a stay in one of the Parties, other than the competent Party.

'Members of families' are defined in accordance with the definitions in Article 1 of Regulation 883/2004/EC.<sup>120</sup> Article 1 (i) defines family members as a person defined or recognised as a member of the family (or household) by the legislation under which benefits are provided. The relevant country is that with the 'competent institution' – in short, the country which pays the benefits, which is usually the country of residence.

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<sup>118</sup> Article MOBI.4 Draft text of the Agreement on the New Partnership with the UK.

<sup>119</sup> Article MOBI.SSC.

<sup>120</sup> Article MOBI.SSC.1.

It only applies to the following matters concerning social security<sup>121</sup>:

- Sickness benefits
- Maternity and equivalent paternity benefits
- Invalidity benefits
- Old age benefits
- Survivors benefits
- Benefits in respect of accidents at work and occupational diseases
- Death grants

NHS treatment – sickness benefits

Pensions – old age benefits

EU position treats visa-free entry and stay (MOBI.4 (1)) and coordination of social security as interconnected (MOBI.SCC.2 (1) (a)).

**Note:** EU position explicit that Common Travel Area rules continue for UK and Irish nationals moving between Ireland and UK (Article MOBI,3 (2))

## 2. Entitlements (healthcare)

### 2.1 UK position

**Article 27 of the UK Draft Social Security Agreement** outlines when EU citizens can receive healthcare when temporarily residing in the UK:

The UK shall afford healthcare to a Union eligible person during a stay by the person in the UK on terms no less favourable than those that would apply to a UK resident, where:

- (a) the healthcare is medically necessary, in the opinion of the institution providing the healthcare, having regard to the nature of the healthcare and the expected length of the stay;
- (b) the person did not travel to the UK for the purpose of receiving that healthcare, unless the person is a passenger or member of the crew on a vessel or aircraft travelling to the UK and the healthcare became medically necessary during the voyage or flight;
- (c) in a case where the healthcare is listed in Annex B, the person obtained agreement in advance from the institution providing the healthcare; and
- (d) a valid Union eligibility document is produced in respect of the person.<sup>122</sup>

#### Definitions:

**Union eligible person** – a person in respect of whom a valid Union eligibility document has been issued;

**Union eligibility document** – a document issued for the purpose of indicating a person's eligibility for healthcare abroad which: (a) is issued by or on behalf of a Member State; and (b) satisfies the requirements in Annex B;

**Stay** – temporary residence.<sup>123</sup>

EU citizens are able to receive healthcare during their stay in the UK so long as it is medically necessary. The EU citizen must have a Union eligibility document issued by their Member State indicating their eligibility for healthcare abroad. However, EU citizens are not able to travel to the UK solely for the purposes of receiving medical treatment. This excludes needing medically necessary treatment during their trip to the UK.

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<sup>121</sup> Article MOBI.SSC.3.

<sup>122</sup> UK Draft Social Security Agreement, Article 27.

<sup>123</sup> UK Draft Social Security Agreement, Article 26.

Similarly, **Article 28 of the UK Draft Social Security Agreement** outlines when UK citizens can receive healthcare when temporarily residing in a Member State:

A Member State shall afford healthcare to a UK eligible person during a stay by the person in the Member State on terms no less favourable than those that would apply to a Union insured person, where:

- (a) the healthcare is medically necessary, in the opinion of the institution providing the healthcare, having regard to the nature of the healthcare and the expected length of the stay;
- (b) the person did not travel to the Member State for the purpose of receiving that healthcare, unless the person is a passenger or member of the crew on a vessel or aircraft travelling to the Member State and the healthcare became medically necessary during the voyage or flight;
- (c) in a case where the healthcare is listed in Annex B, the person obtained agreement in advance from the institution providing the healthcare; and
- (d) a valid UK eligibility document is produced in respect of the person.<sup>124</sup>

#### **Definitions:**

**UK eligible person** – a person in respect of whom a valid UK eligibility document has been issued

**UK eligibility document** – a document issued for the purpose of indicating a person's eligibility for healthcare abroad which:

- (a) is issued by or on behalf of the UK; and
- (b) satisfies the requirements in Annex B.

**Stay** – temporary residence.<sup>125</sup>

UK citizens are able to receive healthcare during their stay in a Member State so long as it is medically necessary. The UK citizen must have a UK eligibility document issued by the UK indicating their eligibility for healthcare abroad. However, UK citizens are not able to travel to a Member State solely for the purposes of receiving medical treatment. This excludes needing medically necessary treatment during their trip to the Member State.

## **2.2 EU position**

The EU Protocol on Social Security Coordination covers 'sickness benefits'.<sup>126</sup>

**Article MOBI.SSC.15** states when UK and EU Citizens may receive benefits, including healthcare benefits, whilst abroad in the EU or UK respectively:

An insured person and the members of his/her family staying in a Party other than the competent Party shall be entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay. These benefits shall be 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 the persons concerned were insured under the said legislation.<sup>127</sup>

Similar to the UK position, both UK and EU citizens may receive healthcare during their stay in a Member State or the UK respectively, so long as it is 'necessary on medical grounds'. However, the Protocol does not explicitly mention for those UK/EU citizens who travel to the EU/UK for the

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<sup>124</sup>UK Draft Social Security Agreement, Article 28.

<sup>125</sup>UK Draft Social Security Agreement, Article 26.

<sup>126</sup>EU Draft FTA, Article MOBI.SSC.3.

<sup>127</sup>EU Draft FTA, Article MOBI.SSC.15.

purpose of receiving medical treatment and therefore this agreement does not cover such people. This is akin to the UK position. Since both positions are compatible it is likely that the future agreement will not allow for people to travel to the UK or EU for the sole purpose of receiving medical treatment, unless permission is granted in advance.

### 3. Pensions

#### 3.1 UK position

Entitlements to pensions: Chapter 3, Articles 14-25 of the UK Draft Social Security Agreement. Under **Article 16 of the UK Draft Social Security Agreement**, persons who fall within the scope of the agreement will benefit from the principle of aggregation:

1. A competent institution of a Party shall, to the extent necessary, take into account equivalent periods of insurance, employment, self-employment or residence completed under the legislation of any other relevant Party as though they were completed under its own legislation.
2. Paragraph 1 shall not apply if the legislation of a Party does not make entitlement to an old age pension conditional upon the completion of insurance periods, and periods of employment, self-employment or residence.<sup>128</sup>

This means that if a person has worked and contributed to the social security systems of more than one country (the UK or a Member State), then the country where the person worked last will have to take into account the accumulation of all the employment that person has undertaken to calculate his pension.

Under **Article 17 of the UK Draft Social Security Agreement**, persons who fall within the scope of the agreement will benefit from the principle of exportability:

1. A person who would be entitled to receive an old age pension under the legislation of one Party if they were in the territory of that Party shall be entitled to receive that old age pension whilst they are in the territory of another Party, as if they were in the territory of the former Party.
2. Where, under the legislation of one Party, an increase of any old age pension would be payable to a person if they were in the territory of that Party, it shall be payable while they are in the territory of another Party.
3. Such old age pension shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation in such circumstances.<sup>129</sup>

This means that a person who is entitled to receive a pension in one country (the UK or a Member State) can collect that pension in another country (UK or a Member State).

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<sup>128</sup>UK Draft Social Security Agreement, Article 16.

<sup>129</sup>UK Draft Social Security Agreement, Article 17.

### 3.2 EU position

Like the UK position, the EU implements into its Draft Agreement the principle of Aggregation.

**Article MOBI.SSC.6** states:

1. The competent Party shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence in the other Party as though they were periods completed under the legislation which it applies, where its legislation makes conditional upon the completion of periods of insurance, employment, selfemployment or residence:

(a) the acquisition, retention, duration or recovery of the right to benefits,

(b) the coverage by legislation, or

(c) the access to or the exemption from compulsory, optional continued or voluntary insurance.<sup>130</sup>

The principle of exportability is also implemented by the EU in **Article MOBI.SSC.7**:

1. The Parties shall ensure the application of the principle of exportability of cash benefits in accordance with paragraph 2.

2. Unless otherwise provided for by this Agreement, cash benefits payable under the legislation of a Party or under this Agreement shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Party other than that in which the institution responsible for providing benefits is situated.<sup>131</sup>

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<sup>130</sup>EU Draft Text on New Partnership, Article MOBI.SSC.6.

<sup>131</sup>EU Draft Text on New Partnership, Article MOBI.SSC.7.

