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JUNCKER'S FIVE SCENARIOS FOR BREXIT AND THEIR IMPACT ON SOCIAL SECURITY COORDINATION

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ABSTRACT

Current debates around the issue of United Kingdom leaving the EU are escalating due to the uncertainty about the direction of negotiations. We must remember that the UK, the EU as a separate entity, and the other 27 Member States can—and will—have different priorities in terms of various areas that are important to them, for example trade, immigration, and the single market. Most publications deal with trade and immigration issues, but there are problems that individual migrants may encounter and with which they need real help and assurance. Brexit will have an impact on principles of coordination of social security depending on the result of negotiations. It is important that those interested parties consider available options and are prepared for the future after Brexit in relation to social welfare regulations.

Key Words: Brexit, social security, coordination, Juncker, European Union

INTRODUCTION

Social security coordination is an important mechanism of the EU that ensures that people's rights are respected and that risks, for example aging, injuries, and ill-health, are secured. Coordination does not obviously mean a harmonisation of legal principles in all Member States of the EU, and it therefore gives some leeway for each country to have their own regulations as long as they are governed by principles of social security coordination. The purpose of this paper is to analyse five scenarios proposed by Jean-Claude Juncker, in which he predicts what might happen to the EU and remaining Member States after the UK ceases to be a member. After careful analysis of these scenarios, one might be able to consider their possible impact on social security coordination mechanisms. As Juncker's White Paper is written from the perspective of the EU and its remaining Member States, this paper will look for most probable option in consideration of those five scenarios, while underlining the options open to the UK and its welfare system after it leaves the EU.

SOCIAL SECURITY COORDINATION

General aspects

Social security coordination is currently governed by the EU Regulation (EC) No 883/2004 on the coordination of social security systems, which came into force on 1 May 2010. Cases that arose prior to that date are still being considered by courts under the old Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community. There are few changes wrought by the new legal instrument on the personal scope and on the material scope (i.e. benefits), but the pressure of both regulations lies on principles of social security coordination. It is important to consider this area in light of Brexit, and especially in terms of what will happen to principles of current social security coordination mechanisms. Some of these principles are directly mentioned within the Regulation (like equality of treatment and aggregation of periods), and some of them are implied. Various theories show a different number of principles and authors group them in a

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different way. This paper will emphasise that there are six main principles of social security coordination: protection of acquired rights, reasonable expectations, equal treatment, single legislation applicable, aggregation of periods and exportability of benefits. Those principles are applicable to all migrants and their families moving between Member States and acquiring rights to social security. It must be taken into account that the migration level in the UK is high (Office of National Statistics: Migration Statistics Quarterly Report May 2017), and the UK is still a Member State to which coordination applies.

It is therefore important to examine the impact of Brexit, not only on the UK, the EU and the individual Member States, but also mainly on migrants relying on social security coordination regulations. A possible method chosen by the UK when leaving the EU would show whether there is a chance that principles would be observed by both Member States and the UK after Brexit. It is also vital because the European Commission emphasises that coordination applies not only to Member States of the EU, but also to Iceland, Switzerland, Norway and Liechtenstein. These countries are members of EFTA, which suggests that if the UK leaves the EU but becomes a member of EFTA the country will still have to observe the principles of social security coordination; migrants would benefit from such a possibility. The only question remaining is whether or not the UK will choose, and would be allowed through negotiations, to go that way. It might be that another way will have to be chosen that might impact on migrants' social security rights through ignorance of principles.

Free movement of workers

Free movement of workers allows a person to move freely between Member States through Art. 45 of the Treaty on the Functioning of the European Union. It therefore allows migrants to rely on social security coordination principles. Generally, all abovementioned principles are based on the free movement of workers rule. It can be seen through cases such as *ZUS v Tomaszewska* [2011].² Migrants are only willing to move between Member States (including the countries making up the EEA and EFTA, namely Iceland, Norway, Liechtenstein and Switzerland) if they can be sure that contributions they have made in relation to their employment will be available when they reach retirement age or become ill. Migrants must be ensured that, if a risk occurs, the country they are based in will be able to help with that risk's implications, and in terms of social security coordination. This can be done through exportability of benefits and aggregation of periods mechanism that will allow a migrant to move to another Member State and use that social welfare system without losing previously acquired rights. This paper considers whether the UK will accept social security coordination principles after Brexit if negotiations with the EU and other Member States ends in so-called 'hard Brexit.' If the UK leaves the EU without willingness to observe social security coordination, those that move freely between Member States may have a problem in executing their rights to contributions made in the UK, for example because exportability of benefits will not be possible. On the other hand, bilateral agreements that the UK could sign with other Member States may create unequal treatment of citizens coming from different States due to individual arrangements with those countries. Social security coordination principles operate when there is free movement of workers, and this situation is thus dependent on the result of negotiations to see whether or not those principles will still be in place in relation to the UK after Brexit. One must also remember that these principles and regulation do not only apply to migrants that move on the basis of Art. 45 TFEU, but also apply to their families.

Principles of social security coordination: an overview

There are six principles of social security coordination: protection of acquired rights, reasonable expectations, equal treatment, single legislation applicable, aggregation of periods

² [2011] C-440/09 (CJEU)

and exportability of benefits. These ensure that the future of those migrating is secured in terms of problems with their employment or pensions, also taking into account their families' welfare. Acquired rights, discussed by the European Court of Human Rights in cases such as *Moskal v Poland* [2010]³ or *Stec and others v United Kingdom* [2006],⁴ are protected through this coordination, which means that if a migrant has paid contributions towards a social welfare system, he will be entitled to use those acquired rights if the need arises. All rights acquired by legitimate means must be available, and they must always be ready to secure the welfare of that interested person. Migrants can also reasonably expect that, if they have fulfilled certain obligations imposed by a Member State, they will be entitled to benefits, either in this or in another EU country (Slingenberg, 2015).

Equal treatment, however, is a two-way street. As suggested by Cornelissen in 2009, migrants and their rights are treated equally, taking into account migrants' characteristics but also the fact that men and women in the same position are treated equally. A strict non-discrimination rule applies to all citizens of Member States, as they are considered citizens of the EU and must be treated equally as such (Myszke, 2006). At any given time, a single legislation should be applicable that excludes problems arising in choosing which legal system should be used when a person accrues rights when travelling from one country to another within the EU. Mostly it is decided by the principle of *lex loci laboris*, explained by the Court of Justice of the EU in cases such as *Bosmann v Bundesagentur für Arbeit–Familienkasse Aachen* [2008]⁵ or *Gemeenschap v Baesen* [2010]⁶ as meaning that the appropriate system is the one where the worker is based, or where the main office of employer is located (if the worker was delegated).

The last two principles that form the basis of the social security coordination mechanisms in some respects work together. The aggregation of periods principle works mainly in situations where one would move between Member States and then claim retirement benefits. On the other hand is the exportability of benefits, which allows for periods to be considered in a Member State other than the one in which they were acquired due to the fact that they can be moved from one system to another within the EU. This brief overview of social security coordination system shows how important it is for individuals to know what they can expect after Brexit, to allow them to plan their future. If they can be sure that rights acquired in the UK will be considered in another Member State after Brexit, they can plan to stay in the UK and contribute to its welfare system. If on the other hand this may not be possible, migrants may want to work in another Member State where they will be allowed to claim acquired benefits after their return to the home country.

JUNCKER'S WHITE PAPER

'Drivers of Europe's Future'

Juncker opened his White Paper with an introduction going through different aspects of living and working in the EU. He focused on ideas based on single market and trade issues from the perspective of the EU. Juncker did not go through possible scenarios for the UK after Brexit, as his five scenarios only covered the interests of Member States and the EU as a separate entity (Juncker, 2017).

In first eight pages of the document, the president of the European Commission acknowledged that the population in Europe is aging fast. He touched upon the euro currency and its share of the global market, but also stated that defence expenditure has been maximised. Juncker also questioned security and defence measures and trust in, and legitimacy of, the EU.

³ [2010] 10373/05 (ECtHR).

⁴ [2006] 65731/01 (ECtHR).

⁵ [2008] C-352/06 (CJEU).

⁶ [2010] C- 296/09 (CJEU)

For the purposes of this article, the most important information from the introduction of the White Paper is that the population is getting older with lower life expectancy. In terms of the risks EU citizens may expect, Member States must be ready at any time to secure citizens' rights in retirement, ill health and other possible problems covered by the social security system. Unfortunately, Juncker only mentioned society's problems in this introductory part of his White Paper, focusing on trade and single market areas in the main body of the document.

Five possible scenarios

Juncker mentioned five scenarios, all from the perspective of the EU and 27 Member States. The purpose of the White Paper was to create more vivid debate about possible outcomes. Unfortunately, there is no clear indication as to which scenario is the most probable and which would be most beneficial. Identifying these aspects is therefore the purpose of this paper.

The first scenario titled 'carrying on' is about the preservation of the status quo. It means that the EU, without the UK, will continue programmes created by the 'New start for Europe' document in 2014. The single market will be strengthened, coordination of migration security will be improved and, most importantly, free movement between Member States for EU citizens will be respected. This might suggest that, in terms of Art. 45 of TFEU, free movement of workers will still be possible and there will be no issue regarding the use of social security coordination principles. These principles will remain as they are, with no change due to the lack of focus in this area. This option looks as a possible scenario but the impact on citizens who have already migrated to the UK, as well as UK citizens living in other Member States, must be considered, as those principles may not (and probably will not) apply to them. This could mean that their rights are not protected unless bilateral agreements come in to play.

'Nothing but the single market' is the second scenario, focusing on strengthening the single market, but this does not guarantee free movement of workers and services. Juncker commented that he would not opt for this scenario, but it is one that is open to the EU. Again, if social security coordination is based on free movement between Member States, then making free movement harder would also impact on social security coordination. Following on from this, if one becomes ill abroad, medical bills will be much higher; in addition, the exportability of benefits like pensions may not be possible at all. By working on making a better single market, the EU would have to abandon work on some of the other priorities, which could weaken the EU in other areas such as defence. This would be a disastrous scenario, not only in relation to social security coordination but also in general for the EU's actions.

The third scenario, 'those who want more, do more', focuses only on certain areas of EU work. The only beneficial aspect is that there would be harmonisation of various regulations and enhanced security and justice. This is a 'two-speed Europe', in which countries that want to participate in certain fields can do so, while others can opt-out due to various reasons, for example a lack of financial resources. We have to bear in mind that a similar mechanism already exists on a much smaller scale, but making its scope wider would not bring anything more beneficial in the area of social security coordination. This is due to the fact that some countries would be able to strengthen this area, and others would have to be left behind, creating unequal treatment of citizens. On the other hand, the relationship with third countries could be managed by the EU (a separate entity), and therefore the UK could deal not with Member States individually in creating separate agreements but would have to make arrangements with the EU as an institution. This looks to be a viable option, but it would still depend on the terms of the social security agreement and whether such an agreement would preserve the principles of coordination. It could be safer for the UK to negotiate separate bilateral contracts with the possibility that most of those agreements would be beneficial for the country's welfare system.

A completely different tone is presented in the fourth scenario, 'doing less more efficiently', in which Juncker foresees that establishing priorities mentioned and agreed by Member States could happen more quickly. However, those priorities would have to be very

specific and could not concern general issues. Juncker sees less work being done in areas such as public health, employment and social policy, which Member States would have to regulate individually (Piec sciezek do Europy, 2017). On the other hand, action would be taken in fields such as migration, defence, trade and innovation, while the single market is being strengthened. This seems like a less viable option in the context of preserving principles of social security coordination. On the other hand, it is also true that Member States have the competency to decide their rules and regulations respecting social security, as we deal with coordination (and not harmonisation) of social security systems. The only criterion regards following coordination's principles. Therefore, applying this scenario would not entail much change in the situation we currently have. From the perspective of the UK as a third country, also, making bilateral agreements with other Member States separately can be beneficial for both parties. In relation to social security and principles of coordination, this scenario seems to preserve the current situation, although if the UK will be signing bilateral agreements we cannot be sure that they will observe all, or any, of the current principles regarding the coordination of social security systems.

Juncker's fifth scenario, 'doing much more together', sees Europe as one entity on the international scene. The EU could be one large federal state, which would take in more national competencies with EU embassies in all Member States and other third countries. Therefore, it would be the EU with which the UK would have to negotiate bilateral agreements in relation to social security. It is impossible to make such a united state, as all Member States have different interests and want to protect their citizens in different ways. As with the third scenario, it would be in the interest of each Member State (and the UK) to have separate agreements and to try to observe the principles of social security coordination. It would not be beneficial to negotiate on the platform of EU v UK, as the EU would force the UK to make an agreement according to principles of coordination. This would mean, in effect, that the UK would be dragged back to a mechanism similar to that of the EU. This seems even more unrealistic if we think that the UK would like to have a 'hard Brexit', distancing themselves from everything related to EU.

OTHER MODELS AVAILABLE TO THE UK

The scenarios presented by Jean-Claude Juncker in his White Paper are shown purely from the perspective of the EU. Juncker's view stands in contrast with possible outcomes for the UK. However, as was mentioned at the beginning of this article, there are countries that are not members of the EU but still enjoy the benefits of social security coordination, such as Iceland or Liechtenstein. Similar ideas operate in Norway and Switzerland, and those two countries could serve as examples of how the UK can finalise its negotiations with the EU.

The Norwegian model

Norway is a member of EFTA and of the EEA, which allows this country to be part of the single market without being a Member State of the EU. In this model, a country preserves the status of free movement of goods, services, people and capital, not only between the EU countries but more widely with members of the EEA. This allows a country to be part of the social security coordination, while observing all principles of this coordination. The main downside for the UK in applying this model would be payments that must be made to the budget, while participation in other activities of the EU would be excluded. The UK would also have to follow EU rules and regulations.

Even though a country pays into the fund of the EEA and must follow EU rules, it cannot have any decision-making powers in the EU, which means that all EU legislation must be observed. This touches on the question of country's sovereignty.

As the UK's Prime Minister Theresa May stated that she would like to follow the 'hard Brexit' option and separate the UK from the EU, it is unrealistic to expect that the Norwegian model could be followed. The UK would have to pay into the budget and follow EU law, while

having no influence on the law-making mechanisms. This could be seen by UK citizens as a simple swap from EU to EEA to preserve the current status quo (nearly fully) without following the voice of the people. It therefore seems that this model is not one that could be chosen by the UK, although it would be beneficial in terms of following the principles of social security coordination.

The Swiss model

Switzerland is slightly different from Norway, as this country is only a member of EFTA and not of the EEA. Not being a member of EEA means negotiation of various bilateral agreements with Member States of the EU will look like negotiations with third countries. Usually each treaty does account for one EU programme. In the context of social security, this means participation in pension programmes, insurance policies, etc. EFTA allows Switzerland to have free trade in non-agricultural goods with EU states.

This model looks like a viable option for the UK, as the country can choose which EU initiative to participate in. This provides a country with greater sovereignty than the Norwegian model. Although Switzerland chose not to be part of the single market in relation to services, there is currently free movement of people in place, which awaits revision due to the negative referendum in 2014.

Like Norway, Switzerland has no power in the decision-making processes, but makes financial contributions to the EU's budget. In choosing this model, the UK would have no guarantee that the EU would want to negotiate with them about social security systems or anything else. The EU offered such negotiations to Switzerland, but whether it would do so for the UK is a matter for the EU to decide. This model is therefore also not ideal for the UK, as they would pay into the budget, adopt EU law and still have no say in decision-making (if remaining a member of the single market). The only benefit is the possibility of choosing areas and regulating them through bilateral agreements, if the EU wishes to negotiate them.

The World Trade Organisation

Becoming a member of the World Trade Organisation is a viable option that the UK might want to pursue, as the free movement of workers would be a non-existent mechanism. Bearing in mind that this option focuses on trade and less on other policies (and cooperation with countries in other areas like defence, migration, integration, etc.), we must note that the UK would be able to trade with the EU, as capital can move freely, unlike workers and their families.

In this instance, the UK would have to negotiate separate bilateral agreements with various countries as a third country. However, it can be claimed that observing the principles of social security coordination will not be ensured. There would be no single market, no paying into the EU budget, and no following of EU legislation that could potentially impose a duty to secure social security coordination principles. The UK would therefore be free to negotiate whatever it wishes, if the other country agrees; there would otherwise be no agreements and no regulation in respect of benefits, pensions and security of other rights. This looks like a dangerous option, but if the UK leaves the EU on strict terms they will want to preserve their sovereignty, and this option thus seems possible, although draconian regarding social security and its principles.

CONCLUSIONS AND RECOMMENDATIONS

If one can imagine that Brexit negotiations happen at the three-side table with the EU, Member States and the UK negotiating the terms for leaving the EU, one would be able to imply from the above analysis what can be claimed by each party in respect of their interests.

The most likely scenario that could be used by the EU and Member States in negotiations is Juncker's fourth scenario. This is because, in some aspects, competencies of Member States will be preserved in relation to passing own legislation about social security

according to coordination's principles. The EU would be able to focus on other issues and do less in a more efficient way, because of their direct focus on agreed priorities. The UK would obviously be treated as a third country (although dependent on the final outcome of negotiations), and therefore the EU, as a representative of Member States, could impose the observance of social security principles in a negotiated bilateral agreement (also if each country had a separate one signed with the UK).

If, however, we look at the choice that the UK is most likely to make, the UK is likely to leave negotiations without an agreement. Following from that is the membership of the World Trade Organisation, which would mean no free movement of workers and therefore no social security coordination for the UK. This is 'hard Brexit', a reflection of the referendum and the voice of UK citizens. The UK is less likely to want to pay into the budget and follow EU legislation, especially if they are unable to have a say about its shape.

Those negotiations can end with no agreement, as the EU, together with the Member States, have a completely different view of what Brexit should look like, especially regarding getting money into the budget. Unfortunately, the most likely consequence is the creation of separate bilateral agreements regarding social security systems, and some of the main principles of current coordination may therefore not be preserved, making it less beneficial for migrants to work in countries other than Member States. The main problem, however, would be the preservation of rights already acquired. This is because social security benefits are usually long term, for example by paying contributions to make plans for the future, and people expect those benefits to help them if the need arises. This, however, is now uncertain.

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