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Bill Digest

Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020

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Abstract

This analysis is based on the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020. Overall, the aim of the Bill is to maintain current arrangements under the Common Travel Area and current legislation when the transition period finishes at the end of 2020.

Tithe an Oireachtais
Houses of the Oireachtas

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Legal Disclaimer

Introduction and background

Following the departure of the United Kingdom (UK) from the EU on 31 January 2020, a transition period until the end of 2020 was agreed to alleviate the impact of this departure, and to allow for time to negotiate an agreement on the future EU-UK relationship. However, the limited progress of negotiations has again raised the prospect of a no deal Brexit, emphasising the need to ensure contingency measures are in place, in addition to the necessary legal modifications arising from the UK's withdrawal, so the impact on people and businesses is limited.

The 2020 Bill is the second Brexit Omnibus Bill to come before the Oireachtas. The *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019* was enacted on 17 March 2019 as part of the Government's preparations for a possible no deal Brexit in 2019. The Act consisted of 15 Parts under the remits of nine Ministers. Parts 1, 14 and 15 were subsequently commenced while Part 3 was repealed and its provisions addressed in the *Industrial Development (Amendment) Act 2019*. The remaining Parts of the 2019 Act were not commenced because the Withdrawal Agreement was concluded and entered into force.[1]

Brexit Omnibus Bill 2020

The *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020* (the Brexit Bill 2020 or the Brexit Omnibus Bill 2020) is intended to mitigate against any adverse effects of Brexit. A Bill Briefing page is available for the Brexit Omnibus Bill 2020.

On 29 May 2020, the Government approved the preparation of a scheme for a new Brexit Omnibus Bill. The overarching objective of the Bill is stated in the Brexit Readiness Action Plan as "to address the wide range of complex issues that could arise post transition and seek to protect citizens and consumers, facilitate the sound functioning of key sectors, and ensure our businesses are not disadvantaged."[2] The Bill is also stated as supporting the Common Travel Area and North-South cooperation. In addition to the Bill, the Government has stated that it intends to screen for any additional emerging issues that may require a legislative response, and to prepare additional relevant secondary legislation required ahead of the end of the transition period.[3]

It is made up of 21 parts covering topics ranging from health to harbours to bus services.

Part 1 - Preliminary and General (Sections 1-4)

Part 2 - Arrangements in relation to Health Services (Section 5)

Part 3 - Reimbursement of Medical Expenses (Sections 6-11)

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[1] According to www.irishtatutebook.ie, only three Commencement Orders were made following the Bill's enactment

[2] Government of Ireland, Brexit Readiness Action Plan, September 2020 at p. 14. (https://www.dfa.ie/media/dfa/eu/brexit/keydocuments/Brexit-Readiness-Action-Plan.pdf)

[3] Ibid. at p. 14-15

Part 4 - Amendment of *Companies Act 2014* (Section 12)

Part 5 - Amendment of Employment Permits Act 2006 (Section 13)

Part 6 - Qualification to carry out activity relating to fluorinated greenhouse gases (Sections 14-15)

Part 7 - Amendment of *Student Support Act 2011* (Sections 16-21)

Part 8 - Taxation

- Chapter 1 – Definitions (s.22)
- Chapter 2 – Income Tax (sections 23-50)
- Chapter 3 – Corporation Tax (sections 51-58)
- Chapter 4 - Capital Gains Tax (sections 59-60)
- Chapter 5 – Value-Added Tax (sections 61-65)
- Chapter 6 – Stamp Duties (sections 66-71)
- Chapter 7 – Capital Acquisitions Tax (s.72)
- Chapter 8 – Excise (s.73)

Part 9 - Financial Services: Settlement Finality (Sections 74-77)

Part 10 - Financial Services: Amendment of European Union (Insurance and Reinsurances) Regulations 2015 and European Union (Insurance Distribution) Regulations 2018 (Sections 78-81)

Part 11- Customs (section 82-85)

Part 12 - Amendment of Harbours Act 1996 (Sections 86-88)

Part 13 - Third Country Bus Services (Section 89-93)

Part 14 - Amendment of Social Welfare Consolidation Act 2005 (Sections 94-97)

Part 15 - Amendment of Protection of Employees (Employers' Insolvency) Act 1984 (Sections 98-102)

Part 16 - Amendment of Extradition Act 1965 (Sections 103- 106)

Part 17 - Immigration (Sections 107- 109)

Part 18 - International Protection (Sections 110- 118)

Part 19 - Recognition of Certain Divorces, Legal Separations and Marriage Annulments (Sections 118-121)

Part 20 - Amendment of Childcare Support Act 2018 (Sections 122- 125)

Part 21 - Construction Products - Market Surveillance Authority (Sections 126-128)

Whether or not specific provisions of the Bill will become necessary depends on the outcome of negotiations. In contrast to consideration of the 2019 Act, there is now the additional challenge of the economic impacts arising from the Covid-19 pandemic, particularly as there is limited overlap between the areas affected by Brexit and Covid-19.

Scrutiny of the General Scheme

Given the breadth of policy areas and Departments involved in the Bill, instead of pre-legislative scrutiny process for the General Scheme, the Business Committee decided that Ministers and Departments whose remits cover the provisions of the Bill would engage with the relevant Committees. The below table summarises the engagements the took place in October 2020, and the Heads relevant to those engagements.

Date	Committee	Head(s)
6 October	Joint Committee on Justice	16. 17, 18, 20
7 October	Joint Committee on European Union Affairs	General Discussion
7 October	Joint Committee on Social Protection, Community and Rural Development and the Islands	14, 15
7 October	Joint Committee on Enterprise, Trade and Employment	4, 5
7 October	Joint Committee on Climate Action	6
8 October	Joint Committee on Education, Higher and Further Education, Research, Innovation and Science	7
8 October	Joint Committee on Transport and Communications Networks	12, 13

Brexit and Covid-19

The timing of Brexit and a possible no deal takes place against the global backdrop of the Covid-19 pandemic and the likely economic impact. In more recent times, the dual impact of both challenges on the economic has featured in public discourse and media coverage of negotiations.

In September 2020, it was reported that research from the ESRI and the Department of Finance has found that "there was limited overlap between the sectors at risk from a hard Brexit and those most impacted by the pandemic".[4] The study in question ranks the sectors most likely to be impacted by Brexit and Covid-19, and notes that these impact are manifested in different ways. In its conclusion, this paper notes the following:

> "Prior to the onset of the pandemic, the Irish economy was performing strongly with the main source of exogenous risk being a concern that trade negotiations between the EU and UK would not reach agreement by the end of the year. While the potential economic impacts of Brexit without a trade deal have been substantially overshadowed by the Covid-19 crisis, it opens up the possibility that layering a hard Brexit on an economy weakened by dealing with Covid-19 could make the previously estimated effects of Brexit worse. The interrelationship of the two shocks is therefore an important consideration for the near-term economic prospects. The direction of the relationship is not obvious *ex ante* as to whether the two

[4] Irish Times, *Economy faces double shock of Covid-19 and hard Brexit, study warns*, 17 September 2020.

shocks might exacerbate each other or if the impact of Brexit be less if economic activity has already shifted to a lower base."[5]

In presenting the Budget for 2021, the Government formulated its macroeconomic projections on the basis of two key assumptions:

1) From the beginning of 2021, bilateral trade between the UK and the EU will be on WTO terms; and
2) A widespread vaccine for Covid-19 will not be available.[6]

The Parliamentary Budget Office has also identified the impact of both challenges on fiscal planning, highlighting multiple sizeable revisions to fiscal forecasts since the previous Budget, with these uncertainties likely to persist in 2021.[7] It should also be noted that in addition to the necessary legal changes, a number of financial support mechanisms have been introduced. The Government website outlines a list of available Government Brexit Advisory, Financial and Upskilling Supports.

[5] ESRI, *Examination of the sectoral overlap of COVID-19 and Brexit shocks*, Working Paper No. 677, September 2020 at p.26.

[6] Department of Finance, Minister Donohue publishes economic forecasts that will underpin Budget 2021, 29 September 2020, Press Release (https://www.gov.ie/en/press-release/4b5e5-minister-donohoe-publishes-economic-forecasts-that-will-underpin-budget-2021/)

[7] Parliamentary Budget Office, *Pre-Budget 2021 PBO Commentary*, Publication 55 of 2020 at p.6 (https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2020/2020-09-30_pre-budget-2021-pbo-commentary_en.pdf)

Authors

A majority of L&RS researchers contributed to the Digest, either as authors or reviewers. The table below shows who is responsible for a particular Part or action.

Part	Person responsible
Introduction/background	Ivan Farmer and Maeve Ní Liatháin (Legal Analysis)
Summary	L&RS Researchers
Part 1 Preliminary and general	Maeve Ní Liatháin (Legal Analysis)
Part 2 Healthcare Arrangements	Etaoine Howlett (Social Policy and Parliamentary Affairs)
Part 3 Reimbursement of medical expenses (	Anne Timoney (Social Policy and Parliamentary Affairs)
Part 4 Amendments to *Companies Act 2014*	Darren Lawlor (Economic and Statistical Analysis)
Part 5 Amendment to Section 10(2) of the *Employment Permits Act 2006*	Maeve Ní Liatháin (Legal Analysis)
Part 6 Arrangements in relation to Fluorinated Greenhouse Gases	Kate Walsh (Environmental and Agricultural Sciences Team)
Part 7 Amendment of *Student Support Act 2011*	Jessica Doyle (SSPA)
Part 8 Taxation	Maeve Ní Liatháin (Legal Analysis)
Part 9 Financial Services: Settlement Finality	Darren Lawlor (Economic and Statistical Analysis)
Part 10 Financial Services: Amendment of European Union (Insurance and Reinsurance) Regulations 2015 and European Union (Insurance Distribution) Regulations 2018	Sinéad Ashe (Economic and Statistical Analysis)
Part 11 Customs	Aoife Halligan (Economic and Statistical Analysis)
Part 12 - Amendment of *Harbours Act 1996*	Eoin McLoughlin (Economic and Statistical Analysis)
Part 13 Third Country Bus Services	Daniel Hurley (Legal Analysis)
Part 14 Amendment of *Social Welfare Consolidation Act 2005*	Niall Watters (Social Policy and Parliamentary Affairs)
Part 15 Amendment of Protection of *Employees (Employers' Insolvency) Act 1984*	Ivan Farmer (Legal Analysis)
Part 16 Amendment of *Extradition Act 1965*	Lianne Reddy (Legal Analysis)

Part 17 Amendment of the *Immigration Act 2004*	Rebecca Halpin (Legal Analysis)
Part 18 Amendment of the *International Protection Act 2015*	Rebecca Halpin (Legal Analysis)
Part 19 Legislating for the recognition of UK divorces after expiry of the Brexit transition period	Maeve Ní Liatháin (Legal Analysis)
Part 20 Amendment of *Childcare Support Act 2018*	Adele McKenna (Social Policy and Parliamentary Affairs)
Part 21 Amendment of the European Communities Regulation S.I. 225	Shane Burke (Private Members Bills)
Quality Assurance	Daniel Hurley, Jessica Doyle, Niall Waters, Maeve Ní Liatháin, Darren Lawlor, Eoin McLoughlin, Sinéad Ashe, Ivan Farmer, Anne Timoney, Lianne Reddy,
Reviewers	Hari Gupta (Private Members Bills) and Rebecca Halpin (Legal Analysis)
Co-ordinator of Bill Briefing page	Lianne Reddy (Legal Analysis)

Summary

Summary of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020

The Brexit Omnibus Bill 2020 is made up of 21 Parts which will amend current legislation ahead of the end of the transition period agreed in the Withdrawal Agreement. The UK is no longer an EU Member State but it stays in the EU Customs Union and the Single Market and remains bound by obligations stemming from all EU international agreements until the end of the transition period on 31st December 2020.

- Part 1 - Preliminary and General
- Part 2 - Arrangements in relation to Health Services
- Part 3 - Reimbursement of Medical Expenses
- Part 4 - Amendment of *Companies Act 2014*
- Part 5 - Amendment of *Employment Permits Act 2006*
- Part 6 - Qualification to carry out activity relating to fluorinated greenhouse gases
- Part 7 - Amendment of *Student Support Act 2011*
- Part 8 - Taxation
- Part 9 - Financial Services: Settlement Finality
- Part 10 - Financial Services: Amendment of European Union (Insurance and Reinsurances) Regulations 2015 and European Union (Insurance Distribution) Regulations 2018
- Part 11- Customs
- Part 12 - Amendment of *Harbours Act 1996*
- Part 13 - Third Country Bus Services
- Part 14 - Amendment of *Social Welfare Consolidation Act 2005*

- Part 15 - Amendment of Protection of *Employees (Employers' Insolvency) Act 1984*
- Part 16 - Amendment of *Extradition Act 1965*
- Part 17 - Immigration
- Part 18 - International Protection
- Part 19 - Recognition of Certain Divorces, Legal Separations and Marriage Annulments
- Part 20 - Amendment of *Childcare Support Act 2018*
- Part 21 - Construction Products - Market Surveillance Authority

Part 1 Preliminary and general

Part 1 of the Bill (sections 1-4) deals with the following:

- Short title, collective citations and construction;
- Commencement;
- Expenses; and
- Repeals.

Short title and collective citation

This is a standard provision in a Bill. The Bill, when enacted, can be cited at the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020. Different parts of the Bill will be included in the collective citation of other Acts, for example Part 2 will be part of the collective citation *Health Acts 1947 to 2020.*

Commencement

Section 2 of the Bill provides that the Minister for Foreign Affairs will commence the Bill but individual Ministers will have the power to commence parts that they are responsible for. For example, the Minister for Health has the power to commence Parts 2 and 3 dealing with health.

Expenses

Section 3 dealing with expenses is a standard provision stating that any expenses incurred by the Ministers in the administration of the Act to be met out of funds provided by the Oireachtas. The Bill and explanatory memorandum do not include financial information on how much, for example, the provisions outlined in Parts 2 and 3 in relation to health would cost.

Repeals

Section 4 repeals legislation, which either has not been commenced, is no longer applicable or is being replaced by provisions in this Bill. This includes the majority of the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019* which was never commenced, and other pieces of legislation which were introduced in anticipation of a no-deal Brexit in 2019. Some of the provisions of these Acts have been reintroduced in this Bill.

Part 2 Arrangements in relation to Health Services

Part 2 of the Bill provides for changes to the *Health Act 1970*, with a view to supporting the maintenance of CTA arrangements, and associated rights and entitlements, in respect of healthcare access following the end of the Transition Period. Specifically, the purpose of Part 2 is to provide for the establishment of “enduring arrangements” to secure continued reciprocal access to health services for residents of Ireland and the UK. The nature of these arrangements will be

agreed with UK authorities via a Memorandum of Understanding, which is currently being negotiated.

In giving effect to this part of the Bill, regulations may provide for, among other things, arrangements for assessing eligibility to access health services in both jurisdictions, administrative arrangements to ensure reciprocal access to health services, and payment mechanisms in respect of health services provided in both jurisdictions.

Part 3 Reimbursement of Medical Expenses

Part 3 of the Bill seeks to provide for the establishment of a scheme to mimic the current European Health Insurance Card (EHIC) for residents of Northern Ireland. It is intended that this would be put in place **if** they lose this cover at the end of the transition period. The proposed scheme would reimburse eligible residents of Northern Ireland the costs they incur for necessary medical treatment (publicly provided) during temporary stays in an EU Member State (other than Ireland), or a member of the European Economic Area (Iceland, Liechtenstein, Norway) or Switzerland.

This Part of the Bill seeks to enable the Health Service Executive (HSE) to administer the scheme, under which eligible persons with relevant expenses would keep receipts and submit them online to the HSE to claim their money back.

Eligible residents of Northern Ireland would be Irish citizens, British citizens and citizens of EU Member States. The scheme seeks to reimburse unplanned care only, does not seek to substitute for private travel insurance and does not, for example, cover the cost of repatriation of a sick/injured person.

The future of the EHIC benefit for UK residents depends on the outcome of the EU-UK Future Relationship Agreement talks.

Part 4 Amendment of *Companies Act 2014*

Part 4 of this Bill for changes to the *Companies Act 2014* with the following aims:

- To accommodate the ongoing migration of the Irish securities market from the existing UK-based Central Securities Depository (CSD) known as CREST and operated by Euroclear UK & Ireland (EUI) to an EU/Belgian-based CSD operated by Euroclear Bank, which is a different operating model; and
- To ensure the successful functioning of the Euroclear Bank CSD as the new Irish settlement system post-migration;

Migration must be completed by **30 March 2021**.

This Part can best be viewed as a companion to Part 9 of the Bill.

Part 5 Amendment of the *Employment Permits Act 2006*

Current Irish employment law requires that certain employment permits will be not be issued unless at least 50% of the employees in a firm are EEA nationals (the ‘50:50 rule’). EEA nationals are EU nationals and also those from Iceland, Liechtenstein and Norway. Swiss nationals are also

covered by the 50:50 rule. When the transition period ends at the end of December 2020, UK nationals will no longer be EU or EEA nationals.

The amendment in Section 13 of the Bill allows for the continued inclusion of UK citizens (including UK citizens from the Channel Islands and the Isle of Man) in the EEA employee count for the purposes of the 50:50 rule. It is expected that this will alleviate disruption for business.

Part 6 Qualification to carry out activity relating to fluorinated greenhouse gases

Part 6 of the Bill concerns arrangements in respect of fluorinated greenhouse gases or 'F-gases'. Individuals require certificates to operate in sectors using F-gases. Currently, mutual recognition of technical qualifications and certifications from UK institutions in the area of F-gases apply across the EU, and this will cease at the end of the transition period on 31 December 2020. Certificate holders may currently avail of a free-of-charge process to receive an Irish certificate to enable them to continue to operate in the EU27 including Ireland. The Bill allows for a six months extension for recognising UK certificates, and, for a four months period in which individuals and companies may exchange their UK for an Irish certificate and continue to operate in Ireland and across the EU27 in the applicable sectors.

Part 7 Amendment of Student Support Act 2011

Part 7 of the Bill proposes to amend the *Student Support Act 2011*. The *Student Support Act 2011* is the main piece of legislation providing for financial supports for third level students. Currently, eligibility for financial support for third level students is limited to courses and institutions in EU member states. In other words, currently eligible students from Ireland who take up approved third level courses in the UK and eligible UK nationals who take up approved courses in Ireland qualify for student support due to the UK's membership of the EU. The effect of the amendments to the *Student Support Act 2011* proposed by Part 7 of the Bill will widen the definitions from the end of the transition period (the period that keeps the UK bound to the EU's rules) to encompass the UK as a third country.

Part 8 Taxation

Part 8 of the Bill (sections 22-73) covers taxation matters following the end of the transition period. The majority of the sections aim to make sure that where the UK was covered in existing tax legislation through references to the EU or the EEA, that a new reference to the UK will be added. The overall aim of Part 8 is to ensure that Irish taxpayers continue to be eligible for applicable tax reliefs.

Part 8 is made up of 8 chapters covering the following areas

Chapter 1 – Definitions (s.22)

Chapter 2 – Income Tax (sections 23-50)

Chapter 3 – Corporation Tax (sections 51-58)

Chapter 4 - Capital Gains Tax (sections 59-60)

Chapter 5 – Value-Added Tax (sections 61-65)

Chapter 6 – Stamp Duties (sections 66-71)

Chapter 7 – Capital Acquisitions Tax (s.72)

Chapter 8 – Excise (s.73)

Part 9 Financial Services: Settlement Finality

The purpose of Part 9 of the Bill is to introduce legislative amendments to support the implementation of the European Commission's equivalence decision under the Central Securities Depositories (CSD) Regulation and to extend the protections contained in the Settlement Finality Directive to Irish participants in relevant third country domiciled settlement systems. Historically, the Irish and UK securities clearing systems are closely linked, and there is a high degree of sharing of financial markets infrastructure. Since the 1990s, Ireland has relied on UK-based and incorporated CREST[8], operated by London-based Euroclear UK & Ireland (EUI[9]) to clear / settle trades on the Irish stock exchange. As a consequence of Brexit, Irish listed securities are being migrated from CREST to an alternative CSD operated by Belgium-based Euroclear Bank.

Part 10 Financial Services: Amendment of European Union (Insurance and Reinsurance) Regulations 2015 and European Union (Insurance Distribution) Regulations 2018

Part 10 of the Bill provides for the temporary run-off regime, which, subject to a number of conditions, will enable insurance undertakings and intermediaries (i.e. brokers) operating in Ireland but based in the UK or Gibraltar, to continue to fulfil contractual obligations to their Irish customers for a period of 15 years following the end of the transition period. This extends the original run-off regime period of three years in Part 8 of the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019* [the 'Brexit Omnibus' Act]. In addition, it introduces a review clause for the Central Bank of Ireland to make a report to the Minister for Finance at the end of year 12 setting out its view on the run-off regime.

Part 11 Customs

The current system for trade and customs will change when the UK leaves the EU single market and customs union at the end of the transition period (on 31 December 2020). From that point customs controls will be applied to the movement of goods between Ireland and Great Britain. Customs formalities will not apply to trade between Ireland and Northern Ireland, however, as the Ireland/Northern Ireland Protocol avoids a hard border on the island of Ireland.

These changes to the terms of customs administration are particularly significant for Ireland given the large volumes of goods going to and from the UK through Irish ports. They are also likely to impact the operations of the Revenue Commissioners and businesses from 2021.

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[8] CREST is an acronym and stands for Certificateless Registry for Electronic Share Transfer.
[9] Euroclear UK & Ireland is a division of Brussels-based Euroclear Bank.

The purpose of Part 11 (on Customs) is to accommodate the anticipated substantial increase in customs controls required at ports and at traders' premises arising from the end of the transition period. Part 11 provides for, amongst other things, an offence where a truck driver entering the State exits a customs port without obeying an instruction given to him/her by Revenue. It also provides a legislative basis for the online Customs Roll on Roll off Service for businesses carrying goods by ferry from the UK (excluding Northern Ireland) to Ireland.

Part 12 Amendment of *Harbours Act 1996*

Part 12 of the Bill, (which proposes amendments to the Harbours Act 1996, was developed to address concerns that pilotage exemption certificates (PECs) which have been issued by Dublin Port Company to seafarers holding UK certificates of competence may no longer be valid or may very quickly become invalid after the end of the transition period. In such cases there may be no means of renewing those PECs for a time after the end of the transition period. These amendments would see the existing maximum one-year period for PECs extended to a maximum of three years. It would also enable a harbour company, through its bye-laws, to require the holder of a PEC of more than one year's duration to undergo a periodic review to ensure they continue to have the relevant competence and local knowledge of the harbour pilotage district to enable them to pilot the ship within that area. Although this part of the Bill is largely technical it has implications in terms of the efficient operation of ferries in Dublin Port.

Part 13 Third Country Bus Services

Part 13 of the Bill proposes to make the National Transport Authority the competent authority to regulate bus services between Ireland and third countries, with enforcement by the Road Safety Authority, the National Transport Authority and An Garda Síochána (as is the case with existing services and their existing regulatory rules). The intention is that Part 13 could provide the backdrop to any future bilateral discussions to be held between the Irish and the UK Governments regarding arrangements to facilitate bus services between the two jurisdictions.

Part 14 Social Protection

Part 14 of the Bill (Amendments to the Social Welfare Consolidation Act 2005) seeks to maintain, following Brexit, the social security arrangements currently in operation between Ireland and the UK. It allows, among other things, for the implementation of the Convention of Social Security between the Government of the United Kingdom of Great Britain and Norther Ireland and the Government of Ireland, signed February 2019, which ensures continuity of CTA social protection arrangements.

One of the main implications of the enactment of the provisions of Part 14 would be to ensure the continuation of existing social security cooperation between Ireland and the UK. This benefits people of both States moving between them and who will to continue to enjoy flexibility and eligibility in respect of social protection.

Part 15 Amendment of Protection of Employees (Employers' Insolvency) Act 1984

Part 15 seeks to make legislative changes to the *Protection of Employees (Employers' Insolvency) Act 1984*, in order to ensure a smooth transitioning of employee protection should a company become insolvent under UK law. Amendments specifically make changes to the legislation to separate the UK from the current provisions regarding EU Member States. It amends the definitions of a "competent authority" and "relevant officer" under the Act. It also provides for changes to account for the United Kingdom's departure from the EU, specifically amending provisions on when an employer is considered to have become insolvent and who may certify the amount of unpaid occupational pension contributions under the 1984 Act. Finally, it permits the Minister to make regulations with regard to the transfer of personal data to individuals involved in the insolvency proceedings based in the UK."

Part 16 *Amendment of Extradition Act 1965*

Part 16 aims to ensure that there is a mechanism in place to allow extradition between Ireland and the UK following its departure from the European Union, when the provisions of the European Arrest Warrant (EAW) will no longer apply. The Government proposes to revert to the use of the Council of Europe Convention on Extradition 1957. Although this mechanism is less efficient than the EAW, the Government says it provides a "workable solution". Part 16 contains a number of amendments to the *Extradition Act 1965* to facilitate this, including an alternative process for extradition requests to try and minimise potential procedural delays. This process will allow requests to be transmitted electronically directly to the Department of Justice & Equality, rather than in hard copy through the Department of Foreign Affairs.

Part 17 Immigration

Part 17 proposes to amend the *Immigration Act 2004*, which governs the entry and residence of non-Irish nationals in the State. The main purpose of the proposed amendments under Part 17 of the Bill is to ensure that, following the end of the transition period, UK citizens do not come within the definition of "non-national" as it applies to sections 11 and 12 of the Immigration.

Part 18 International Protection

Part 18 of the Bill provides for amendments to current international protection legislation and aims to address the circumstances which may arise if the transition period expires without a relevant agreement being reached on this issue between the UK and the EU. The primary aim of the proposed changes is to, as far as possible, maintain the current system for the transfer of international protection applicants between Ireland and the UK following the end of the transition period on 1 January 2021. This is to be done by enabling the Minister to designate a country as a safe third country, provided that country meets specific criteria. This is proposed with a view to designating the UK as a safe third country. Where an applicant for international protection has arrived in Ireland from a safe third country, their protection application may be deemed inadmissible, and, it is proposed, the Minister may then make a return order in relation to that

applicant. The Bill also proposes amendments in support of this process, including provision for the detention of the applicant in certain circumstances, fingerprinting of the applicant and for the option to judicially review a removal order.

Part 19 Recognition of Certain Divorces, Legal Separations and Marriage Annulments

Part 19 deals with how the recognition of certain divorces, legal separations and marriage annulments will be dealt with once the transition period is over at the end of 2020. Currently, divorces granted in the UK or Gibraltar are recognised in Ireland under EU rather than Council of Europe[10] rules and this will change following transition unless new legislation is introduced.

Recognition under EU rules is based on habitual residence, rather than domicile under the Council of Europe. Domicile is more difficult to establish and could lead to a longer divorce process. Part 19 provides that the habitual residence (EU) rule will continue to apply to divorces granted in the UK and Gibraltar rather than the domicile (Council of Europe) rule.

Part 20 Amendment of *Childcare Support Act 2018*

The purpose of Part 20 of the Bill is to make provision for citizens of the United Kingdom of Great Britain and Northern Ireland to access the National Childcare Scheme on the same basis as Irish citizens[11]. This includes eligibility to apply for financial supports under the scheme. Part 20 of the Bill proposes to do this by amending the Childcare Support Act 2018. The Act of 2018 marked the first statutory entitlement to financial support for childcare.

Part 21 Construction Products - Market Surveillance Authority

The main purpose of Part 21 of the Bill is to allow the Minister to appoint a local authority as a market surveillance authority for construction products, under *European Union (Construction Products) Regulations 2013* (S.I. No.225 of 2013).

The DHLGH has stated that this is to support the policy decision to appoint Dublin City Council as a market surveillance authority with a national role.

The DHLGH has stated that any market surveillance authority, operating on a national basis, under Regulation 10 of the Regulations of 2013, must have a "solid and unimpeachable legal basis", and for this reason primary legislation is required; an agreement under Part 10 of the Local Government Act 2001, would not be sufficient under the circumstances.

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[10] For Council of Europe members who are not EU members

[11] Explanatory memorandum accompanying the Bill, Part 20 Amendment of the *Childcare Support Act 2018*, pp. 15-16 https://data.oireachtas.ie/ie/oireachtas/bill/2020/48/eng/memo/b4820d-memo.pdf

Part 1: Preliminary and general

Definitions

There is no general definitions section for the Bill. Definitions in particular Parts of the Bill are limited to their use in that part.

Part 1 of the Bill (sections 1-4) deals with the following:

- Short title, collective citations and construction;
- Commencement;
- Expenses; and
- Repeals.

Short title and collective citation

This is a standard provision in a Bill. The Bill, when enacted, can be cited at the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020*. Different parts of the Bill will be included in the collective citation of other Acts, for example Part 2 will be part of the collective citation *Health Acts 1947 to 2020.* Similarly, the *Customs Acts* and Part 11 of the Bill will be construed together as one Act.

Commencement

Section 2 of the Bill provides that the Minister for Foreign Affairs will commence the Bill but individual Ministers will have the power to commence parts that they are responsible for. For example, the Minister for Health has the power to commence Parts 2 and 3 dealing with health.

Expenses

Section 3 dealing with expenses is a standard provision stating that any expenses incurred by the Ministers in the administration of the Act are to be met out of funds provided by the Oireachtas. The Bill and explanatory memorandum do not include financial information on, for example, how much the provisions outlined in Parts 2 and 3 in relation to health would cost.

Repeals

Section 4 repeals legislation that is spent, will not be commenced, or will be superseded by provisions in this Bill. This includes the majority of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 (2019 Act) that was never commenced, and other pieces of legislation that were introduced in anticipation of a no-deal Brexit in 2019. Some of the provisions of these Acts have been reintroduced in this Bill.

The following Parts of the 2019 Act are repealed:

Part 2: Arrangements in relation to health services, Part 4: Arrangements in relation to Electricity and Fluorinated Greenhouse Gases, Part 5:Amendment of Student Support Act 2011, Part 6: Taxation, Part 7: Financial Services: Settlement Finality, Part 8:Financial Services: Amendment of

European Union (Insurance and Reinsurance) Regulations 2015 and European Union (Insurance Distribution) Regulations 2018, Part 9:Amendment of *Harbours Act 1996,* Part 10:Third Country Bus Services, Part 11:Amendment of *Social Welfare Consolidation Act 2005,* Part 12: Amendment of *Protection of Employees (Employers' Insolvency) Act 1984* and Part 13: Amendment of *Extradition Act 1965.*

The *Health and Childcare Support (Miscellaneous Provisions) Act 2019*, which was never commenced.

Part 3 of the *Family Law Act 2019* dealing with the recognition of foreign divorces, which was commenced but is dealt with in Part 19 of the Bill.

Sections 12, 13(2), 13(3), 15, 23, 36, 58 and 59 of the *Finance Act 2019* that were not commenced.

Part 2: Arrangements in relation to health services

The *Health Act 1970*, the "Principal Act" for this part of the Bill, is the main piece of legislation providing for the provision of health services in Ireland, including establishing regional health boards for the administration of health services in the State and setting down the criteria for full or limited eligibility for services.[12]

Policy context

As per the General Scheme:

> "Part 2, which is intended to replace the arrangements provided in Part 2 of the 2019 Omnibus Act, provides that the Minister for Health will facilitate the provision of health services under the Common Travel Area Healthcare Arrangement currently being negotiated between the Department of Health in Ireland, the Department of Health in Northern Ireland and the UK Department of Health and Social Care. The shared objective is to have in place an enduring arrangement to provide reciprocal access to healthcare in the UK and Ireland, both on a planned basis and on an as-necessary basis (e.g. on a temporary visit in the other State) ..."

As further detailed in the Explanatory Memorandum, Section 5 of the Bill seeks to support the maintenance of Common Travel Area (CTA) arrangements by giving the Minister for Health the power to give effect to healthcare and reimbursement arrangements that will apply between Ireland and UK after the ending of the transition period.

Common Travel Area (CTA)

[12] McDaid D, Wiley M, Maresso A and Mossialos E. Ireland: Health system review. Health Systems in Transition, 2009; 11(4): 1 – 268.

The CTA provides for associated rights and entitlements in both jurisdictions in a range of areas, including healthcare.[13] An Information Note (2017) to the Article 50 Working Party[14] in respect of the CTA explains these arrangements in respect of health services as follows:

> "The right to access the health systems in both the UK and Ireland depends on residence. There are no restrictions on residence of UK and Irish nationals in the other jurisdiction. A UK citizen resident in Ireland has access to public health services on a similar basis to an Irish citizen resident in Ireland. Reciprocal arrangements in respect of Irish citizens apply in the UK. There is extensive co-operation on a number of all-island and cross-border health care services due to the mobility of people on the island, the size of populations and the unique geography. This encompasses both emergency and non-emergency care, including planned treatment and emergency transfers on the island of Ireland and between Ireland and Great Britain. This may involve health professionals working in the other jurisdiction. There are also other arrangements for health co-operation."

The Memorandum of Understanding (MoU) between Ireland and the UK concerning the CTA and associated reciprocal rights and privileges, signed on 8 May 2019, reaffirms the arrangement between Ireland and the UK in relation to the CTA and the associated reciprocal rights and privileges enjoyed by Irish and British citizens in each other's state. In respect of health care, this MoU states that:

> "The CTA affords Irish citizens residing in the UK and British citizens residing in Ireland the right to access emergency, routine and planned publicly funded health services in each other's state, on the same basis as citizens of that state."[15]

Further, the Programme for Government – Our Shared Future (June 2020) undertook to:

> "Ensure the continued effective operation of the Common Travel Area and reciprocal rights between Ireland and Britain across areas such as social protection, education and training and healthcare."

Further detail in respect of this is available in the Department of Health (DoH)'s briefing material provided to the Minister and Ministers of State on their appointment to the DoH[16]. In respect of Brexit preparations, the briefing states that:

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[13] Common Travel Area: Information Note from Ireland to the Article 50 Working Group, 7 September 2017 [accessed 30 October 2020]

[14] This is the ad hoc Working Party on Article 50 of the Treaty on European Union (TEU), which was established to assist Coreper and the European Council in all matters pertaining to the withdrawal of the United Kingdom from the European Union. (See Council Decision (EU) 2017/900, 22 May 2017).

[15] Memorandum of Understanding between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland concerning the Common Travel Area and associated reciprocal rights and privileges, 8 May 2019.

[16] Briefing to the Minister June 2020

> "The preservation of current EU based eligibility arrangements[17] that enable Irish and UK residents to access both planned and necessary healthcare when visiting, studying, working or residing in each other's country following the end of the Transition Period is an area of major focus for the Department in 2020. Intensive negotiations are currently underway with the UK Department of Health (and the Northern Ireland Department of Health) to agree a reciprocal Healthcare Agreement under the Common Travel Area (CTA) Arrangement which will replace the current EU arrangements with effect from 1 January 2021.
>
> Once the negotiations are finalised, it will be necessary to enact primary legislation to give effect to this reciprocal healthcare agreement sufficiently in advance of the year-end to ensure a successful implementation of the CTA Healthcare Agreement with effect from 1 January 2021."[18]

This is reaffirmed in the Explanatory Memorandum to this Bill, which states that:

> "Section 5, in order to support the maintenance of Common Travel Area arrangements, gives the Minister for Health the power to make an Order, or Orders, and Regulations to give effect to the healthcare and reimbursement arrangements provided for in the enduring Memorandum of Understanding between Ireland and the UK that will apply between the States after the end of the transition period. An Order made under this Part may specify the category or categories of persons and services to whom the Order applies. Regulations made under this Part will set out the detailed operational and administrative arrangements necessary to operationalise the healthcare arrangements between the State and the UK."

Legislative changes

Part 2 of the Bill (Arrangements in relations to Health Services) is comprised of one section (Section 5). Section 5 seeks to amend the *Health Act 1970*,[19] the Principal Act, by inserting a new Part (Part IVA - Arrangements in Relation to Health Services) after Part IV (Health services) of the Principal Act.

Arrangements for health services

Section 75A provides for arrangements in relation to health services between Ireland and UK. It seeks to provide, among other things, for the Minister for Health to make such orders[20] as are

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[17] According to this briefing material, the Eligibility Policy Unit of the DoH will have responsibility for the development of the post-Brexit eligibility framework underpinning access to healthcare for Irish and UK residents under the Common Travel Area Healthcare Agreement. Department Briefing for Minister June 2020: Part 4, p. 76.

[18] Department Briefing for Minister June 2020: Part 4, p. 76.

[19] This link to the Health Act 1970 is to the revised/consolidate Act maintained by the Law Reform Commission and includes all amendments up to 17 February 2020.

[20] These order(s) may specify the categories of persons to be covered by the arrangements and the categories of health services to be encompassed by the arrangements.

necessary to conduct reciprocal or other arrangements with the appropriate UK authorities concerning health services, which will apply between Ireland and the UK after the transition period has ended. Section 75A(3) also provides that, in making such an order, the Minister for Health shall, among other things, have regard to:

- the CTA and associated reciprocal rights and privileges as fundamental public policy;

- the right for citizens residing in either state to access specified health services (i.e. emergency, routine and planned[21] publicly funded health services) in each other's state on the same basis as citizens of that state; and
- ease of access to healthcare in each state for residents of either state.

Regulations to give full effect to this Part

Section 75B(1) provides the Minister for Health with the power to make regulations, having regard to section 75A(3), to give full effect to Part IVA. Further, this section states that these regulations may provide, among other things, for one or more of the following:

- Applicable arrangements for assessing eligible persons to access health services in the State, as well as such arrangements for assessing eligible persons to access planned services in the UK (incl. establishing qualifying criteria);
- HSE administrative arrangements to ensure access to (a) planned health services in the UK and (b) health services in Ireland by persons from the UK;
- Payment mechanisms in respect of health services provided in both the UK and Ireland, and the manner in which each will be calculated, levied and paid; and
- The basis by which the HSE may reimburse persons in respect of health services received in the UK and paid for by the individual

Section 75B(3) provides for penal provisions for a person who contravenes the regulations made under section 75B(1), with such an individual liable on summary conviction to either or both a Class A fine and imprisonment for no more than 3 months.

Orders and regulations

Section 75C provides that orders and regulations made under Part IVA will be laid before the Houses of Oireachtas. Either House may annul the regulations within 21 sitting days.

Implications

The Department of Health (DoH) indicates that primary legislation is required prior to the ending of the Transition Period to underpin CTA-derived reciprocal healthcare access. For instance, the briefing material (June 2020) provided to the incoming Minister for Health advised that, once an

[21] The DoH briefing to the Oireachtas Committee on Health (7 October 2020) indicates that the MOU will provide for reciprocal access to planned healthcare, which predominately covers essential and highly complex treatment (e.g. treatments for rare disease; certain organ transplants), which are not available in Ireland and are currently accessed under the Treatment Abroad Scheme (TAS) provided for under EU Regulation 883/2004.

"Enduring CTA Healthcare Arrangement" is agreed between Ireland and UK, primary legislation is required to provide for the necessary domestic legal basis for these reciprocal rights.[22] Similarly, a DoH briefing to the Oireachtas Committee on Health (7 October 2020) stated that, in light of the ending of the Transition Period, "enduring arrangements" need to be put in place to secure continued access to healthcare in the UK.[23] Furthermore, the briefing notes that the CTA has enabled significant cooperation in the field of healthcare between the UK and Ireland and "proven to be an important shared service that has provided significant benefits to the residents of both States". This briefing also advises that these healthcare arrangements, which will aim to ensure that healthcare access is ensured "to the greatest extent possible, in line with the health care arrangements currently set out in relevant EU Regulations", will be underpinned by a Memorandum of Understanding, which is currently being negotiated with a view to being "agreed and signed in the very near future".

It is notable that this DoH briefing to the Oireachtas Committee on Health highlights that the proposed healthcare arrangements will be applicable to all *residents* of Ireland and the UK.[24] This is a departure from the overarching CTA arrangements, which confer rights and entitlements on *citizens* of Ireland and the UK:

> "While the overarching CTA MOU provides for the free movement of Irish and British citizens within the CTA enabling citizens of each State to visit, work, study and reside in the other State, both the Irish and UK Governments agree that the residency based nature of the health systems of each State requires that the enduring CTA healthcare arrangements should cover all residents and not just citizens of each State."

In terms of the cost implications of these proposed healthcare arrangements, the DoH advises that, whilst there might be some increased cost to the Exchequer, it is expected that the overall impact of these proposals "will be cost neutral as our liabilities for the cost of healthcare provided to Irish citizens/residents in the UK will be reduced". Furthermore, in terms of the costs associated with administering these new healthcare arrangements, the DoH advises that there will be additional costs associated with implementing the necessary administrative arrangements. However, the DoH states that it is not expected that these will give rise to "significant additional costs" given that they will replace the current workload associated with operationalising existing EU Regulations underpinning reciprocal access rather than being in addition to them.[25]

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[22] Department Briefing for Minister June 2020: Part 6, p. 116.

[23] Taking 2019 as an example, the DoH indicates that of the 764 successful applications made by Irish residents to the HSE to be referred abroad for specialised treatment under the Treatment Abroad Scheme operated under EU Regulations 883/2004, 86% were referred to the UK. The DoH advises that "maintaining this access is crucial to ensuring that patients have access to key services in the UK and remains a key objective of the Brexit preparations". (Source: Researcher consultation with a DoH official, 4 November 2020).

[24] Access to healthcare in the other State will be based on the equal treatment principle (i.e. access on the same basis as a local resident). In the case of treatment in Ireland, therefore, the DoH has indicated that it is intended that UK residents will be conferred with limited eligibility status (i.e. the default eligibility status conferred on persons 'ordinarily resident' in Ireland under the Health Act 1970 [as amended]).

[25] Source: Researcher consultation with a DoH official, 4 November 2020

Part 3: Reimbursement of medical expenses

Policy context

Part 3 of the Bill seeks to provide for the establishment of a scheme to mimic the current European Health Insurance Card (EHIC) for residents of Northern Ireland (NI). It is intended that this would be put in place *if* they lose this cover at the end of the transition period. The proposed scheme would reimburse eligible residents of NI the costs they incur for necessary medical treatment (publicly provided) during temporary stays[26] in an EU Member State (other than Ireland), or a member of the European Economic Area (Iceland, Liechtenstein, Norway) or Switzerland.[27]
The Bill defines eligible residents of NI as Irish citizens, British citizens and citizens of EU Member States. The scheme seeks to reimburse unplanned care only,[28] does not seek to substitute for private travel insurance and would not, for example, cover the cost of repatriation of a sick/injured person.
The future of the EHIC benefit for UK residents depends on the outcome of the EU-UK Future Relationship Agreement talks.[29] The current and previous Irish Governments have voiced their commitment to ensuring the continuation of EHIC equivalent benefits for the people of Northern Ireland post-Brexit.[30] This has been presented as being "in the spirit of the State's commitment" [31] to the British-Irish Agreement (Good Friday Agreement) and in light of the State's EU membership.

The Government website on Brexit states:

> "The Government of Ireland continues to recognise the importance placed on continued access to the European Health Insurance Card entitlements by residents of Northern Ireland…"[32]

The Department of Health Briefing for the Incoming Minister for Health, published in June 2020, stated:

> "Depending on the outcome of the EU-UK Future Relationship Agreement talks, it may…be necessary to revisit legislation to facilitate the provision of a scheme for certain residents of

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[26] The maximum duration of stay is not determined by law and depends of the factual circumstances in each case. In practice, this could be e.g. a holiday period or a period of study (if not accompanied by a change in habitual residence). See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0520%2805%29&qid=1604407493815

[27] This HSE webpage sets out which countries are included in EHIC benefits: https://www2.hse.ie/services/ehic/countries-in-the-eu-and-eea.html

[28] Funding for *planned* care in other EU states may be available to EU residents under the Cross-Border Healthcare Directive.

[29] A European Commission Guidance Note explains transitional arrangements: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0520%2805%29&qid=1604407493815

[30] See for instance the Government of Ireland (2019) *Preparing for the withdrawal of the United Kingdom from the European Union Contingency Action Plan; Update July 2019*

[31] See long title of the *Health and Childcare Support (Miscellaneous Provisions) Act 2019* which provided for the same policy goal, and would be repealed under Part 1 of this Bill.

[32] https://www.gov.ie/en/publication/060fdf-northern-ireland/#health

> Northern Ireland which is analogous to the EHIC scheme for necessary healthcare while on a temporary visit to another MS [Member State] of the EU / EEA. If required, this legislation will need to be passed by the end of the Transition Period – 31st December 2020."[33]

This Part of the Bill seeks to enable the Health Service Executive to administer the scheme, under which eligible persons with relevant expenses would keep receipts and submit them online to the HSE to claim their money back.

If this Bill is enacted, the proposed scheme could be in place, should it be required, from 1 January 2021.

EHIC: latest data on coverage and costs in Northern Ireland

The population of Northern Ireland is approximately 1.8 million people.[34] In December 2019, there were 632,000 EHIC cards held at NI addresses.[35] The Table below shows the best available data on the number of EHIC claims and their costs for residents of Northern Ireland in 2018 and 2019.[36]

Table 1: Claims and costs of EHIC benefit in Northern Ireland, 2018-2019

Year treatment started	No of Claims	Amount of accepted claims GBP	Euro equivalent[37]
2018	2,596	£1,018,000	€1,126,457
2019	2,772	£1,254,000	€1,387,630

Source: Data from private communication from NHS Business Services Authority, 5 November 2020.

UK position

In 2018, the UK Government stated that its "preferred policy position" with regard to future reciprocal healthcare arrangements was, amongst other things, its continued participation in the EHIC scheme.[38] The UK has legislated to allow for this – see the *Healthcare (European Economic Area and Switzerland Arrangements) Act 2019*. This Act was put in place to allow for either a Brexit deal or no deal scenario, and gives the UK Secretary of State for Health and Social Care powers to regulate to make arrangements for healthcare for UK residents, including payment for

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[33] https://www.gov.ie/en/organisation-information/94260-briefing-to-the-minister-june-2020/

[34] https://www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/MYE19-Bulletin.pdf

[35] Data provided to Library & Research Service in private communication from NHS Business Services Authority, 4 November 2020.
Further data show that 551,000 cards were held at NI addresses in September 2020, but as 2020 has been an exceptional year in terms of travel restrictions and the numbers of cards issued were exceptionally low, the December 2019 figure is considered more indicative of demand for the card benefits.

[36] Due to the nature of EHIC claims, there may be more claims submitted in for treatment starting in these years. However the NHS unit providing the data consider these to provide a good indication of the volume and cost associated with these claims.

[37] Currency conversion on 5/11/2020 using www.xe.com. Actual value likely to have varied over time due to fluctuations in exchange rates.

[38] UK Department of Health and Social Care (2018) as before.

healthcare,[39] when in EEA countries and Switzerland and vice versa.[40] This could be done by continuing the EHIC or by putting in place bilateral or multilateral arrangements.

Legislative changes

Part 3 of the Bill, Reimbursement of Medical Expenses, encompasses sections 6 to 11 of the Bill (inclusive). The key elements of these provisions are described below.
First, section 6 provides the definitions for this Part of the Bill.

Table 2: Definitions applicable in Part 3 of the Bill

Term	Definition applicable in Part 3 of the Bill
British Citizen	A citizen of the United Kingdom of Great Britain and Northern Ireland (NI)
Eligible person	(a) Irish citizen who is ordinarily resident in Northern Ireland; (b) British citizen who is ordinarily resident in Northern Ireland; or (c) A citizen of a Member State who is ordinarily resident in Northern Ireland. Excluding people resident in NI who: Have or would be entitled to have a European Health Insurance Card (EHIC)[41] or equivalent issued by an EU Member State; or Holds/would be entitled to hold an equivalent document to EHIC issued by the UK; or Is otherwise entitled to reimbursement of necessary medical treatment in a Member State after the end of the transition period (whether under the Withdrawal Agreement or otherwise).
European Health Insurance Card	The card issued in the State by the HSE.
Executive	Health Service Executive (HSE).
Medical expenses	Cost of medical care, products and services related to that care, incurred by an eligible person for necessary medical treatment.
Member State	Members State of the European Union (other than Ireland); Members of the European Economic Area (EEA); and Switzerland.
Minister	Minister for Health.

[39] The Act (s.2(2)) would allow the Secretary of State to regulate as to eligibility.

[40] In 2019 the UK had 16 bilateral agreements in place with non-EEA countries, including Australia, Jersey and Serbia. See House of Commons Library *(2019) Healthcare (International Arrangements) Bill 2017-19.* Briefing Paper No, 08435.

[41] For information provided by the HSE on the European Health Insurance Care see: https://www2.hse.ie/services/ehic/ehic.html

Necessary medical treatment	Treatment for an eligible person that becomes medically necessary and which the person would be entitled to receive during a temporary stay in a Member State with a European Health Insurance Care if they were eligible for one.
Prescribed	Prescribed by regulations issued under Section 8.
Transition period	Transition period provided under Article 126 of the Withdrawal Agreement.
United Kingdom of Great Britain and Northern Ireland	Includes the Channel Islands and Isle of Man.
Withdrawal Agreement	Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Agency Community.[42]

Section 6(2) provides that this Part of the Bill applies to medical expenses incurred on or after the date on which s.7 of the Bill comes into operation.

Section 7 provides for a Scheme for 'Reimbursement of expenses incurred by eligible persons in respect of necessary medical treatment'.

Section 7(1) provides that an eligible person (see table above), or someone acting on their behalf, may apply to the State to reclaim expenses incurred for 'necessary medical treatment'. This provision seeks to establish a scheme to repay the medical expenses of Irish, British and EU citizens living in Northern Ireland, where they receive treatment when staying temporarily in another EU Member State (not Ireland). For instance, a British citizen who lives in Northern Ireland who gets sick while on holidays or staying temporarily in France could reclaim their necessary medical expenses from the HSE.

Section 7(2) provides that applications for reimbursement must follow the prescribed format.

Section 7(3) provides that the HSE will repay expenses where it is satisfied conditions have been met for eligibility of the person and the definition of 'necessary medical treatment', and any regulations under s.8 (below) have been followed.

Section 7(4) provides that, as far as practicable, the HSE 'shall endeavour to ensure' that its assessment of applications for reimbursement is on a par with (no more or less favourable than) assessments of applications under the EHIC scheme.

Section 7(5) is included to allow the HSE to seek repayment, as simple contract debt, of any wrongly or fraudulently claimed payments.[43]

Section 8 would allow the Minister for Health, with the consent of the Ministers for Finance and Public Expenditure and Reform, to make regulations to give effect to this Part of the Bill. The

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[42] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29&qid=1604329222839

[43] Detailed in the Department of Health Eligibility Policy Unit (2020) Submission on the Drafting of Part 2 and 3 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020 to the Joint Oireachtas Health Committee. 7th October 2020.

Minister would have to consult with the HSE (s.8(1)). This section does not place an obligation on the Minister to make regulations under s.8.

The regulations may provide for any or all of the following:

(a) The period in which an application for reimbursement of expenses can be made;
(b) How reimbursements will be made by the HSE;
(c) The documentation that will be required to support an application for reimbursement, including proof of citizenship and residence.
(d) The class or classes of persons who may make an application in respect of an eligible person.
(e) The forms that may be needed under paragraphs (a) to (d) above.
(f) Any other additional, incidental, consequential or supplemental matters that the Minister considers are needed or beneficial to give effect to this Part of the legislation.

Section 8(2) provides that, in making regulation, the Minister shall have regard to the proper administration of reimbursements, to ensure the effective and efficient use of resources. The Minister must also have regard for the policies and objectives of the Government, with specific reference to the State's commitment to the British-Irish Agreement (Good Friday Agreement) and the State's membership of the EU, to enable arrangements for health services for eligible people to be maintained after the end of the transition period.

Section 8(3) sets out that regulations under this section must be laid before each House of the Oireachtas as soon as may be after they are made.

Section 9 would allow the HSE to enter into administrative and technical arrangements with equivalent institutions of Member States for processing, calculating, exchanging information and facilitating cooperation to allow for the reimbursement of expenses incurred in other Member States.

Section 10 would allow the HSE to modify the proposed scheme to keep it aligned with the benefits/rules of the EHIC.

Section 11 would require the HSE to review the operation of the scheme within two years of its establishment and to submit a report to the Minister in this regard.

Implications

The Government's intention is to establish the new EHIC-type scheme for NI residents only in the case of a Brexit outcome that results in the end of the current EHIC benefit for NI residents. The scheme, set out in Part 3, provides a back-up plan for that scenario. The UK has also passed legislation to allow it to either continue the EHIC/equivalent or to make bilateral or multilateral arrangements of its own. These would likely benefit NI residents. So, it is not clear whether the scheme provided for in Part 3 will be required.

Under the proposed scheme, Ireland would assume the costs of necessary medical treatment incurred by eligible Northern Irish residents when they are on temporary visits to other EU/EEA states or Switzerland, so long as they are treated by public sector providers. As noted above, the EHIC scheme resulted in claims related to NI residents costing €1.4m in 2019.

The Department of Health has provided a high-end estimate suggesting the cost of the scheme could be up to €5m a year.[44] However, given current public health related travel restrictions, the Department notes it is likely that costs will be lower. This estimate of the cost assumes that a similar percentage of the NI population avail of the EHIC as do in this State. The Department has also identified that:

> "A further factor which will impact on the numbers that can avail of the scheme is the number of Irish, EU and British Citizens that will retain EHIC rights under EU Regulations, the Withdrawal Agreement or otherwise who will not be eligible for this scheme – such information is not currently known."[45]

If the UK leaves the EU without a deal that continues the EHIC, and enters into bilateral arrangements with other countries, then the proposed scheme would not cover expenses for those countries.

Under the proposed scheme, NI residents would have to meet their costs when having necessary medical treatment, save the receipts, and provide these as part of their online application to the HSE for reimbursement.[46] They would also have to provide documentation to prove their eligibility for the scheme. Thus, the proposed scheme might be seen as more cumbersome than the EHIC scheme (where the patient with an EHIC does not need to reclaim expenses, as they are not charged for covered costs).

Very little stakeholder commentary specific to this Part of the Bill has been identified. In the UK, the Brexit Health Alliance, a group of healthcare providers, academic institutions and professional and advocacy bodies, has promoted the following goal as a priority in current negotiations:

> "UK and EU citizens to continue to benefit from simple and safe access to treatment in the EU at local, affordable cost."[47]

The same Alliance recommends that contingency plans for alternative arrangements for access to healthcare for UK citizens living, travelling or working in the EU be made to provide for the event of a no-deal Brexit.

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[44] Information provided to Library & Research Service in private communication from a Department of Health official, 4 November 2020.

[45] Private communication from a Department of Health official, 4 November 2020.

[46] Detailed in the Department of Health Eligibility Policy Unit (2020) Submission on the Drafting of Part 2 and 3 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020 to the Joint Oireachtas Health Committee. 7th October 2020.

[47] https://www.nhsconfed.org/-/media/Confederation/Files/Publications/Documents/BHA_How-do-we-protect-patients_Brexit-transition-FNL.pdf

Part 4: Amendment of *Companies Act 2014*

Policy context

Part 4 provides for an amendment to the *Companies Act 2014*. Changes to the *Companies Act 2014* are required to:

- Accommodate the ongoing migration of the Irish securities market from the existing UK-based Central Securities Depository (CSD) known as CREST and operated by Euroclear UK & Ireland (EUI) to an EU/Belgian-based CSD operated by Euroclear Bank, which is a different operating model; and
- Ensure the successful functioning of the Euroclear Bank CSD as the new Irish settlement system post-migration.

Migration must be completed by **30 March 2021**. A May 2019 White Paper, published by Euroclear Bank, highlights a number of areas requiring limited legal changes to provide for long-term sustainability of Irish securities settlement, as follows (p.20):

"5.4 Changes to Irish Company Law to accommodate the Euroclear Bank model

- Changes to allow migration to occur by operation of law (rather than by individual schemes of arrangement per issuer, or other existing mechanism;
- Corporate law changes to disapply the requirement for share certificates to be issued in respect of shares held or to be held through Euroclear Bank, and to remove the need for a written instrument of transfer for transfers of shares out of Euroclear Bank;
- **Changes to disapply the scheme of arrangement requirement for approval by a majority in number (and corresponding amendments elsewhere in the *Companies Act 2014*);**
- Changes to the charge to stamp duty."

Legislative changes

Section 12 of the Bill provides for a technical change to Part 17 of the *Companies Act 2014* by the insertion of a new Chapter (7A) after Chapter 7. Chapter 7A comprises 8 sections (1087A-1087H) as follows:

- Interpretation;
- Share certificates;
- Written instruments of transfer;
- Alternative special majority for Schemes of Arrangement;
- Disapplication of additional requirement;
- Irrevocable power of attorney;
- Record date for participation and voting in general meeting;
- Definition of subsidiary.

This change is in addition to other changes relevant to the migration project recently provided for under the *Migration of Participating Securities Act 2019*. The changes are not considered to be a "fundamental change in Irish Company Law" according to the Euroclear Bank White Paper.

Implications

Part 9 of this Bill Digest examines the existing securities settlement system and proposed changes in this legislation.

Part 5: Amendment of the *Employment Permits Act 2006*

Policy context

Section 10 of the *Employment Permit Acts 2006* (the 2006 Act) deals with restrictions on granting employment permits. Under this section, an employment permit will not be issued unless, at the time of application, at least 50% of the employees in a firm are EEA nationals (the '50:50 rule'). EEA nationals are EU nationals and also those from Iceland, Liechtenstein and Norway. Swiss nationals are also covered by the 50:50 rule. When the transition period ends at the end of December 2020, UK nationals will no longer be EU or EEA nationals. However, Ireland and the UK will continue to be members of the Common Travel Area with equal rights in many areas, including employment. A change is being made to current legislation in order to provide that UK nationals can be included in the EEA /Swiss 50% of the 50:50 rule.

The Minister of State for Trade Promotion, Digital and Company Regulation, Robert Troy TD,[48] in his meeting with the Joint Committee on Enterprise, Trade and Employment on 7th October 2020 stated:

> "under the Employment Permit Acts, as currently drafted, when the transition period ends, UK citizens would fall outside the EEA category for the purpose of the 50:50 rule.
>
> This would give rise to considerable disruption for companies who are applying for new employment permits and for companies applying for employment permit renewals because they may not satisfy the 50:50 rule if they are unable to include UK citizen employees, as they do at present, in the EEA/Swiss employee count.
>
> To avoid disruption for business, Part 5 of the Bill provides for an amendment to s.10(2) of the *Employment Permit Acts 2006* to facilitate the continued inclusion of UK citizens in this."

Legislative changes

Section 13 of the Bill amends s.10(2) of the 2006 Act, which deals with restriction on the grant of employment permits. The amendment allows for the continued inclusion of UK citizens (including

[48] https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_enterprise_trade_and_employment/submissions/2020/2020-10-07_opening-statement-robert-troy-t-d-minister-department-of-foreign-affairs-and-trade_en.pdf

UK citizens from the Channel Islands and the Isle of Man) in the EEA employee count for the purposes of the 50:50 rule.

Implications

UK nationals, including those from the Isle of Man and the Channel Islands, will be included in the EEA/Swiss 50% of the 50:50 rule. It is expected that this will alleviate disruption for business.

Part 6: Qualification to carry out activity relating to fluorinated greenhouse gases

Policy context

Part 6 of the Bill (sections 14 and 15) concerns arrangements in respect of fluorinated greenhouse gases, (F-gases). This Part will address the issue of certification for individuals who work with F-gases in critical sectors such as refrigeration, air conditioning and heat pumps, mobile air conditioning, fire suppression, solvents and electrical switch gear.

The current arrangements, whereby mutual recognition of technical qualifications and certifications from UK institutions in the area of F-gases apply across the EU, will cease at the end of the transition period on 31 December 2020.

A recertification scheme has been in place since July 2019 to enable individuals and companies with UK F-gases certificates to avail of a free-of-charge process to receive an Irish/EU 27 certificate to enable them to continue to operate in the EU, including Ireland.

Legislative changes

The Bill allows an extension of six months for individuals who hold a valid UK certificate for use of F-gases immediately prior to the end of the transition period.

Further, the legislation provides for a four-month period at the start of the six-month extension period in which licensees may apply for an equivalent Irish licence, free of charge, from the Environment Protection Agency.

Implications

The extension of license validity and licence exchange will enable licensees to continue to operate in Ireland and across the EU27 in the applicable sectors.

Part 7: Amendment of the *Student Support Act 2011*

Part 7 of the Bill proposes to amend the *Student Support Act 2011* (the 2011 Act). The 2011 Act is the main piece of legislation providing for financial supports for third level students. The Act established, among other things, a unified grant payment scheme to replace multiple existing schemes and provided for a new independent appeals board (*An Bord Achomhairc i leith Deontas Mac Léinn* or the *Student Grants Appeals Board*). The student grant scheme is administered by *SUSI* (Student Universal Support Ireland). Enabled by the 2011 Act, SUSI provides grants to students who meet the prescribed conditions of funding, including those relating to nationality, residency, previous academic attainment and means. As it stands, eligibility regarding approved courses and institutions is limited to courses and institutions in EU member states. In other words, currently eligible students from Ireland who take up approved third level courses in the UK and eligible UK nationals who take up approved courses in Ireland qualify for SUSI grants due to the UK's membership of the EU. The effect of the amendments to the 2011 Act proposed by Part 7 of the Bill will widen the definitions from the end of the transition period to encompass the UK as a third country.

Policy context

SUSI is Ireland's single national awarding authority for all higher and further education grants. It is a central online information resource on financial supports for students. In 2012 it replaced the 66 local awarding authorities which previously processed student grant applications. SUSI grants are payable at various rates including; special rate maintenance, full maintenance, part maintenance, full fees and part fees, in order of decreasing support.

As it stands, the Common Travel Area (CTA) affords both Irish and UK citizens the right to access all levels of education and training and associated student support in each other's State on terms no less favourable than those for the citizens of that State.[49] This means that UK citizens studying in Irish Universities pay the same University registration fees as Irish citizens, and Irish citizens studying in UK Universities pay the same University fees as UK citizens.

Table 3 shows the difference in Undergraduate fee rates for Irish/UK students compared to non-EU students for the year 2020/21. If, following Brexit, students from Ireland in the UK or students from the UK in Ireland were to be categorised as non-EU international students they could be required to pay these much higher fees.

Table 3: Comparison of Undergraduate fees 2020/21

	Ireland and UK fees	Non-EU international fees
Ireland	Registration fee of up to €3,000	Typically, between €10,000 and €30,000 but also up to around €50,000 for certain courses (e.g. medicine)

[49] "Common Travel Area Guidance".

United Kingdom	Up to £9,250 per year for an undergraduate degree in England but significantly less in Wales and Northern Ireland. Northern Ireland charges up to £4,275 for home students	Typically, between £10,000 and £26,000 per year but these can be up to £58,600 per year for certain courses (e.g. medicine)

Source: Times Higher Education (THE)[50]

UK citizens can also access the same financial support as Irish students when studying in Ireland and vice versa. In the academic year 2018/2019, 1,418 students (1,352 undergraduates and 66 post-graduates) from Ireland studied in UK or Northern Ireland while in receipt of SUSI grants, and 214 students (196 undergraduate and 17 postgraduate) usually domiciled in the UK studied in Ireland while in receipt of a SUSI grant[51].

Students from Ireland pursuing approved courses outside of Ireland (and who are otherwise eligible for a SUSI grant) are only entitled to the maintenance grant from SUSI, and not the fee grant.[52] Maintenance grant funding is also only available for undergraduate study, except for students attending postgraduate courses in one of the following four approved institutions in Northern Ireland:

- Queen's University, Belfast – full-time Postgraduate courses of not less than one-year duration
- University of Ulster – full-time Postgraduate courses of not less than one-year duration
- St. Mary's College of Education, Belfast – Postgraduate Certificate in Education (Irish Medium)
- Stranmillis College, Belfast – Postgraduate Certificate in Education

Legislative changes

As noted, the 2011 Act is the main piece of legislation providing for financial supports for third level students and Part 7 of the Bill seeks to amend that Act.

Section 17 seeks to amend s.2 (interpretation) of the 2011 Act by, among other things, inserting a definition of "relevant specified jurisdiction" as provided for in s.14 of the Act (student – interpretation), subject to amendments proposed by s.20 of the Bill. The UK can be designated as a relevant specified jurisdiction.

Section 18 proposes to amend s.7 (approved institution) of the Act of 2011, which defines what an approved institution is for the purposes of the grant scheme. Currently, approved institutions are publicly funded higher education institutions in current EU Member States. The effect of the

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[50] "The cost of studying at a university in the UK".

[51] Oireachtas Library & Research Service, 2019. *Bill Digest – General Scheme off the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019.*

[52] "Students Studying Outside the State", https://susi.ie/eligibility__trashed/student-studying-outside-the-state/

amendment will allow for the recognition of approved institutions in a prescribed third country, such as the UK, following the end of the transition period.

Section 19 provides for amendments to s.8 (approved course) of the 2011 Act by the insertion of subsections which, among other things, expand the definition of an approved course to cover arrangements, systems and procedures in a prescribed third country, such as the UK, from the end of the transition period. The definition of an approved course under s.8 has implications for the recognition of qualifications awarded following completion of an approved course.

Section 20 seeks to amend s.14 (student – interpretation) of the 2011 Act which defines what an approved student is for the purpose of the grant scheme provided for under the Act. Section 20 of the Bill provides for various insertions, substitutions, and deletions to s.4 so that students in a country prescribed under the Act by the Minister, such as the UK, are students for the purposes of s.14 of the Act.

Section 21 of the Bill seeks to insert section 14A after s.14 (prescribing of certain matters) of the 2011 Act. Section 14A, among other things, defines the policies and principles to which the Minister must have regard when prescribing a class of person as an approved class for student grant purposes.

Implications

As mentioned, in the most recent year for which data is available (2018/2019), approximately 1,500 Irish nationals studying in the UK and approximately 200 UK nationals studying in Ireland qualified for SUSI grant support. In the absence of the amendments proposed by Part 7 of the Bill that will not continue, and these students will not meet the current statutory-based eligibility criteria. The provisions proposed in Part 7 of the Bill seek to address this by amending the 2011 Act to enable students to continue to qualify for grant support when the transition period ends.[53]

A Department of Public Expenditure and Reform Social Impact Assessment of SUSI Grants[54] (published October 2020) reports that "SUSI administered over €360 million in the 2017/2018 academic year, supporting 77,495 or 37% of students in higher and further education". It goes on to report that the gross median household income of a SUSI recipient was €48,972 and that approximately one-third of students receiving the highest rate of support (the special rate of maintenance) are in households in which there is no income from employment/self-employment. While this is overall data from Ireland and does not specifically speak to Irish citizens studying in the UK and vice versa, it does serve to highlight the importance of SUSI grants to students' access to University education.

[53] See Joint Committee on Education, further and higher education, research, innovation and science, Debate, Thursday, 8 October 2020.

[54] "Social Impact Assessment Series: Student Grant Scheme (SUSI Grants)".

A January 2020 press release[55] issued from both the Minister of Education and Skills, Joe McHugh T.D. and the Minister of State for Higher Education, Mary Mitchell O'Connor T.D. confirms that current fee regimes and grant supports will be maintained for the 2020/21 academic year. It states:

> "Should you pursue your further and higher study in the UK, your fees will be set at the same level as citizens in the UK for the 2020/2021 academic year, and will continue on that basis for the duration of the programme for which you have registered. The Common Travel Area (CTA) means Ireland and the UK will take steps to ensure Irish and British citizens can continue to access further and higher education on the same fee basis into the future."
>
> And:
>
> "After the end of the transition period, the usual SUSI grant rules will continue to apply for UK and Irish students."

Part 8: Taxation

Many of the changes proposed in the Bill were first proposed in Part 6 of the Brexit Omnibus Act 2019. Part 6 was never commenced so none of the provisions were enacted.

This section does not compare Part 6 of the 2019 Act with Part 8 of the Brexit Omnibus Bill 2020.

Policy context

Part 8 is a lengthy part which makes mostly technical changes to existing legislation in order to extend certain tax reliefs available in the EU or in the European Economic Area to the UK following the end of the transition period.

Part 8 comprises of:

Chapter 1 – Definitions (section 22)

Chapter 2 – Income Tax (sections 23-50)

Chapter 3 – Corporation Tax (sections 51-58)

Chapter 4 - Capital Gains Tax (sections 59-60)

Chapter 5 – Value-Added Tax (sections 61-65)

Chapter 6 – Stamp Duties (sections 66-71)

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[55] "Ministers McHugh and Mitchell O'Connor provide assurance to students and their families for studies in the UK", 10 January, 2020.

Chapter 7 – Capital Acquisitions Tax (section 72)

Chapter 8 – Excise (section 73)

Legislative changes

Chapter 1 – Definitions

Section 22 sets out definitions for Part 8.

"Act of 1997" means the Taxes Consolidation Act 1997; (TCA 1997)

"Act of 1999" means the Stamp Duties Consolidation Act 1999;

"Act of 2010" means the Value-Added Tax Consolidation Act 2010. (VAT 2010)

Chapter 2 – Income Tax

The overall aim of Chapter 2 is to amend parts of *TCA 1997* to include explicit references to the UK in various sections, where previously the UK would have been covered by references to the EU or to the European Economic Area. It is to ensure that income tax measures which currently apply to Irish taxpayers will continue following the end of the transition period.

Section 23 of the Bill amends section 42 of the *TCA 1997* which deals with an exemption of interest on savings certificates issued by an EU/EEA Member State. Section 23 extends this exemption to savings certificates or other similar products issued by the government of the UK.

Section 24 of the Bill amends section 128D of the *TCA 1997* to include entities in the UK to qualify for an income tax abatement where certain shares are held in trust for a period of more than five years. Section 128D is currently limited to entities in the EEA only.

Section 25 of the Bill amends section 128F of the *TCA 1997* which provides for the Key Employee Engagement Programme. The amendment will allow entities established in the UK remain included.

Section 26 of the Bill amends section 191 of the *TCA 1997* to ensure that recurring compensation payments from Hepatitis C/HIV public compensation schemes in the UK remain exempt from Irish income tax.

Section 27 of the Bill amends section 192BA of the *TCA 1997* to make sure that ensure that payments made by UK authorities for the fostering of children will continue to be exempt from Irish income tax.

Section 28 of the Bill amends Section 192F of the *TCA 1997* to include to UK student support payments to current exemptions available to EU Member State payments in certain circumstances.

Section 29 of the Bill amends section 195 of the *TCA 1997* which provides income tax exemptions on some earning by artists (writers, composers and artists). Section 29 extends the exemption to include UK residents as it is currently only available to EEA residents.

Sections 30 and 31 of the Bill amend sections 208A and 208B of the *TCA 1997* so that certain tax exemptions will continue to apply to charities and donations made to charities established in the UK.

Sections 32 and 33 amend sections 244 and 244A of the *TCA 1997* which deal with mortgage interest relief**.** The proposed amendments will make sure that certain UK properties situated in the UK will still be eligible for mortgage interest relief.

Section 34 of the Bill amends s.470 of the *TCA 1997* which deals with relief for insurance against expenses of illness. This aims to ensure that income tax relief remains available for certain health insurance policies granted by insurers established in the UK.

Section 35 of the Bill amends s.472B of the *TCA 1997* to ensure that the Seafarer Allowance will not stop for work done on certain sea-going ships registered on UK registers.

Section 36 of the Bill similarly amends s.472BA of the *TCA 1997* to ensure that the Fisher Tax Credit will not stop for work done on certain fishing vessels that are registered on UK registers.

Section 37 amends s.473A of the *TCA 1997* to make sure that tax relief for fees paid for third level undergraduate education will continue to apply to UK-based institutions.

Section 38 of the Bill amends s.480A of the *TCA 1997* to ensure that sportspersons relief can still to applicable to certain UK residents.

Sections 39 and 40 of the Bill amend sections 489 and 490 of the *TCA 1997* which provide relief for investments in corporate trades to extend this to the UK as it is currently limited to entities established in EEA Member States.

Sections 41 to 48 deal with pension-related income tax reliefs. The Bill amend sections 770, 772, 772A, 784, 784A, 785(1A), 787M, and 790B of the *TCA 1997* to make sure that Irish taxpayers can keep availing of the various pension-related income tax reliefs. The amendments will also ensure that UK occupational pension schemes and other retirement plans may continue to operate in Ireland and avail of the appropriate tax reliefs.

Sections 41 and 42 of the Bill provide that UK occupational pension schemes may continue to obtain "exempt approved" status under the *TCA 1997.*

Sections 43, 44 and 46 of the Bill aim to allow UK annuity providers to continue to obtain tax approval for their retirement products under the *TCA 1997.*

Section 45 provides that UK entities can still act as qualifying fund managers for the purposes of the Approved Retirement Fund regime.

Section 47 of the Bill provides that UK employees or self-employed individuals who come, or return, to Ireland may continue to obtain tax relief for contributions to pension plans with UK pension or EU (excluding Ireland) providers.

Section 48 of the Bill provides that an Irish pension scheme may accept contributions from UK undertakings and obtain tax exemptions in respect of scheme income.

Section 49 amends s.806(11)(a) of the *TCA 1997* which deals with charges to income tax on transfer of assets abroad. The amendment will allow the UK to maintain its existing position for anti-avoidance provisions relating to income tax in s.806 and specific capital gains tax anti-avoidance provisions in sections 579, 579A and 590 of the Act.

Section 50 amends s.1032 of the *TCA 1997* which deals with restrictions on certain reliefs. Section 50 will allow applicable UK residents to retain certain reliefs and allowances when calculating their Irish income tax liability.

Chapter 3 – Corporation Tax

Section 51 of the Bill amends subsections (2B) and (3)(d) of s.130 of the *TCA 1997 Act* which aims to stop tax avoidance .The amendment will ensure that the current regime to combat tax avoidance will continue to apply to Irish subsidiaries of UK-resident companies, following the end of the transition period.

Section 52 of the Bill looks to amend Section 243(4) of TCA 1997 which deals with allowance of charges on income. References to the EU will also include references to the UK so that current arrangements with UK can continue.

Section 53 of the Bill concerns group loss relief provisions and amends sections 410 and 411 of the *TCA 1997* *TCA 1997* to include the UK in the definition of relevant Member State.[56]

Section 54 will amend Section 438 of *TCA 1997* to include the UK within the tax treatment for loans to participators applicable to EU Member States. This will allow for the continuation of existing arrangements in the short term and allow time to examine any potential impact on bona-fide business transactions.

Section 55 amends Section 486C of *TCA 1997* to extend the tax relief to certain start-up companies in the EEA to the UK.

Section 56 of the Bill amends s.615 of *TCA 1997* which deals with relief from Capital Gains Tax on a transfer of assets under a scheme of reconstruction or amalgamation of companies. It will extend the provisions which apply to a relevant Member State to also include the UK.

Section 57 amends s.616(1) of the *TCA 1997* which deals with interpretations relating to groups of companies. The amendment means that companies resident in the UK will continue to be regarded as being in a group of companies following the end of the transition period, so that the reliefs in s.586 (company amalgamations by exchange of shares), s.587 (company reconstructions and amalgamations), s.618 (transfers of trading stock within a group) and s.620 (replacement of business assets by members of a group) of the Act will continue to apply in the case of such companies.

Section 58 amends s.766 of *TCA 1997* dealing with tax credit for Research & Development (R&D) expenditure to include the UK within the definition of relevant Member State. This will allow

[56] Other than for the purposes of Section 411(2A) and Section 420C.

for the continuation of existing arrangements in the immediate future, pending further research on the potential consequences for established R&D activities in Ireland.

Chapter 4 - Capital Gains Tax

Section 59 of the Bill amends s.541C of the *TCA 1997* which deals with the treatment of certain venture fund managers and allows for relief from capital gains tax for fund managers. The amendment meant that UK investments can be used in calculating the amount of applicable relief.

Section 60 amends s.604A of the *TCA 1997* which provides relief from Capital Gains Tax (CGT) on property purchased in any EEA State between 7 December, 2011 and 31 December, 2014 where the property is held for a minimum period of time. This relief is extended to include the UK.

Chapter 5 – Value-Added Tax

Section 61 amends s.53 of the *VAT Consolidation Act 2010* to reflect the change in s.62 of the Bill.

Section 62 introduces a new Section 53A of the *VAT Consolidation Act 2010* which will allow for postponed accounting for VAT for all importers registered for VAT in Ireland. It also allows the Revenue Commissioners to exclude a person from the scheme.

Section 63 amends s.56 of the *VAT Consolidation Act*. This deals with VAT authorisations and zero-rating of goods and services.

Section 64 amends s.58 of the VAT Consolidation Act which deals with retail export schemes. It will restrict the operation of the VAT Retail Export Scheme in two ways:

- the value of qualifying goods must exceed €175 for third country residents in order to qualify for the Scheme.
- UK citizens will have to show to show proof that VAT and customs and excise duties have been paid.

In addition, provision is made for the deletion of the reference to intended emigrants in the definition of “traveller” in s.58(1).

Section 65 amends s.120 of the VAT Consolidation Act to provide regulation making powers with regard to postponed accounting (s.62) and s.56 VAT Authorisations (s.63).

Chapter 6 – Stamp Duties

Stamp duty is a tax on certain instruments (written documents). Stamp duty is chargeable on instruments that transfer land and buildings situated in Ireland, and in other specified circumstances.

Section 66 of the Bill amends s.75 of the *Stamp Duties Consolidation Act 1999* which deals with relief for member firms. It provides a relief from stamp duty for brokers purchasing stocks or marketable securities of Irish incorporated companies on behalf of clients. If this amendment is not amended then purchases made by UK-based intermediaries on behalf of their clients would be subject to a 1% stamp duty.

Section 67 of the Bill amends s.75A of the *Stamp Duties Consolidation Act 1999* which provides counterparty relief for share transfers. Without this amendment, all purchases in a chain of transactions by UK-based counterparties would be subject to the 1% stamp duty.

Section 68 of the Bill amends s.80 of the *Stamp Duties Consolidation Act 1999* to allow UK-based companies who merge with or acquire Irish-based companies to avail of a certain relief.

Section 69 amends s.80A of the *Stamp Duties Consolidation Act 1999* to allow that instruments (shares, stock, etc.) issued by acquiring companies incorporated in the UK are covered by the stamp duty exemption currently available under such circumstances.

Section 70 amends s.124B of the *Stamp Duties Consolidation Act 1999* in order to provide that UK and Gibraltar-based assurers will be liable to the current 1% levy on life assurance premiums on their Irish business.

Section 71 amends s.125 of the *Stamp Duties Consolidation Act 1999* in order to the provide that UK and Gibraltar-based insurers will be liable to the current 3% levy on certain non-life insurance premiums on their Irish business.

Chapter 7 – Capital Acquisitions Tax (CAT)

Section 72 of the Bill amends s.89 of the *CAT Act 2003* which deals with provisions relating to agricultural property. It allows for a reduction in inheritance or gift tax in relation to agricultural property. This amendment means that agricultural property situated in the UK can be used to calculate liabilities in respect of and relief from CAT.

Chapter 8 – Excise

Section 73 amends s.104 of the *Finance Act 2001* to allow a tax-free shop at a port to have full relief from excise duty for excisable products (as with a tax-free shop at airport).

Implications

Generally, the changes proposed in Part aim to make sure that Irish tax-payers will still be entitled to specific tax reliefs once the transition period is over.

Part 9: Financial services: Settlement finality

Policy context

As detailed in the 2019 L&RS Bill Digest of the then General Scheme of the *Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019*:

> "Euronext Dublin, formally known as Irish Stock Exchange, uses a UK based Central Securities Depository (CSD) known as CREST which is operated by Euroclear UK (& Ireland) to settle trades in Irish equities and exchange traded funds. In a no-deal Brexit scenario, under the CSD Regulation, Euronext Dublin would not be able to continue using the CREST system as the UK would become a third country outside the EU. The inability to continue settling trades through CREST may also impact on the collection of stamp duty on equity trades.
>
> For the contingency of a no-deal Brexit, the EU Commission has adopted a temporary and conditional equivalence decision for UK based CSD services for a period of 2 years. This is to allow sufficient time to complete the transition of the Irish market to an EU based CSD.
>
> The purpose of this Part of the bill is to introduce legislative amendments to support the implementation of the European Commission's equivalence decision under the Central Securities Depositories (CSD) Regulation and to extend the protections contained in the Settlement Finality Directive to Irish participants in relevant third country domiciled settlement systems."[57]

This description is relevant to this Bill. A Central Securities Depository (CSD) is a specialist, commercial financial institution which operates a market securities settlement system. It is used to hold, transfer and settle different financial instruments (e.g. shares, bonds, mutual funds, Government bonds, etc.) on stock exchanges. Ireland is unique among EU Member States in that it lacks its own CSD. Historically, the Irish and UK securities clearing systems are closely linked, and there is a high degree of sharing of financial markets infrastructure. The Irish (Dublin) and UK (London) stock exchanges were one entity until 1995, and since the 1990s, Ireland has relied on UK-based and incorporated Certificateless Registry for Electronic Share Transfer (CREST), operated by London-based Euroclear UK & Ireland (EUI)[58] to clear/settle trades on the Irish stock exchange.[59] As a result, in effect, Ireland and the UK share a CSD. The total value of Irish securities which are held by EUI is approximately €182bn.[60] However, Irish market participants

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[57] Oireachtas Library & Research Service, 2019. Bill Digest – General Scheme off the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019, p 31.

[58] Euroclear UK & Ireland is a division of Brussels-based Euroclear.

[59] Known as Euronext Dublin since its acquisition by Paris-based Euronext in 2017 for €137 million.

[60] See: Irish Times (2018) 'Euroclear forms back-up plan for Irish sharing trading after Brexit', 5 June 2018 – available at https://www.irishtimes.com/business/markets/euroclear-forms-back-up-plan-for-irish-share-trading-after-brexit-1.3519428 (accessed 1 November 2020).

may use different CSDs in other EU Member States to settle trades. For example, the National Treasury Management Agency (NTMA) and the Central Bank use Euroclear Belgium for monetary operations.[61]

Box 1: Securities and Central Securities Depositories (CSDs)

A 'security' is a negotiable and tradable financial instrument which is used by a company or a government as proof of ownership rights, debt rights, or rights to buy. They are issued by a private company or a public institution (i.e. the State) as prospective investments. A security is typically either a debt security (e.g. currency, loans, government bond, corporate bonds, etc.) or an equity security - an investment based on the equity of a company (e.g. shares). Other examples of financial instruments include investment funds (pensions fund, hedge funds, etc.), carbon emission rights, and commodities. Central Securities Depositories (CSDs) are commercial, specialist (private or public) financial market entities which record, hold, maintain and trade securities on behalf of their owners, otherwise known as 'settlements'. A transaction is 'settled' once the CSD has debited the account of the seller and credited the account of the buyer with the purchased securities – this process is typically instantaneous. The primary clients of CSDs are typically banks and brokerage firms, rather than individuals.

Migration to Euroclear Bank (Belgium)

As a result of Brexit uncertainty, and following end of the transition period, there is a risk of disruption to the Irish securities market. Following the 2016 Brexit referendum, questions arose over the viability and sustainability of the existing settlement system. In a 'no-deal' scenario, under the CSD Regulation (CSDR), Euronext Dublin would not be able to continue using the CREST system for settlement of security trades as the UK would become a third country, outside the EU. The European Commission's temporary and time-limited (2-year) equivalence decision provided the necessary clarity, mitigated the 'cliff edge' scenario and allowed for a transitional period for Irish market participants to migrate their portfolios to a new settlement system provided by Euroclear Bank (Belgium). This will protect the long-term sustainability of Ireland's CSD.

However, the Euroclear Bank model is structurally different to CREST and primary legislation was required to facilitate the migration of existing Irish listed securities.[62] This was completed with the enactment of the *Migration of Participating Securities Act 2019* in December 2019. The Act sets out the mechanism by which securities will migrate from EUI to Euroclear Bank, which is a complex process. This has been known as the '*migration project'* by Irish authorities and must be completed by 30 March 2021.[63]

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[61] Confirmed by the Minister of State at the Department of Finance, Michael D'Arcy during second stage debate for the Migration of Participating Securities Bill 2019 in December 2019.

[62] A succinct summary of the migration project is provided by Matheson (February 2020), available at https://www.matheson.com/news-and-insights/article/over-the-crest-the-move-to-eurolclear-bank?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (accessed on 2 November 2020).

[63] Euroclear Bank (2020) Delivering continuity of Irish securities settlement in the long-term post Brexit. May 2019. Available at https://www.euroclear.com/content/dam/euroclear/About/regulatory-

Part 9 of this Bill will support the full implementation of the European Commission equivalence decisions in this area and ensure the protections provided under the EU Settlement Finality Directive (98/26/EC) and the Irish Settlement Finality Regulations (SI 624 of 2010) continue to apply to Irish market participants in UK-based settlement systems.

Box 2: CSDR - EU Regulation on Central Securities Depositories (CSDs)

The EU Regulation on CSDs (CSDR) was introduced in September 2014 as part of wider reforms of the EU economic governance structure. The aim was to harmonise the settlement process to ensure consistency and enhance efficiency across the EU in relation to CSD regulation. The CSDR applies to all CSDs in the EU, and Norway, Iceland and Liechtenstein (i.e. the European Economic Area, comprising the EU-27 and those 3 countries).

Under the Settlement Finality Directive (SFD), EU Member States are also required to ensure that their laws protect payment and settlement systems of other Member States from the impact of insolvency proceedings on the finality of settlement. The SFD does not provide for a third country (equivalence) regime. The Bill (as with the previous Withdrawal Bill in 2019) proposes to designate the UK a 'third country' for the purposes of extending protections of the CSDR to Irish firms using settlement/payment systems in the UK (and all 'third countries').

The following timeline of events summarises the developments relevant to this Part:

- **July 2017**: The Minister for Finance and Public Expenditure and Reform, Paschal Donohoe T.D., announced the Government was encouraging applications to the Central Bank of Ireland by private institutions to establish an Irish-based CSD to, among other things, maintain continuity and minimise disruption that may arise due to Brexit;
- **February 2018:** The existing UK & Ireland CSD operator Euroclear published a White Paper outlining the details of a proposed Irish CSD – *Euroclear Ireland*;
- **April 2018:** Following discussions between the Central Bank of Ireland and the Bank of England, Euroclear cancels plans to establish an Irish CSD;
- **November / December 2018:** The Bank of England confirmed EU systems can apply to enter the temporary designation regime in a 'no-deal' scenario in order to continue to benefit from UK Settlement Finality Regulations (SFD) protection until the permanent designation process is complete.[64] However, each EU Member State is required to extend the SFD to UK-based settlement systems if they wish to avoid disruption to the domestic securities market;
- **February 2019:** The Bank of England (which acts as the national regulator for the CSD) and the European Securities and Markets Authority (ESMA) agree that UK clearing houses and the EUI will continue to serve Irish securities in the event of a 'no deal' Brexit. This

landscape/EuroclearBankWhitePaper-DeliveringcontinuityofIrishsecuritiessettlementinthelongtermpostBrexit.pdf

[64] See: http://www.mondaq.com/uk/x/756796/Constitutional+Administrative+Law/Bank+Of+England+Provides+Further+Guidance+On+Settlement+Finality+Designation+PostBrexit (accessed on 2 November 2019).

agreement will ensure that disruption will be minimised as the regulatory framework of the UK CSD will be in accordance with the CSDR in a 'no deal' scenario;

- **February 2019:** The *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2019* is published. The Bill was enacted on 17 March 2019. Part 7 of the Act relates to *Financial Services: Settlement Facility*. The sections have not been commenced (as of November 2020);
- **December 2019**: The *Migration of Participating Securities Act 2019* is enacted to facilitate the migration of Irish securities from CREST to Euroclear Bank. The rational for this legislation was explained by the then Minister of State at the Department of Finance, Patrick O'Donovan during second stage debate in Dáil Éireann:

> "Since the beginning of the migration project, officials from the Department of Finance, the Department of Business, Enterprise and Innovation and the Central Bank of Ireland have been engaging intensively with stakeholders across the Irish market. One outcome of that engagement was a request from issuers and the Irish legal community for a legislative mechanism to facilitate migration by providing for the transfer of title to the migrating securities by operation of law. In the absence of an alternative legislative mechanism, issuers would instead have to rely upon a scheme of arrangement under Part 9 of the Companies Act 2014. To effect transmission of legal title to securities to a CSD in this manner would involve all of the relevant issuers having to pursue individual schemes of arrangement through the High Court. This would be a time-consuming, expensive and uncertain option for issuers. On 17 July 2019, the Government approved the drafting of the general scheme of the Migration of Participating Securities Bill to facilitate the migration of Irish issuers.
>
> The legislative mechanism, as provided for in the Migration of Participating Securities Bill 2019, **will allow for a more orderly migration of the market from Euroclear UK ahead of the March 2021 deadline**. An early enactment of this Bill will also facilitate the holding of the necessary shareholder votes during the upcoming 2020 annual general meeting season, avoiding the need for separate extraordinary general meetings to be called."

As outlined by the Minister of State, the legislation provides a legislative mechanism to facilitate the migration of Irish securities. This Act allows issuers, subject to the requirements set out in the Act, to seek shareholder approval by special resolution of the migration of their securities from CREST to Euroclear Bank without the need to go through individual schemes of arrangement. Companies with shares or debt listed in Dublin must pass necessary corporate resolutions to allow for the migration of their securities to the new settlement system. The *2019 Act* sets a deadline of **30 March 2021** in accordance with the European Commission's Brexit contingency planning (based on existing equivalence

decisions[65]) after which the migration must end. This date is extendable by the Minister under section 16 of the *2019 Act*.

- **March 2020:** Euroclear secures passporting rights from the Central Bank of Ireland, allowing it to continue providing services to EU-domiciled companies after Brexit. Passporting rights are essential as without them, Euroclear would no longer be able to passport its services into Ireland.

Legislative changes

Note: The previous legislative changes as set out in sections 68-71 of the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019* have not been commenced as of 1 November 2020. The provisions in Part 7 of that Act are identical to Part 9 of this Bill, as detailed below:

Table 4: A comparison of the provisions of the *2019 Act* and the 2020 Bill, as relevant to this Part

	2019 Bill	2020 Bill	Different?
Interpretation	**Part 7** **Section 68** of the Bill is a standard legislative provision for the inclusion of additional definitions	**Part 9** **Section 74** of the Bill is a standard legislative provision for the inclusion of additional definitions.	**No.** Section 68 of the *2019 Act* and section 74 of the 2020 Bill are identical.
Temporary designation of relevant arrangement	**Section 69** provides for the temporary designation of settlement systems already designated by the Bank of England under their Settlement Finality Regulations to avoid 'cliff edge' or market disruption.	**Section 75** provides for the temporary designation of settlement systems already designated by the Bank of England under their Settlement Finality Regulations to avoid 'cliff edge' or market disruption.	**No.** Section 69 of the *2019 Act* and section 75 of the 2020 Bill are identical.
Designation of relevant arrangement	**Section 70** provides for the Minister of Finance to designate a UK-based system ("relevant arrangement") for the purposes of the Settlement Finality Regulations. This will extend the protections of	**Section 76** provides for the Minister of Finance to designate a UK-based system ("relevant arrangement") for the purposes of the Settlement Finality Regulations. This will extend the protections	**No.** Section 70 of the *2019 Act* and section 76 of the 2020 Bill are identical.

[65] Since March 2017, there has been an increasing focus on 'equivalence provisions' in EU legislation, including CSDR which would give third country firms some access to the EU. However, recognition of non-EU financial frameworks (equivalence decisions) is based on the specific circumstances of the (third) country concerned and there is no automatic right to equivalence.

	the Regulations to Irish firms in the UK.	of the Regulations to Irish firms in the UK.	
Rules applicable to arrangement to which *section 69* or *70* applies	**Section 71** provides for the necessary amendment of certain definitions in the existing Irish Settlement Finality Regulations.	**Section 77** provides for the necessary amendment of certain definitions in the existing Irish Settlement Finality Regulations.	**No.** Section 71 of the *2019 Act* and section 77 of the 2020 Bill are identical.

Section 74 of the Bill is a standard legislative provision for the inclusion of additional definitions.

Section 75 provides for the temporary designation of settlement systems already designated by the Bank of England under their Settlement Finality Regulations to avoid 'cliff edge' or market disruption.

Section 76 provides for the Minister of Finance to designate a UK-based system ("relevant arrangement") for the purposes of the Settlement Finality Regulations. This will extend the protections of the Regulations to Irish firms in the UK. The legislation protects payments and transfers of securities made by Irish participants by ensuring that trades entered into a system fully settle even if one of the participants attempts to revoke the trade or becomes insolvent. This will be required for Irish firms to continue using systems in the UK when it becomes a third country. The Central Bank of Ireland is required to carry out a technical equivalence assessment of the UK national laws governing the system for its equivalence with relevant Irish laws and an assessment of the rules of the system itself to ensure its compliance with the conditions set out in Regulation 7 of the Irish Settlement Finality Regulations.

Section 77 provides for the necessary amendment of certain definitions in the existing Irish Settlement Finality Regulations (SI 624/2010) as and when those regulations are applied to a system designated under Section 75 or 76.

Implications

There are several implications for Ireland and stakeholder groups, as follows:

- **Securities market and participants:** Risk of disruption remains, despite being minimised, particularly for CSD customers (financial institutions, etc.) and other Irish market participants such as central counterparties, clearing houses, and trading venues;
- **Reputational risk:** Ireland's position as a world-class location for financial services relies on a free-flowing settlement system and/or migration to a system which ensures disruption is minimised/eliminated and long-term sustainability is assured;
- **Stamp duty** / **Exchequer**: The current CSD (CREST) also assists companies in the payment of dividends and Revenue in collecting stamp duty, currently charged at a rate of

1 per cent on Irish share trading. Receipts from stamp duty from share trades totaled €380 million in 2019.[66]

Part 10: Financial services - Amendment of the *European Union (Insurance and Reinsurance) Regulations 2015 and European Union (Insurance Distribution) Regulations 2018*

Policy context

As outlined in the 2019 L&RS Digest, the General Scheme of the *Miscellaneous Provisions (Withdrawal of the United Kingdom for the European Union on 29 March 2019) Bill 2019* stated that:

> "The European Commission has advised that Member States may take appropriate national measures in relation to the issues of insurance contract continuity in the context of Brexit, subject to appropriate engagement with the European Insurance and Occupational Pensions Authority (EIOPA)[67].
>
> Consequently, this Part of the Bill is designed to ensure that Irish policyholders that hold existing life and non-life insurance policies with insurance undertakings or through insurance intermediaries, operating in Ireland from the UK or Gibraltar, will not be affected by those undertakings losing their right to conduct business in EU Members States post Brexit. Its primary purpose is therefore to ensure the continuing ability of such firms to service insurance contracts written prior to any no-deal Brexit – such as paying out on claims or accepting premium payments.
>
> This Part of the Bill provides for a temporary run-off regime, which, subject to a number of conditions, will enable insurance undertakings and intermediaries to continue to fulfil contractual obligations to their Irish customers for a period of three years after the date of the withdrawal of the UK from the EU. However, those insurers/intermediaries will no longer be able to write new insurance contracts or continue insurance distribution in respect of

[66] Provided by the Minister of State at the Department of Enterprise, Trade and Employment, Robert Troy during Dáil Éireann debate - Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020: Discussion, 7 October 2020. Available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_enterprise_trade_and_employment/2020-10-07/3/.

[67] The EIOPA is an independent advisory body to the European Commission, the European Parliament, and the Council of the European Union.

new insurance contracts in Ireland until they obtain a relevant authorisation under the EU insurance supervisory regime."

This description is still relevant to this Bill. The Bill proposes several changes:

1. **Extension of the runoff regime period from 3 years to 15 years**

   Part 10 of the Bill proposes extending this run-off regime period from 3 to 15 years. As before, these entities won't be allowed to write new business during this period, but the new provisions will allow them to continue to service existing contracts for a longer period. Additionally, as before, the insurance undertakings and intermediaries must fulfil certain criteria including complying with general good requirements and exclusively administering its existing portfolio of Irish policies/business "*in order to terminate is activity in the State*". They must also notify the Central Bank of Ireland if they intend to rely on the provisions no later than three months from the end of the Brexit transition period.[68]

   Legal firm William Fry stated "*the proposals will be welcomed by the insurance industry and policyholders, as it is a significant extension to the previous proposed run-off period of 3 years."*[69]

2. **Central Bank of Ireland review clause**

   A review clause has been added to Part 10 of the 2020 Bill. It requires the Central Bank to submit a report to the Minister for Finance at the end of year 12 setting out its view on the run-off regime covering both insurance undertakings and persons carrying on insurance distribution business.

Insurance undertakings (i.e. companies) operating in Ireland but established in the UK or Gibraltar require a licence from the Central Bank. In the event of the UK withdrawing from the EU without an agreement, policyholders in Ireland holding life insurance or non-life insurance policies (e.g. wedding, gadget, holiday, pet insurance, etc.) could be left without insurance cover if these policies are underwritten by a UK/Gibraltar-based insurer or broker/intermediary, as the UK/Gibraltar will no longer by covered by the relevant EU Directives.

Part 10 of this Bill provides for the establishment of a time bound (15-year) temporary run off regime for UK and Gibraltar authorised insurers and registered insurance intermediaries. This is to ensure there is no immediate disruption to the existing policies held by Irish policyholders.

However, this will also mean that no new insurance policies (or renewals) may be issued by these companies during this period. Although the measure will apply to all relevant UK/Gibraltar-based insurers/brokers servicing the Irish market, many have already taken appropriate action to mitigate the potential impact of a no-deal scenario.

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[68] For more information, see this article by Pinsent Mason [Accessed 3 November 2020].

[69] This sentiment has been mirrored by other legal firms including McCann Fitzgerald, Pinsent Masons, and Matheson.

Legislative changes

The legislative changes set out in sections 72-74 of the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019* have not been commenced as of 3 November 2020.

The provisions set out in Part 10 of the 2020 Bill and Part 8 of the *2019 Act* contain some differences. Table 5 below provides a comparison of these provisions and the differences contained in each section, and references the new addition of section 81.

Table 5: A comparison of the provisions of the *2019 Act* and the *2020 Bill*

	2020 Bill	*2019 Act*	Different?
Interpretation	**Part 10** **Section 78** is a standard legislative provision to provide for the inclusion of additional definitions.	**Part 8** **Section 72** is a standard legislative provision to provide for the inclusion of additional definitions.	**No.** Section 78 of the 2020 Bill and Section 72 of the *2019 Act* are the same.
Amendment of Regulations of 2015	**Section 79** adds a new regulation to the European Union (Insurance and Reinsurance) Regulations 2015 that will establish a temporary domestic runoff regime for certain insurance undertakings for 15 years.	**Section 73** adds a new regulation to the European Union (Insurance and Reinsurance) Regulations 2015 that will establish a temporary domestic runoff regime for certain insurance undertakings for 3 years.	**Yes.** Section 79 of the 2020 Bill establishes a 15-year temporary domestic runoff regime for certain insurance undertakings. Section 73 of the *2019 Act* allowed for a three-year temporary domestic runoff regime.
Amendment of Regulations of 2018	**Section 80** adds a new regulation to the European Union (Insurance Distribution) Regulations 2018 that will establish a temporary domestic runoff regime for certain insurance intermediaries for 15 years.	**Section 74** adds a new regulation to the European Union (Insurance Distribution) Regulations 2018 that will establish a temporary domestic runoff regime for certain insurance intermediaries for 3 years.	**Yes.** Section 80 of the 2020 Bill establishes a temporary domestic runoff regime of 15 years for certain insurance intermediaries. Section 74 of the *2019 Act* allowed for a 3-year temporary domestic runoff regime.
Requirement for Central Bank to make	**Section 81** This adds a review clause to require that the Central Bank make a		**Yes.** This is a new addition.

a report to Minister	report to the Minister at the end of year 12 setting out its view on the runoff regime covering both insurance undertakings and persons carrying on insurance distribution business.		

Section 78 of the Bill is a standard legislative provision to provide for the inclusion of additional definitions.

Section 79 of the Bill adds a new regulation to the European Union (Insurance and Reinsurance) Regulations 2015 [S.I. 485 of 2015] that will establish a temporary domestic runoff regime for certain insurance undertakings for 15 years. In that respect, it provides that insurance undertakings which meet certain conditions shall be deemed to be authorised for **15 years** following the relevant date for the purposes of running off their existing portfolio.

Section 80 adds a new regulation to the European Union (Insurance Distribution) Regulations 2018 [S.I. 229 of 2018] that will establish a temporary domestic runoff regime for certain insurance intermediaries for 15 years. In that respect, it provides that intermediaries which meet certain conditions shall be deemed to be authorised for **15 years** following the relevant data for the purposes of running off their existing portfolio.

Section 81 adds a review clause to require that the Central Bank make a report to the Minister at the end of year 12 setting out its view on the run-off regime covering both insurance undertakings and persons carrying on insurance distribution business. This report should consider a number of principles and policies, including the need to protect policyholders, the number of firms remaining in run-off, and the nature of the policies in question.

Implications

There are several implications for Ireland and stakeholder groups, as follows:

Consumers / policyholders:

- May lead to reduced choice (particularly for 'niche' insurance products) and higher premiums for policyholders;
- Existing policyholders may also, in the absence of alternatives, suffer inconvenience as they seek replacement policies;
- Policyholders (existing and potential) may be unable to obtain appropriate coverage;
- Existing and potential policyholders may opt to go without insurance in some cases (e.g. if travel insurance is no longer sold on UK-based travel websites, etc.), heightening their exposure.

Irish insurance industry:

- Instability in the UK market may benefit the Irish insurance market due to greater certainty. This may also lead to increased demand for domestic insurance policies.

Irish economy / investment:

- UK-based insurers/intermediaries may seek to establish an Irish branch/subsidiary to service the Irish/EU market and bypass 'passporting' concerns, with employment benefits for skilled Irish graduates and the wider economy.

Part 11: Customs

Policy context

Although the UK formally left the EU on 31 January 2020, there have been no immediate changes for Irish businesses, including in terms of customs. This is because the UK is effectively functioning as an EU Member State during the 11-month transition period provided for in the revised Withdrawal Agreement.[70] As such, the UK will remain in the EU Customs Union and Single Market, and subject to EU law, albeit without any participation in EU institutions and governance structures, until 31 December 2020.

EU Customs Union

The EU Customs Union currently comprises the 27 EU Member States, and the UK until the end of the transition period. In operation since 1968, the Customs Union is a single territory for customs purposes with participants applying a uniform system for handling the import, export and transit of goods. They also implement a common set of rules called the Union Customs Code (UCC).

The Customs Union is considered essential for the proper functioning of the single market.[71] Having a single territory for customs means:

- no customs duties are paid on goods moving between Member States;
- all Member States apply a common customs tariff for goods imported from outside the EU; and
- goods that have been legally imported can circulate throughout the EU with no further customs checks, whether they are made in the EU or imported from beyond its borders.[72]

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[70] This is a legally binding Treaty setting out the terms for an orderly Brexit. It includes three Protocols (on Ireland/Northern Ireland, the UK's Sovereign Base Areas in Cyprus, and Gibraltar). The Protocol on Ireland/Northern Ireland is designed to prevent a 'hard border' on the island of Ireland. The EU and the UK also agreed a revised Political Declaration which provides the framework for the future EU-UK relationship.

[71] European Commission webpage, *EU Customs Union – unique in the world*. Available at https://ec.europa.eu/taxation_customs/facts-figures/eu-customs-union-unique-world_en.

[72] European Commission webpage, *EU Customs Union*. Available at https://trade.ec.europa.eu/tradehelp/eu-customs-union.

The UK's withdrawal from the EU is clearly significant for many reasons, including its impact on trade. There has been much debate over recent years regarding whether the UK would remain in the EU Customs Union following its departure from the EU or leave it and become a 'Third Country' for customs purposes. While there is no impact on customs or taxation during the current transition period, it is clear that public administrations, businesses and citizens are facing significant consequences from Brexit next year even if a highly ambitious partnership covering all areas agreed in the Political Declaration is concluded in the near future.[73] As highlighted by the Department of Finance:

> "Regardless of the outcome of the current negotiations, from 1 January 2021, the UK will no longer be a part of the rules of the EU Single Market and Customs Union.[74] This will bring substantial challenges for supply chains and trade flows. Checks and controls will be required, in both directions, on EU UK trade. In addition, businesses will have to engage with a new range of regulatory issues such as customs formalities and SPS checks for agri food products. Failing to agree an FTA [(free trade agreement)] would see the introduction of tariffs on EU UK trade. An FTA in goods only would not address a range of areas important to Ireland such as trade in service including transport, energy and police and judicial cooperation".

Legislative background

Customs is an exclusive competence of the EU; it is one of the areas in which the EU alone is able to legislate and adopt binding acts.[75] The Union Customs Code (EU Regulation 952/2013) sets out the legal basis for third country customs formalities, with national legislation supplementing EU law by underpinning the powers of customs in policing and administering the EU rules.[76] It provides the legal structure for the management and control of customs interactions with third country trade,[77] making it significant for Ireland given the extent of trade with the UK.

Ireland and other EU Member States are currently preparing to transition the trading relationship with the UK to one of trade with a third country from 1 January 2021, when the transition period ends and the UK is due to depart the Single Market and Customs Union. This will change the terms of customs administration.

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[73] European Commission webpage, *Brexit – how to get ready for the end of the transition period*. Available at https://ec.europa.eu/taxation_customs/uk_withdrawal_en.

[74] The Department of Finance notes that "The Protocol on Ireland/Northern Ireland provides that Northern Ireland will remain aligned to a limited set of EU rules, notably related to goods, and the Union's Customs Code will apply to all goods entering Northern Ireland."

[75] For more information on Division of competences within the European Union see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020.

[76] Department of Finance (2020) *Brexit Readiness – Taxation and Customs Issues*, Tax Strategy Group – 20/09 (September 2020). Available at https://assets.gov.ie/87002/08391037-173f-4ee0-ad12-4865c380e1e2.pdf.

[77] Department of Finance (2020) *Brexit Readiness – Taxation and Customs Issues*, Tax Strategy Group – 20/09 (September 2020). Available at https://assets.gov.ie/87002/08391037-173f-4ee0-ad12-4865c380e1e2.pdf.

It is in this context that the Department of Finance and the Revenue Commissioners are proposing Brexit-related legislative measures, by way of amendment to the *Customs Act 2015*. These proposals are discussed in the "Legislative changes" section of this Bill Digest.

Government and EU preparatory work for Brexit

Part of the Government readiness work for Brexit includes that undertaken collectively by the Revenue Commissioners and Department of Finance in the area of tax and customs. There has been ongoing work on the identifiable tax and customs impacts of the UK's departure in two categories:

1. Policy development and implementation in the form of legislation; and
2. Operational preparations by Revenue in terms of IT structures, staffing and infrastructure.[78]

The Government's Contingency Action Plan Update (July 2019) detailed key measures in respect of infrastructure, staffing and ICT systems at Irish ports and airports in the case of the most extreme form of Brexit, i.e. a no-deal Brexit. These measures included:

- Putting in place sufficient infrastructure to manage the necessary checks and controls on East-West trade with the UK outside the EU.
- Work at Dublin Port to deliver 13 new inspection bays, documentary and identity check facilities, office facilities and parking for up to 128 heavy goods vehicles (HGVs).
- Recruitment and training of 400 additional Revenue staff to perform customs facilitation and checks.[79]

The Brexit Readiness Action Plan (September 2020) outlines measures aimed at ensuring optimal goods trade traffic flows in the context of Brexit. Those of relevance to this Bill include Revenue preparations around their systems and services:

> "Capacity of the Customs IT systems has been significantly increased in order to deal with the expected growth in the number of transactions post-Brexit. Revenue estimates that import and export declarations could increase to as many as 20 million per annum (an extra 18.3 million or a 12-fold increase). A new national import system, Automated Import System (AIS) will replace the current system for imports in November 2020. This change is necessary in order to ensure compliance with the Union Customs Code; to provide the most efficient process possible for trade; and to provide additional functionality that is not possible with the existing system. […]
>
> Revenue will also launch a Customs Roll-On Roll-Off Service to assist in streamlining procedures for ferry traffic at Irish ports.[80]

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[78] Department of Finance (2020) *Brexit Readiness – Taxation and Customs Issues*, Tax Strategy Group – 20/09 (September 2020). Available at https://assets.gov.ie/87002/08391037-173f-4ee0-ad12-4865c380e1e2.pdf.

[79] Government of Ireland (2019) *Preparing for the withdrawal of the United Kingdom from the European Union Contingency Action Plan Update*. July 2019. Available at https://www.dfa.ie/media/dfa/eu/brexit/keydocuments/Contingency-Action-Plan-Update.-July-2019.pdf.

[80] Government of Ireland (2020) *Preparing for the End of the Transition Period, Brexit Readiness Action Plan*. September 2020. Available at https://assets.gov.ie/86844/daaf5213-2bd0-4ac3-870b-d495ba3c1df8.pdf.

In addition to work at the national level, the EU has produced a large number of readiness notices, which provide advice for businesses and citizens on a wide range of issues. These include an updated notice on Customs including preferential origin.

Statistics on port traffic

Ireland is the only Member to share a land-border with the UK. As previously noted, moving goods to and from the UK (with the exception of Northern Ireland) will be affected once the current arrangements under the transition period end. This is particularly significant for Ireland given the large volumes of goods going to and from the UK through Irish ports.

CSO data shows, for example, that Great Britain (GB) and Northern Ireland accounted for 38% of the total tonnage of goods handled in the main ports by region of trade in Q1 2020. This compares to a 35.1% share in the case of other EU countries (see table 6).

Table 6: Total tonnage of goods handled classified by port and region of trade, Quarter 1 2020 ('000)

Port	Great Britain & Northern Ireland	Other EU	Non-EU[1]	Other ports[2]	Coastal trade	Total
Bantry Bay	30	184	-	154	-	**368**
Cork	210	678	131	897	271	**2,187**
Drogheda	90	198	21	25	2	**336**
Dublin	3,968	2,056	122	54	197	**6,397**
Rosslare[3]	..	..	..	..	..	..
Shannon Foynes	261	793	100	1,078	103	**2,335**
Waterford	27	334	63	32	-	**457**
Total	**4,586**	**4,243**	**437**	**2,240**	**573**	**12,079**

Source: CSO (2020) *Statistics of Port Traffic*, Quarter 1 2020. Available at https://www.cso.ie/en/releasesandpublications/er/spt/statisticsofporttrafficquarter12020/

Notes: [1] Trade with ports in European countries that are not members of the E.U.
[2] Trade with ports in Non-European countries.
[3] Data for Rosslare for Q1 2020 is not included due to technical issues.

The 12.1 million tonnes of goods handled by six of the seven main Irish ports is broken down by the five categories of traffic in table 7 below (the data excludes Rosslare). It shows that Roll-on/roll-off accounted for 3.4 million tonnes of goods handled in that quarter.

Table 7: Tonnage of goods handled by main Irish ports, Quarter 1 2018-2020[1] ('000 tonnes)

Category of goods	Q1 2018	Q1 2019	Q1 2020	% Change Q1 2019-2020
Liquid bulk	2,937	2,939	3,075	4.6%
Dry bulk	4,057	3,905	3,426	-12.3%

Lift-on/lift-off	1,838	1,977	1,929	-2.4%
Roll-on/roll-off	3,336	3,641	3,402	-6.6%
Break bulk & other goods	211	285	248	-13.0%
Total	**12,379**	**12,746**	**12,079**	**-5.2%**

Source: CSO (2020) *Statistics of Port Traffic*, Quarter 1 2020. Available at https://www.cso.ie/en/releasesandpublications/er/spt/statisticsofporttrafficquarter12020/

Notes: [1] Data for Rosslare is not included in this table.

Legislative changes

The purpose of Part 11 of this Bill (on Customs) is to accommodate the anticipated substantial increase in customs controls required at ports and at traders' premises arising from the end of the transition period on 31 December 2020. Part 11 comprises four sections:

- Section 82: Definition (Part 11);
- Section 83: Customs control at customs ports;
- Section 84: Amendment of s.25 of the *Customs Act 2015*; and
- Section 85: Procedures for goods entering or departing the State by ferry (from or to a place outside the customs territory of the Union).

Customs control at customs ports

Section 83 provides for the introduction of a new Section 12A in the *Customs Act 2015*. This section makes it an offence for a driver of a goods vehicle entering the State at a customs port from a third country to fail to comply with certain instructions from the Revenue Commissioners or act without the relevant authorisation from same. This includes failure to comply with instructions to bring their vehicle to a designated area for customs control, ensure their vehicle is kept at such an area and comply with other instructions by the Revenue Commissioners until given clearance to leave that place.

A person who commits an offence under this section is liable on summary conviction, to a fine of €5,000 or imprisonment for a term up to 12 months or both.

Amendment of section 25 of the *Customs Act 2015*

Section 84 amends s.25 of the *Customs Act 2015* which relates to the powers of custom officers to enter and inspect certain places, at any time and without warrant. Such powers will be extended to include a place approved under the Union Customs Code by this Section.

Procedures for goods entering or departing the State by ferry

Section 85 inserts a new section 12B into the *Customs Act 2015* (after section 12A inserted by section 83 of this Bill) to provide a legislative basis for the online Customs Roll on Roll off Service for businesses carrying goods by ferry from the UK (excluding Northern Ireland) to Ireland. This has been developed to minimise the impact of complying with customs procedures required after

the transition period and to assist goods with moving swiftly through any import controls required on arrival in the State.[81]

This amendment provides for a requirement that a carrier use the online Customs Roll on Roll off Service to complete a pre-boarding notification with the Revenue Commissioners in respect of goods entering or departing the State by ferry (from or to a place outside the customs territory of the EU). This is to be done prior to departure.

In addition, the section also introduces offences for non-compliance. These relate to circumstances where the carrier fails to complete the pre-boarding notification and where people in the supply chain fail to provide certain information required for the completion of the pre-boarding notification to the carrier and to other persons in the supply chain to whom the identity of the carrier is known. A person who commits an offence under this section is liable on summary conviction, to a fine of €5,000 or imprisonment for a term up to 12 months or both.

The rationale for this new proposal, to provide a legislative basis for the online Customs Roll on Roll off Service, is explained in the General Scheme as follows:

> "Most trade flows arriving in the State by ferry operate on a just-in-time model. It is critical to assist in maintaining these trade flows where possible to facilitate the ongoing viability of this business model and in order to minimise congestion and delays at Irish ferry ports".

Implications

There are several implications for Ireland and stakeholder groups, as follows:

Revenue:

- The departure of the UK from the Customs Union and Single Market will significantly alter current customs arrangements and in that context could present challenges for the administration of customs after the transition period expires.
- The robustness and capacity of Revenue's systems are likely to be tested by having to cater for the increased volumes of trade that will be subject to customs formalities at the end of the transition period.
- Staffing levels and the capacity of existing and new staff may need to be kept under review as the effect of the Brexit workload, and any consequential wider impact on Revenue as an organisation, becomes apparent when customs arrangements change next year;[82]
- Revenue operations and work practices may continue to be impacted by Brexit.[83]

[81] As explained in the General Scheme.

[82] The Tax Strategy Group explains that Revenue had planned to have a total of 600 staff in Brexit related roles by the end of 2020, which has been under active examination in light of the experience gained over 18 months to September 2020, the need for a strong focus on measures to combat illegitimate trade, a risk that will be enhanced from 1 January 2021 and in the context of the existence of a Free Trade Agreement between the EU and UK, and the operation of Duty Free and the VAT Retail Export Scheme.

[83] The Tax Strategy Group explains, for example, Revenue envisage that as a result of Brexit there will be an increase in approvals by Revenue for traders to present goods at their approved premises and accordingly, customs formalities will be carried out at those premises instead of at ports and airports.

Ports infrastructure:

- There will be a large increase in third country Roll On Roll Off traffic (i.e. goods arriving by trailer, either accompanied or unaccompanied, carried on a ferry) at Irish ports once the transition period ends, the full impact of which will only become apparent over time.
- Any increased congestion and delays at Irish ferry ports could impact the functioning of the ports themselves, in addition to just-in-time trade flows arriving in Ireland by ferry.

Business:

- Given that all goods imported into Ireland from GB or exported from Ireland to GB will be subject to customs processes from 2021, businesses will have to incorporate customs work into their existing workload or engage a customs agent. This could require putting in place any necessary software and IT systems, staffing and internal arrangements.[84]
- Failure to understand and take necessary action in relation to new customs formalities and other regulatory requirements could result in delays in moving goods to and from the UK from 1 January 2021.
- Less favourable arrangements than at present for goods entering and leaving the UK may add to overall costs and transit times for freight transport.
- Businesses not directly impacted by Brexit, may be still exposed to it through their supply chain, as non-tariff issues (customs clearance requirements, potential delays, etc.) potentially affect business operations.

Consumers:

- It is possible that some businesses could seek to transfer any additional costs arising from new customs procedures onto customers, including in the form of potentially higher prices.
- Any changes to the current just-in-time model could potentially impact the availability of certain products or see consumers face delays in obtaining certain items.

Irish economy:

- Potential implications for different stakeholders as outlined above, could potentially impact on the wider economy.
- Any increased costs and transit times arising from the new customs relationship could feed into the overall cost of products, which may in turn negatively impact the competitiveness of Irish businesses in the future with consequential impacts on the Irish economy.
- The inevitable bureaucracy associated with the new customs arrangements may make Ireland less desirable as an investment hub.

[84] The July Jobs Stimulus includes a €20 million Brexit fund to help SMEs to prepare for new customs arrangements. Training programmes are available including through Local Enterprise Office and Enterprise Ireland.

Part 12: Amendment of *Harbours Act 1996*

Policy context

Part 12 of the Bill relates to the amendment of the *Harbours Act 1996*. The main two policy issues under sections 87 and 88 relate to the period of time that Pilot Exemption Certificates (PECs) are granted for, as well as the need to ensure that such certificate holders retain the competency to pilot the ship within the district to where they are operating the vessel. The issues addressed in the Bill Digest relating to Part 11 of the Bill on customs is also relevant to this section, providing some useful background information.

A PEC is commonly defined as a certificate that provides for suitably qualified crew (usually the shipmaster) to navigate their vessel instead of being compelled to use a maritime pilot when navigating in compulsory pilotage areas. The European Commission had previously invited Member States to create a regulatory framework which would permit easier pilotage exemptions and not contain elements of protectionism.[85]

EU Directive 2008/106/EC sets out the legislative requirement for the minimum level of training for seafarers and their certification of competence. It incorporates, into EU law, minimum standards of training, certification and watchkeeping for seafarers serving on board EU vessels which are fixed by the convention on standards of training, certification and watchkeeping for seafarers (STCW convention) of the International Maritime Organization.

This EU Directive is given effect in Ireland by *European Union (Training, Certification and Watchkeeping for Seafarers) Regulations 2014* (S.I. No 242 of 2014). Section 10 of these regulations provides for the issuance of a certificate of competency by the Minister for Transport. These certificates are issued to candidates who meet the required standards for physical fitness (particularly regarding eyesight and hearing) and who provide satisfactory proof of identity, age, service at sea and skills (ability, task and level).

Under section 71 of the *Harbours Act 1996*, a company may, in relation to pilotage in its pilotage district, make bye-laws. Such bye-laws have been adopted by Port Companies in Ireland, including the Dublin Port Company. These bye-laws include provisions for the granting of PECs subject to certain conditions being met, including in relation to seafaring competency.

Joint Committee on Transport and Communications Networks

The Joint Committee on Transport and Communications Networks met on 8 October 2020 to discuss the provisions of Part 12 and Part 13 of the General Scheme of the Withdrawal of the

[85] European Commission (2009), *Communication and action plan with a view to establishing a European maritime transport space without barriers*. Available here.

United Kingdom from the European Union (Consequential Provisions) Bill 2020.[86] A senior official from the Department of Transport briefed the Committee on Part 12 of the General Scheme and noted:

> "Part 12, which proposes amendments to the *Harbours Act 1996*, was developed to address concerns that pilotage exemption certificates which have been issued by Dublin Port Company to seafarers holding UK certificates of competence may no longer be valid or may very quickly become invalid after the end of the transition period, with no means of renewing those PECs for a period after the end of the transition period.
>
> Pilotage exemption certificates meet the statutory pilotage requirements on approximately 65% of all ship movements in Dublin Port's pilotage district. The frequency with which PECs are used in Dublin Port on ferries to and from the UK is high, given that ferries from the UK arrive daily, for example, from Liverpool and Heysham, or twice daily from Holyhead. If PECs that have been issued to seafarers with UK seafarer certificates of competence on such ferries became invalid at the end of the transition period, it would lead to a number of serious problems for Dublin Port. The turnaround efficiency would be greatly reduced as the act of boarding and disembarking harbour pilots is time-consuming with a consequent impact on roll-on, roll off, RoRo, ferries operating on tight schedules which transport most of the country's RoRo freight. Pilotage by a port pilot is considerably more expensive for ferry operators than pilotage exemption certificates and the need to use pilots would impose significant additional costs on ferry companies and, in turn, their customers and end consumers at a time when many ferry companies are experiencing difficult trading conditions due to Covid."[87]

Legislative changes

Note: There are no differences between the provisions of Part 12 of the 2020 Bill and Part 9 of the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019* which is to be repealed by s.4 of the 2020 Bill.

It is proposed that this Part of the Bill, following enactment, would be commenced shortly before the end of the transition period (prior to 31 December 2020) to enable Dublin Port Company to complete the processing of applications for three-year PECs in line with the legislative changes to the *Harbours Act 1996* set out in Part 12.

Section 86 is a standard legislative provision that provides a definition for the purposes of this Part. In this Part, the "Act of 1996" means the *Harbours Act 1996*.

Section 87 amends s.72 of the Act of 1996 and provides for an extension of the period of validity of PECs issued by harbour companies from the existing maximum one-year period to a maximum

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[86] Joint Oireachtas Committee on Transport and Communications Networks, *Pre-Legislative Scrutiny on The Heads of the Parts of the Bill (Parts 12 and 13 - Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020)*. The full hearing is available here.

[87] Joint Oireachtas Committee on Transport and Communications Networks, *Pre-Legislative Scrutiny on The Heads of the Parts of the Bill (Parts 12 and 13 - Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020)*, Opening Statement of Paul Hannon available here.

of three years. It will also provide that existing holders of PECs may apply for new certificates in the period leading up to the end of the transition period, notwithstanding the fact that their existing PECs may not have expired.

Section 88 provides for an amendment of the Pilotage Bye-Laws powers of harbour companies to enable the relevant harbour company to require the holder of a PEC of more than one year's duration to undergo a periodic review to ensure that they continue to have the skills, experience, and local knowledge of the relevant harbour pilotage district to enable the holder to pilot the ship within that pilotage district.

Implications

The intention is that these amendments in primary legislation will ensure that ferries can continue to be piloted efficiently and with quick turnaround times in Dublin Port without unnecessary delays, particularly at the end of the transition period. According to the Department of Transport[88], the implications for Dublin Port if these changes were not enacted could include:

- Turn-around efficiency times may take longer with a consequent impact on ferries operating on tight schedules. These ferries transport most of the country's roll-on, roll-off freight and so this could have a potential economic impact.
- Additional costs for ferry operators arising from having to use more expensive port pilots. This would have knock-on effects for their customers and end-consumers who may face higher prices.
- Risks due to bad weather meaning the boarding and disembarking of port pilots may have to be suspended thus delaying cargo vessels.
- Dublin Port Company would not have sufficient time available to employ and train sufficient pilots to meet the requirements for pilotage for ferries. According to the Department of Transport, it typically takes 16 months to train a newly employed pilot for small ferry operations and 36 months for the largest ferries.

Part 13: Third country bus services

Policy context

The National Transport Authority (NTA) is currently Ireland's competent authority for regulating bus services with other Member States. A no-deal Brexit would mean that the UK, in addition to being outside the Single Market and Customs Union, would no longer be part of the framework of EU law, becoming a 'third country'.[89] Part 13 of the Bill will make the NTA the competent authority to regulate bus services between Ireland and third countries, with enforcement by the Road Safety

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[88] Joint Oireachtas Committee on Transport and Communications Networks, *Pre-Legislative Scrutiny on The Heads of the Parts of the Bill (Parts 12 and 13 - Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020)*, Opening Statement of Paul Hannon available here.

[89] Government of Ireland, "Preparing for the End of the Transition Period: Brexit Readiness Action Plan" (Government of Ireland, September 2020). Available at https://www.dfa.ie/media/dfa/eu/brexit/keydocuments/Brexit-Readiness-Action-Plan.pdf.

Authority, the NTA, and An Garda Síochána (as is the case with existing services and their existing regulatory rules). The intention is that Part 13 could provide the backdrop to any future bilateral discussions to be held between the Irish and the UK Governments regarding arrangements to facilitate bus services between the two jurisdictions.[90]

Part 13 in the context of the Interbus Agreement

A protocol of the Interbus Agreement of 2002[91] will allow for the future continuation of all cross-border bus and coach services between the EU and the UK as a 'third country' post-Brexit. At the time of writing, ratification of the protocol has not yet been completed. Part 13 of the Bill will be needed in the event of the UK not joining the Interbus Agreement, or in the event of no EU-level agreement or contingency being in place on 1 January 2021. In such an event, Part 13 will be needed to allow for the continuation of all classes of bus service between Ireland and the UK as a third country.

Protocol to Interbus Agreement

The Government of Ireland's Brexit Readiness Action Plan, published in September 2020, indicates that a protocol extending the agreement's scope to include regular and special regular services has been agreed and notes that it is hoped that the UK will be in a position to ratify it before the end of the transition period.[92] The Brexit Readiness Action Plan indicates that this development will mean bilateral agreements between individual Member States and the United Kingdom will not be needed.[93] Mr Éanna Ó Conghaile, speaking before the Joint Committee on Transport and Communications Networks, noted:

> "If the UK does accede to the Interbus Agreement but the protocol is not yet in place, we will use Part 13 as a contingency for regular and special regular services only, with occasional services being covered by the Interbus Agreement."[94]

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[90] See opening statement of Mr Éanna Ó Conghaile, before the Joint Committee on Transport and Communications Networks, (Thursday, 9 October, 2020). Discussion of the General Scheme of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020. Available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_transport_and_communications_networks/2020-10-08/3/.

[91] European Committee, "Interbus Agreement: The International Occasional Carriage of Passengers by Coach and Bus," 2002, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al24264.

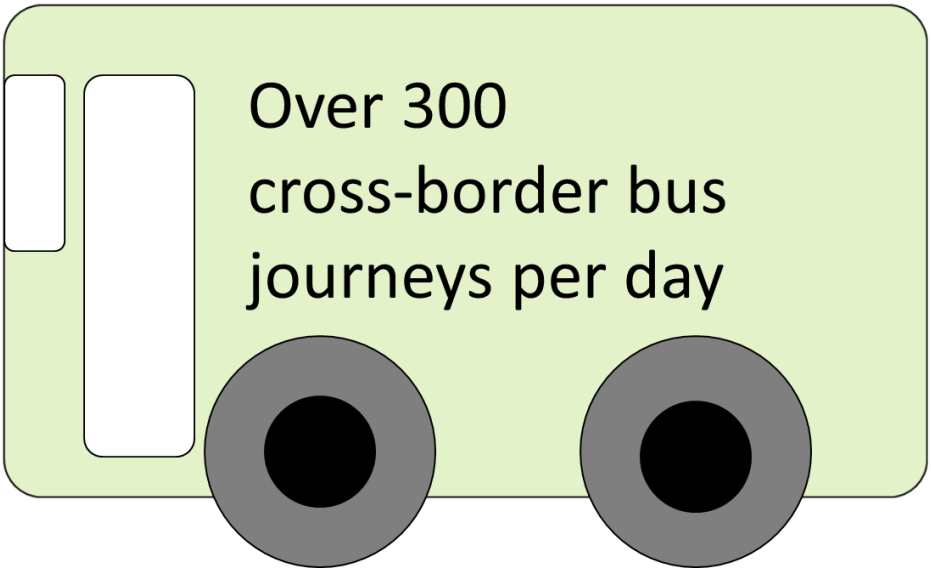
[92] Government of Ireland, "Preparing for the End of the Transition Period: Brexit Readiness Action Plan" (Government of Ireland, September 2020), at p. 39.

[93] Government of Ireland.

[94] Opening statement of Mr Éanna Ó Conghaile, before the Joint Committee on Transport and Communications Networks, (Thursday, 9 October 2020). Discussion of the General Scheme of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020.

Frequency of cross-border journeys

A significant number of cross-border bus and coach services support the needs of businesses and surrounding communities. These will rely on provision being made for the future continuation of cross-border services once the United Kingdom leaves the EU.



Source: Pre-Covid figure given by Mr Éanna Ó Conghaile, before the Joint Committee on Transport and Communications Networks, (Thursday, 9 October 2020).

Pre-Covid, there were over 300 daily cross-border bus journeys (Monday to Friday) authorised by the National Transport Authority (NTA).[95] These services range from daily regular services to Local Link services. They are operated by both private and public companies. This figure does not consider the occasional journeys which capture the 'once off' community-related bus and coach services. These would include instances like a GAA or rugby club near Clones, for example, which brings a team to participate in a Saturday morning blitz taking place across the Border.

Stakeholder Perspectives

Public Transport Sectors (Island of Ireland)

The Department of Transport, Tourism and Sport carried out all-island sectoral dialogues on transport and logistics, and tourism and hospitality in January 2017.[96] Many relevant sectors including public transport sectors from North and South were represented.

For many participants, maintaining the Common Travel Area (CTA) was the most critical issue. Should the CTA come to an end with Brexit, the flow of people, goods and services between

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[95] *Ibid*.

[96] Department of Transport, Tourism and Sport, "All-Island Sectoral Dialogues on Transport & Logistics and Tourism & Hospitality 23rd January 2017," (February 2017). Available at http://www.dttas.old.gov.ie/sites/default/files/publications/corporate/english/brexit-reports-all-island-sectoral-dialogues-transport-logistics-and-tourism-hospitality/reports-all-island-sectoral-dialogues-transport-logistics-and-tourism-hospitality.pdf.

Ireland and the UK will be severely affected. This will be exacerbated by the large numbers of border crossings. Officially, there are 208 cross-border roads on the island of Ireland, nearly twice as many as those crossing the EU's entire eastern external frontier.[97]

Significant potential impacts noted by participants that relate to Part 13 of the Bill include:

- Considerable uncertainty for people living on one side of the border and working on the other: this extends beyond travel delays and employment rights to include issues such as social welfare entitlements, pensions, employment terms and conditions etc.
- Skills shortages may arise on both sides of the border if people can no longer travel easily from one side to the other for work.
- There would be severe congestion at border crossings.
- There would be major regulatory implications for public transport operators (bus, rail).
- Many coach tours to southern Ireland incorporate Northern Ireland but might exclude it in the future due to border delays (as well as currency fluctuations).
- Smuggling of goods and people could re-emerge as a significant activity.[98]

Bus Users UK

Bus Users UK is an independent, not-for-profit Company Limited by Guarantee and is the nominated body in the UK (outside London and Northern Ireland, which have their own designated bodies)[99] to oversee complaint handling under the EU Bus Passenger Rights Directive. Their response to an UK Inquiry into the future of UK-EU Transport offers an insight into the perspective of UK bus users.

Bus Users UK states that a post-Brexit agreement on passenger transport is in the mutual interest of the EU and the UK.[100] They outline the provisions that would be required for any such agreement to be effective:

- Simple cross border planning arrangements, including an agreed system for pre-authorisation of passenger passports to avoid delays.
- Clear published information about special arrangements for passengers and staff in vehicles if delays in boarding occur at ports or interchanges, either in the UK or the EU, to enable them to wait in comfort and with access to catering and sanitary facilities.

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[97] Cathal McCall, "Smuggling in the Irish Borderlands – and Why It Could Get Worse after Brexit," The Conversation, (February 11, 2019). Available at http://theconversation.com/smuggling-in-the-irish-borderlands-and-why-it-could-get-worse-after-brexit-111153; Department of Transport, Tourism and Sport and Department for Infrastructure, "Public Road Border Crossings Between the Republic of Ireland and Northern Ireland," (June 2018). Available at https://www.infrastructure-ni.gov.uk/sites/default/files/publications/infrastructure/border-crossing-joint-report-final_0.pdf.

[98] McCall, "Smuggling in the Irish Borderlands – and Why It Could Get Worse after Brexit."

[99] There does not seem to be a similar bus users group in Northern Ireland (Bus Users UK does not have an office in Northern Ireland). Complaints about bus services in Northern Ireland are handled by Translink or the Consumer Council.

[100] Bus Users UK, "Response to Inquiry on the Future of UK-EU Transport," July, 2019. Available at https://bususers.org/wp-content/uploads/2019/07/Inquiry-on-the-Future-of-UK-EU-Transport.pdf.

- Reciprocity of arrangements and agreements to enable a smooth transition and make it simple for passengers to understand their rights. Arrangements should take into account the problems which would be caused, especially to older or disabled passengers if coach transport involved changing vehicles at a border crossing and to a third party carrier whose vehicles may not meet the originator's accessibility standards. Uncertainty on this front could prove to be a barrier to travel for many passengers and reduce the likelihood of people deciding to travel by this mode.
- Changes which increase administrative costs for passenger transport operators will inevitably be passed on to customers. As the low cost of coach travel makes it the choice of travellers on more limited incomes, any significant increase could render this option unattractive to a substantial number of passengers. This would impact on the viability of some services, result in a reduction in passenger choice and possibly endanger the survival of some coach operators, which would also make it harder for passengers to travel.

Legislative changes

Part 13 of the Bill is largely similar to the provisions provided under Part 10 of the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019*. Mr Éanna Ó Conghaile, speaking before the Joint Committee on Transport and Communications Networks, noted:

> "While the heads presented here are largely similar to the provisions of Part 10 of the 2019 Act, there is a small change under head 13.5 relating to the proposed section 28N, to be inserted in the *Public Transport Regulation Act 2009*. This provision had provided that services operating under a reciprocal arrangement, this being an interim arrangement while a bilateral is being negotiated, could operate for a period of 12 weeks. We are seeking to amend this to 24 weeks to provide additional time to be able to complete any negotiations in the context of Covid-19 and the additional challenges it might bring to finalising any negotiations."[101]

Section 89: provides that where Part 13 refers to the "Act of 2009", this is defined as the *Public Transport Regulation Act 2009*.

Section 90: provides for a new section 5A to be inserted into the *Road Traffic Act 1978*. Section 5A provides the Minister for Transport with a power to make an exemption, a declaration or both in respect of licencing requirements relating to bus operators from third countries.

Section 91: provides for amendments to the *Dublin Transport Authority Act 2008*. Section 91(a) provides for the insertion of the definition of "third country bus service". Section 91(b) provides for

[101] Opening statement of Mr Éanna Ó Conghaile, before the Joint Committee on Transport and Communications Networks, (Thursday, 9 October 2020). Discussion of the General Scheme of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020.

the amendment of section 11(1) of the *Dublin Transport Authority Act 2008* to provide for the regulation of third country bus services by the NTA.

Section 92: amends the definition of "international service" in section 2 of the *Public Transport Regulation Act 2009*.

Section 93: provides for the insertion of a new Part 2A into the *Public Transport Regulation Act 2009*. Part 2A will provide for the regulation of third country bus services operating between the State and a third country. Part 2A provides for regulatory procedures and requirements in respect of third country authorisation and third country journey forms. Part 2A also provides for offences and penalties where the procedures and requirements set out in Part 2A are not met.

Implications

The intention is that Part 13 of the Bill will authorise the National Transport Authority to engage in any future bilateral negotiations post-Brexit with a view to maintaining the current level of bus and coach services between Ireland and the UK.

As outlined above there are several factors that could potentially challenge the continuity of cross-border bus and coach services post Brexit.

Maintaining the Common Travel Area (CTA) is critical. Should it come to an end, the flow of people will be severely affected with negative consequences for travel delays.[102] It will be particularly disruptive for those living on one side of the border and working on the other. It could lead to skill shortages on both sides of the border .[103] Disruption minimising actions have been called for:[104]

- Pre-authorisation of passenger passports would be required to avoid delays.
- Comfortable and sanitary facilities would be required to facilitate bus and coach passengers in the event of border crossing delays.
- Reciprocity of arrangements and agreements between jurisdictions may be required to enable a smooth transition and make it simple for passengers to understand their rights.

Ensuring that all future solutions, including legislative provisions, are fully consistent with EU law is vital. The Department for Transport has made assurances that steps will be taken to ensure such consistency is maintained and has had on-going engagement with the European Commission as regards contingency planning.[105]

Irish bus and coach operators travelling to the UK or transiting through the UK to access continental Europe could be faced with increases in costs and restrictions on carrying out public transport cabotage operations in the UK. Picking up and setting down passengers as part of a cross-Border trip is particularly an issue for services to and from Northern Ireland.[106]

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[102] Department of Transport, Tourism and Sport, "All-Island Sectoral Dialogues on Transport & Logistics and Tourism & Hospitality 23rd January 2017."

[103] Department of Transport, Tourism and Sport.

[104] Bus Users UK, "Response to Inquiry on the Future of UK-EU Transport."

[105] Information supplied to researcher by officials in Department of Tourism, Transport and Sport 06/02/18.

[106] Houses of the Oireachtas, "Implications of Brexit for Transport, Tourism and Sport.," § Joint Committee on Transport, Tourism and Sport (2017),

Any changes which increase administrative costs for bus and coach operators may be passed onto customers. The low cost of bus and coach travel makes it the choice of travellers on more limited incomes any significant increase could render this option unattractive to a substantial number of passengers. This in turn may impact on the viability of some services, result in a reduction in passenger choice and possibly endanger the survival of some coach operators, which would also make it harder for passengers to travel.[107]

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_transport_tourism_and_sport/2017-05-31/3.

[107] Bus Users UK, “Response to Inquiry on the Future of UK-EU Transport.”

Part 14: Amendment of *Social Welfare Consolidation Act 2005*

The key aim of the social welfare Part of this Bill is to supplement the provisions of Part 11 of the *Brexit Omnibus Act 2019* so as to further maintain the social security arrangements currently in operation between Ireland and the UK in the context of the Common Travel Area (CTA) and related EU frameworks.

At her recent appearance at the Oireachtas Joint Committee on Social Protection, Minister for Social Protection, Community and Rural Development and the Islands, Heather Humphreys TD, stated the following in respect of this Part of the Bill:[108]

> "To underpin the readiness measures required at the end of the transition period, the Government approved the preparation of a scheme for the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020*, known as the 2020 Brexit Omnibus Bill… . The Bill underlines the common travel area arrangements formalised in a memorandum of understanding signed by both Governments on 8 May 2019 and ensures the rights and entitlements of Irish and British citizens which remain under this long-standing agreement."

Minister Humphreys also outlined that Part 14 of the Bill seeks to:[109]

> "… maintain the *status quo* under the common travel area arrangements, which build on work already completed by the Department, which has resulted in a new agreement on social security with the UK… . This agreement was signed 1 February 2019 and passed through the necessary parliamentary ratification processes in both Ireland and the UK during March 2019. Under the terms of the agreement existing arrangements with regard to recognition of and access to, social insurance entitlements will be maintained in both jurisdictions. This means that the rights of Irish citizens living in Ireland to benefit from social insurance contributions made when working in the UK and to access social insurance payments if resident in the UK are protected and maintained."

Policy context

Social welfare aspects of Common Travel Area between Ireland and UK

As noted across this Digest, the CTA between Ireland and the UK (including the Channel Islands and the Isle of Man) is a long-standing arrangement which allows Irish citizens to move freely to live, work, and study in the UK on the same basis as UK citizens, and *vice versa*.

The Memorandum of Understanding (between the Irish and UK Governments) on reciprocal rights and privileges under the CTA (signed on 8 May 2019) addresses, among other policy areas, social protection. Regarding social protection, it states:

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[108] Joint Committee on Social Protection, Community and Rural Development and the Islands (07/10/20).

[109] Joint Committee on Social Protection, Community and Rural Development and the Islands (07/10/20).

> "… [t]he CTA affords Irish citizens residing or working in the UK and British citizens residing or working in the Ireland, social security rights in each other's state."

And that UK and British citizens:

> "… are entitled, when in the other state, to the same social security rights, and are subject to the same obligations, as citizens of that state."'

Prior to the signing of the Memorandum, the Irish and UK Governments had signed a detailed Convention of Social Security between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland. This is discussed in more detail below.

Convention on Social Security between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland

The Convention of Social Security between the Government of the United Kingdom of Great Britain and Norther Ireland and the Government of Ireland (the 'Convention'), signed February 2019, preserves the reciprocal social security rights established through CTA arrangements and as provided for under EU law in respect of social security contributions, pensions and benefits.

The Convention which runs to 67 Articles continues access to, and equality of treatment in relation to, social security provision for Irish and UK citizens and their qualifying family members in each country.

Reciprocity in social security before the UK's withdrawal from the EU was provided for under EU law and the Convention protects this reciprocity post-Brexit so that Irish and UK citizens taking advantage of their CTA movement and working rights are not affected. The Convention also ensures Irish and UK nationals residing and/or working in the UK or Ireland do not lose their accrued contributions or rights to social security benefits when moving between the two countries, whilst at the same time preventing any duplication of provision of benefits and double liability for social security contributions across the two jurisdictions.

The Convention covers the following:

- social security contributions;
- pensions;
- family benefits;
- benefits in respect of sickness and invalidity;
- maternity and paternity;
- unemployment;
- accidents at work and occupational disease; and
- bereavement.

The Convention also provides for the necessary administrative arrangements for data sharing, social security debt recovery and mutual cooperation necessary for implementing reciprocity.

Article 65 of the Convention (Duration of Convention) states that the Convention will come into force when both Governments notify each other in writing when the necessary internal procedures for entry into force have been completed. As such, the Convention will come into force on the date of the later of the notifications of the two Governments.

In June 2020, the Department of Employment Affairs and Social Protection's Briefing Paper for the Incoming Minister, Heather Humphreys, TD, observed the following in relation to post-Brexit arrangements:[110]

> "Under the terms of the agreement, all existing arrangements regarding Social Insurance entitlements will be maintained in Ireland and the UK. This means that Irish citizens living in Ireland maintain the right to benefit from Social Insurance contributions made when working in the UK and to access Social Insurance payments if living in the UK and vice versa."

Irish and UK social welfare beneficiaries in the counterpart jurisdiction[111]

As of October 2020, it is estimated that there are approximately 132,000 people in receipt of a UK state pension living in Ireland and approximately 1,000 people receiving child benefit payments from the UK for children residing in Ireland.

In addition, it is estimated 27,100 people residing in the UK are in receipt of a contributory State pension from Ireland. Just over 900 people residing in the UK are in receipt of full-rate child benefit payments from the Department of Social Protection. These payments affect 1,950 children, 97% of whom reside in Northern Ireland.

A further 920 people residing in the UK are in receipt of child benefit supplement payments, affecting 2,015 children, 98% of whom reside in Northern Ireland.

Legislative changes

The *Social Welfare (Consolidation) Act 2005*[112], the "Principal Act" for this part of the Bill, provides the main legislative basis for the interpretation and operation of the social welfare code in Ireland.[113] Any amendment to the social welfare code will, in practice, require amendments in the first instance to the Principal Act and/or other relevant legislation related to social welfare arrangements in Ireland. Part 14 of the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020* seeks to amend the Principal Act.

Part 14 of the Bill consists of four sections (sections 94 to 97), three of which are substantive and are dealt with below.

Amendment to Section 287 of the Principal Act

Section 287 (Reciprocal arrangements) of the Principal Act provides the Minister with general powers to make regulations for the purposes of carrying out reciprocal or other arrangements with other States, governments, international organisations or proper authorities in respect of insurance and benefits under Part 2 (Social Insurance) of the Principal Act. Section 287 also seeks to

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[110] Department of Employment Affairs and Social Protection (2020) Minister's Brief.

[111] Joint Committee on Social Protection, Community and Rural Development and the Islands (07/10/20).

[112] This link to the *Social Welfare Consolidation Act 2005* is a revised version of the Act, maintained by the Department of Employment Affairs and Social Protection as of 2018, but not including amendments proposed in Budget 2021, as of October 2020, for which the relevant proposed legislation is yet to be presented to the Houses of the Oireachtas.

[113] Gov.ie, Policy information, *Social Welfare Consolidation Act 2005* (Running consolidation).

empower the Minister to make such reciprocal or other arrangements in respect of the following non-social insurance based or means-tested social welfare schemes:

- State pension (non-contributory) and blind pensions,
- widow's (non-contributory) pension,
- widower's (non-contributory) pension,
- surviving civil partner's (non-contributory) pension or guardian's payment (non-contributory),
- jobseeker's allowance, and
- child benefit.

Section 95(a) of the Bill seeks to substitute references to the above named schemes in subsection 287(1) of the Principal Act, with new text referring to social assistance under Part 3 of the Principal Act, child benefit under the Principal Act's Part 4, or any other scheme, or payment, under the Principal Act. This has the effect of broadening the range of measures over which the Minister can make regulations concerned with reciprocal arrangements, including those arrangements made with the UK.

Section 95(b) inserts a new subsection (3), which seeks to provide that an arrangement, on foot of a regulation made under section 287, includes in certain circumstances an agreement (which is intended to be binding on the Minister, the State or the Government) where such an agreement has not yet become binding. This has the effect of allowing the Minister to make orders in respect of the implementation of a such an agreement. This section would apply to the Convention on Social Security between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, signed in February 2019 but not yet fully ratified[114], so as to ensure continuity of existing CTA social protection arrangements, if required before the ratification process has been fully completed.

Transfer of personal data to a compensator in the United Kingdom

Section 96 of the Bill proposes to insert a new section 343PB (Issuing of statements and revised statements of recoverable benefits by Minister) into Part 11B (Recovery of certain benefits and assistance) of the Principal Act. Section 343PB provides that the Minister will transfer to a compensator,[115] who is subject to UK laws, the personal data of an injured person who has received, is receiving or will receive specified benefits. The effect of section 96 is to continue the transfer of personal data to UK-based compensators of injured persons for the purposes of

[114] Explanatory Memorandum, Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020.

[115] Department of Social Protection Operational Guidelines – Recovery of Benefits and Assistance (RBA) Scheme states that the RBA Scheme "recovers the value of certain illness-related social welfare payments from compensation awards made to a person as a consequence of personal injuries claims. The benefits are recovered from the compensator, not the injured person". Section 343M(a) of the Principal Act states that "a payment (in this Part referred to as a 'compensation payment') is made by or on behalf of a person (in this Part referred to as the 'compensator') who is, or is alleged to be, liable to any extent in respect of personal injury…".

recovery of certain social welfare benefits and social welfare assistance payments so as to avoid 'double compensation'.[116]

Consequential amendments

Section 97 provides for consequential amendments relating to those proposed by this Part of the Bill. Section 97 seeks to amend sections 113A (entitlement for invalidity pension recipients), 205 (recoupment of supplementary welfare allowance (continued)) and Table 2 of Schedule 3 to provide for references to the UK. Section 97 also proposes to insert a new Part 8A (certain payments – entitlement to island allowance) which provides for references to the UK.

The effect of these consequential amendments will be to continue the existing social welfare arrangements in the case of:

- persons receiving an invalidity pension from Ireland who become entitled to a UK state retirement pension;
- the recoupment of supplementary welfare allowances paid by the Department of Social Protection to persons awaiting UK payments;
- UK child benefit will be disregarded in the means test for social assistance schemes; and
- such island allowances can continue to be paid to persons who rely on an equivalent primary UK payment to support their entitlement.

Implications

One of the main implications of the enactment of the provisions of Part 14 would be to ensure the continuation of existing social security cooperation between Ireland and the UK. This would benefit people of both States, who will to continue to enjoy flexibility and eligibility in respect of social protection. As noted above, the current reciprocal arrangements benefit approximately 133,000 people residing in Ireland receiving UK benefits and the almost 29,000 UK residents in receipt of Irish benefits. The financial implications of the proposals set out Part 14 are not significant given that they solely seek to maintain the *status quo* with respect of social security arrangements between Ireland and the UK as per existing arrangements under the CTA.

In this regard, in the previously noted statement to Oireachtas Joint Committee on 7 October 2020, Minister Humphreys stated that this Part of the Bill facilitates the operation of the convention of social security arrangements agreed with the UK, signed in February 2019.[117] Minister Humphreys also addressed the financial implications of this part of the Bill during her appearance at the Joint Committee as follows[118]:

> "'… I do not think there will be any direct cost to my Department as a result of what is being provided for on passage of this legislation. We are maintaining the status quo and making sure that people continue to get their entitlements. Much work has been done on the

[116] Section 96(3) provides that personal data under this section is personal data within the meaning of the General Data Protection Regulation and is required for the purposes operations of section 96(2) and is held by the Minister for that purpose and operation.

[117] Joint Committee on Social Protection, Community and Rural Development and the Islands (07/10/20).

[118] Joint Committee on Social Protection, Community and Rural Development and the Islands (07/10/20).

legislation by my officials but there is no cost beyond that which would be the case if the UK were to remain in the EU."

Part 15: *Protection of Employees (Employers Insolvency) Act 1984*

The purpose of Part 15 of the Bill is **to allow access to the Insolvency Payment Scheme for employees who are employed or habitually employed in Ireland by a company that has been made insolvent in the UK**. To do this, the Bill proposes several changes to the *Protection of Employees (Employers' Insolvency) Act 1984*, in order to ensure that employees are covered by the scheme where their employer has been made insolvent in the UK. The 1984 Act transposed EU law on the protection of employees in the event of the insolvency of their employer. A codified version of EU provisions, Directive 2008/94/EC (consolidated version), was enacted in 2008 in order to account for several amendments since the 1980 Directive. As amended, this is the EU legislation that is currently in force.[119]

Policy Context

The 1984 Act provides for an Insolvency Payments Scheme, which was put in place to protect the pay-related entitlements of employees whose employer becomes insolvent. It covers employees who are employed or habitually employed in Ireland by an employer who becomes insolvent in another EU Member State.

According to the Government's Guide to the Insolvency Payments Scheme, an employee normally makes a claim through the liquidator or receiver. When a payment is made under the scheme, the claim against the employer is transferred to the Minister for Employment Affairs and Social Protection. Employees can claim for arrears of pay, holiday pay, pay in lieu of statutory notice and various other entitlements, to be paid from the SIF. Any part of the claim that is recovered in the final winding-up of the company is repaid to the SIF.[120]

The level to which the fund is utilised varies on an annual basis, but it does appear to increase following period economic uncertainty and turmoil, when there is a higher of company insolvencies. An examination of the Comptroller and Auditor General Reports shows that payments from the fund substantially increased following the 2008-2011 financial crisis (see Figure 1 below).[121]

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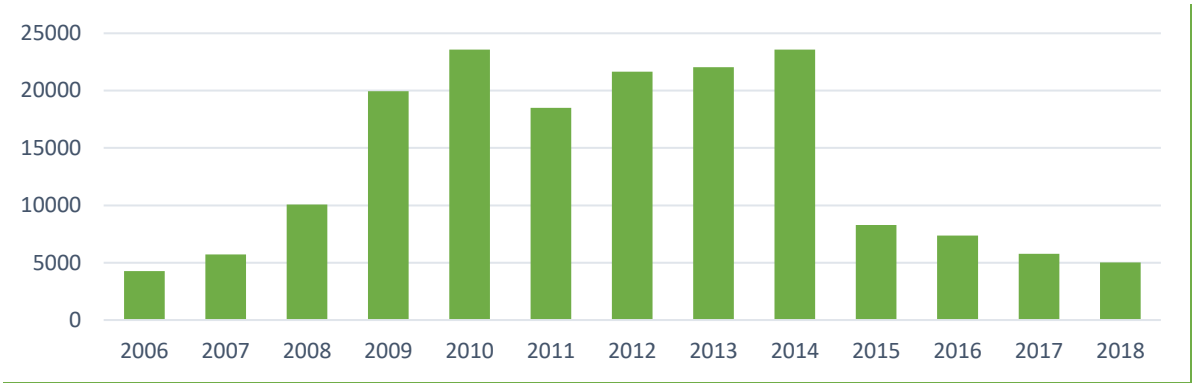
[119] The 1984 Act transposed the provisions of Council Directive 80/987 on the approximation of laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. This Directive was subsequently amended by Directive 2002/74/EC, transposed into Irish law by the European Communities (Protection of Employees (Employers' Insolvency)) Regulations 2005, S.I. No. 630/2005.

[120] In respect of redundancies it should be noted that a separate scheme, the Redundancy Payments Scheme, makes such payments, but these are also paid from the SIF. See Guide to the Insolvency Payments Scheme, p.5.

[121] This point is particularly relevant in the context of the potential economic challenges likely to arise due to the current pandemic.

Figure 1: Total Payments from SIF, 2006-2018 (€000)



Source: Comptroller and Auditor General[122]

An additional consideration is that as insolvency is involved, full recovery of the debt from the company is rarely possible.[123] The Comptroller and Auditor General noted in 2014 that debts arising from the SIF are not recognised as assets by the Department given the uncertainty of collection, but these amounts are nonetheless disclosed by the Department by way of note in the account.[124]

The Bill Digest to the previous Bill noted that in the five years preceding the summer of 2018, 530 employees from 50 UK-based companies received payment from the Insolvency Payments Scheme. However, it also noted that annual beneficiaries can vary substantially depending on which companies become insolvent.

In addition to Brexit, the policy context surrounding the protection of employees is also impacted by further challenges are presented by the ongoing Covid-19 pandemic. In an analysis of the impact of the pandemic on the SIF, the Parliamentary Budget Office has noted that according to the Department of Finance Stability Programme Update 2020, PRSI receipts are forecast to decrease by 12% in 2020. It also noted that the availability of pandemic supports, which are not funded by the SIF, has shielded the SFI from additional spending, while the increase in insolvent businesses and redundancies will also impact the SIF as it funds both payments.[125]

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[122] Comptroller and Auditor General, Social Insurance Fund, Financial Statements 2006-2018.

[123] Comptroller and Auditor General (2014) Management of Redundancy and Insolvency Scheme Debts (https://www.audit.gov.ie/en/Find-Report/Publications/2015/Chapter-18-Management-of-Redundancy-and-Insolvency-Scheme-Debts.pdf) at p.201. The Minister, along with the Revenue Commissioners and local authorities, is a preferential creditor for the purposes of recovering debts arising from SIF payments, although they only stand to recover such amounts after secured creditors have been paid and the liquidation expenses have been discharged

[124] Ibid. at p.203.

[125] Parliamentary Budget Office, *The COVID-19 Pandemic: Implications for the Social Insurance Fund*, No. 25 of 2020, (https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2020/2020-05-13_the-covid-19-pandemic-implications-for-the-social-insurance-fund_en.pdf)

Supreme Court Decision

While not directly related to Brexit, a further issue to arise in relation to the Scheme in recent years is the level of protection available to employees in the event of an informal insolvency, that is when their employer ceases trading but the company is not formally wound up.[126]

The issue related to the transposition of Article 2(1)(b) of the 2008 Directive, which provides for situations where it has been established that an employer is "definitively closed down" and the available assets are insufficient to warrant the opening of proceedings.[127] The 1984 Act, as amended, stipulates that an employer is insolvent "if, and only if: a winding up order is made or a resolution for voluntary winding up is passed with respect to it, or a receiver or manager of its undertaking is duly appointed".[128]

This issue was considered by the Supreme Court in the case of *Glegola v Minister for Social Protection*, where the court held that the State had indeed failed to fully transpose EU law.[129] In his judgment, O'Donnell J stated that Article 2(1) requires Member States to offer an alternative course to employees of insolvent employers".[130] He continued by stating "I also agree with the decision of the Court of Appeal that, at least insofar as the issue was advanced in this case, Irish legislation does not provide for the necessary procedure"[131].

In November 2019, the then Minister for Employment Affairs and Social Protection, described the judgment and its ramifications as complex and stated that consideration must be given to the implications and consequences for company law in extending the definition, how an insolvency may be determined in the absence of a formal wind-up process, and how the SIF may be safeguarded from potential abuse.[132]

The question of informal insolvency has been highlighted as one that will impact upon the situation of UK based companies. A recent academic analysis in relation to post-Breixt insolvency

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[126] See *In re Davis Joinery Ltd* [2013] IHEC 353. In the case it was remarked that unless the issue is successfully litigated, "the obvious unfairness of the Act … will only be redressed by legislative change". See Willian Fry, *Difficulties in Accessing Employer's Insolvency Fund in the Case of Informal Insolvency*, 24 September 2013, (https://www.williamfry.com/newsandinsights/news-article/2013/09/24/difficulties_in_accessing_employers_insolvency_fund_in_the_case_of_informal_insolvency_)

[127] Directive 2008/94/EC, Article 2(1)

[128] This appears to correspond more with the provisions of Article 2(1)(a) of the Directive.

[129] [2018] IESC 65

[130] [2018] IESC 65 at para.20.

[131] [2018] IESC 65 at para.21. See C Heery, *Court of Appeal rules that State must pay damages in informal insolvency case*, Ronan Daly Jermyn (blog), 27 March 2017 (https://www.rdj.ie/insights/court-of-appeal-rules-that-state-must-pay-damages-in-informal-insolvency-case)

[132] Minister for Employment Affairs and Social Protection, Regina Doherty TD, Response to Parliamentary Question No. 536 (Insolvency Payments Scheme Payments), *Dáil Éireann Debate*, 12 November 2019 (accessed 6 November 2020).

proceedings in five countries stated that "the position [in Ireland] in relation to collective proceedings falling short of a winding up seems to be less clear".[133]

Legislative Changes

The provisions of the Bill remain unchanged from the 2019 Act and these provisions have yet to be enacted. These provisions are set out as follows:

Section 98 provides for the definition of the Act of 1984 for the purposes of Part 15.

Section 99 seeks to amend section 1 of the 1984 Act, which concerns the interpretation of the Act, It amends the definitions of "competent authority" and "relevant person" to include separate provisions for the United Kingdom, in addition to existing provisions for EU Member States. In also inserts definitions for the 2008 Directive and the United Kingdom and amends section 1(3) of the Act of 1984 to provide for an employer that becomes insolvent in the United Kingdom.

Section 100 seeks to amend section 4(1) of the 1984 Act, which concerns the date on which an undertaking becomes insolvent. It specifically amends the Act to provide for the 2008 Directive with regard to undertakings in EU Member States and provides a separate such provision for undertakings in the United Kingdom.

Section 101 seeks to amend section 7(3)(b) of the 1984 Act, which concerns the certification of an amount of unpaid contributions to an occupational pension scheme. It specifically amends the provision on who may certify an amount to be paid to include an actuary, or an actuary or person performing a similar function, in an EU Member State. On the latter, it includes a separate provision for the United Kingdom.

Section 102 provides for the insertion of a new provision, section 8A, into the 1984 Act, with regard to the transfer of personal data to individuals in the United Kingdom. It applies where the employer is insolvent under the laws, regulations and administrations procedures in the UK, and the employees concerns are employed or habitually employed in the State.

- Section 8A(1) empowers the Minister to make Regulations providing for the transfer of personal data, including special categories of personal data, to i) a relevant officer or ii) an actuary or a person performing a similar function.[134] The provision applies insofar as that transfer is necessary for the performance of the functions of the person to whom it is transferred.
- Section 8A(2) also requires the Minister to have regard to the protection of employees in an employer insolvency, ensuring a minimum degree of protection, in particular guaranteeing payment of employees' outstanding claims, and the need for balanced economic and social development.

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[133] Umfreville et al, Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario, *International Insolvency Review*, 27, no.3 (2018): 422-44, at p.435. (https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1325)

[134] The applicable definitions of personal data and specific categories of personal data are those in Articles 4 and 9(1) of the General Data Protection Regulation respectively.

- Finally, section 8A(3) provides definitions for the GDPR, "personal data" and "special categories of personal data" for the purposes of Section 8A.

Implications

The Minister for Social Protection, Rural and Community Development and the Islands, Heather Humphreys TD, attended the corresponding Joint Committee on 7 October 2020 to discuss the provisions of the General Scheme. In respect of Part 15 of the Bill, the Committee focused on two primary issues:

- The impact of the provisions on redundancy and the current Covid-19 emergency measures; and
- The personal data that may be transferred under the provisions.

In relation to redundancies, the Committee raised the current suspension of redundancy provisions in the context of the payment of redundancies by an employer based in the UK to employees based in Ireland. This included the payment of redundancies under the Insolvency Payments Scheme and the potential effect of the extension of emergency provisions. In response, the Minister told the Committee the following:

> "Regarding redundancy, because the UK will no longer be in the EU different rules will apply to companies based in the UK but employing people here. We want to ensure, therefore, that staff working and paying their PRSI contributions here will get their full entitlements under our legislation. That is why we are ensuring that we have this agreement and that commitments will have to be honoured. Staff who work in this country, however, will get benefits from our redundancy payments."[135]

The Minister also indicated that the redundancy entitlements of workers made redundant due to an insolvency of the company based in the United Kingdom will be protected despite the extension.

The main implications of the Bill only arise should a contingency be required in the absence of an agreement between the UK and the EU. The purpose of its provisions is to maintain the *status quo* and to prevent any uncertainties regarding employees' rights in the event of a cross-border insolvency. However, there are possible questions that may arise, as noted in the Bill Digest for the previous Bill:

1. What will be the significance of differences between how Irish and UK law treats preferential creditors in insolvency situations?
2. What employee rights will apply in situations of a transfer of undertakings or company reconstructions? Will UK-based reconstructed companies remain obliged to realise employee rights?

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[135] Minister for Social Protection, Rural and Community Development and the Islands, Heather Humphreys TD, Discussion on the Bill, *Joint Committee on Social Protection, Rural and Community Development and the Islands*, 7 October 2020

Part 16: Amendment of *Extradition Act, 1965*

Policy context

Extradition is "the handing over of a person who either stands convicted or accused of a crime for the purpose of being tried or punished for it."[136]

The end of the transition period means that the UK will cease to be part of the European Arrest Warrant (EAW) system (discussed below) which currently governs the extradition of individuals between EU member states.

As noted in the Explanatory Memorandum accompanying the Bill, the Government proposes to revert to the use of the Council of Europe Convention on Extradition 1957 to facilitate extradition between Ireland and the UK once the provisions of the EAW system no longer apply. The *Extradition Act 1965* gave effect in Irish law to the 1957 Convention.

The issue of extradition was addressed by Part 13 (sections 91 to 94) of the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019* however those provisions were never commenced and will be repealed by this Act,[137] to be replaced by the provisions of this Part. The replacement provisions are identical to those passed by both Houses of the Oireachtas, in the 2019 Act.

What is the European Arrest Warrant?

The EAW system came into effect in Ireland in January 2004, replacing the pre-existing arrangements for extradition. As noted by Briscoe:

> "The EAW system provided a unified, streamlined method of ensuring that the 28 European member states could surrender individuals accused or convicted of crimes in another member state efficiently and without delay."[138]

The EAW allows judicial authorities in Member States to send warrants to each other for the purpose of execution. The procedure for issuing an EAW is as follows:

- A domestic warrant is issued for a person in a Member State.
- If it becomes clear that the person is no longer within that jurisdiction ('the requesting state'), the prosecuting authorities there will make an application to their appropriate judicial authority for an EAW.
- This request will be sent to the Central Authority (in Ireland, this is the Department of Justice and Equality) who will then apply to the Court (in Ireland, this is the High Court) to have the warrant endorsed for execution.

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[136] Remy Farrell and Anthony Hanrahan, *The European Arrest Warrant in Ireland* (Clarus Press, 2011) at page 3.

[137] See section 4 of this Bill.

[138] Briscoe, R. 'Brextradition', *The Law Society Gazette* Jan/Feb 2017, at 36.

- Where the person named in the warrant is found, they will be arrested and brought before the Court.[139]

The United Kingdom is the jurisdiction with which Ireland has the most interaction in terms of EAW, as has been consistently shown in Annual Reports on the operation of the system.[140] In 2018 (the most recent year for which figures are available):

- of 106 EAWs sent by Ireland, 69 of these were sent to the UK;[141] and
- of 398 EAWs received by Ireland, 260 of these were from the UK.[142]

The most recent Annual Report[143] addresses the issue of Brexit specifically, saying:

> "As the majority of Annual Reports on the EAW to date have shown, the UK remains the state with which Ireland has the greatest interaction. The departure of the UK from the EU has considerable consequences for Ireland on a wide range of issues. However, in the context of combatting crime and terrorism, the necessity to maintain a functioning system of extradition between the two States has been identified as a key priority. In that regard the Department of Justice and Equality continues to monitor developments closely."[144]

What is the European Convention on Extradition 1957?

As explained by Briscoe:

> The convention is a multilateral extradition treaty introduced in 1957. Prior to the introduction of the European Arrest Warrant, the convention provided a system for the extradition of persons between the member states of the Council of Europe (including EU countries), together with certain specified third states.[145]

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[139] Remy Farrell and Anthony Hanrahan, *The European Arrest Warrant in Ireland* (Clarus Press, 2011) at page 26.

[140] Section 6(6) of the European Arrest Warrant Act 2003 requires that an annual report be prepared on the operation of Part 2 of the Act and be laid before both Houses of the Oireachtas. Part 2 of the 2003 Act sets out the procedure for the issue of European Arrest Warrants within the State.

[141] Report on the operation of the European arrest warrant act 2003 (as amended) for the year 2018 made to the Houses of the Oireachtas by the central authority in the person of the Minister for Justice and Equality pursuant to section 6(6) of the European Arrest Warrant Act 2003, at page 13, available here: https://ptfs-oireachtas.s3.amazonaws.com/DriveH/AWData/Library3/Documents%20Laid/pdf/JUQdoclaid020320_020320_110214.pdf.

[142] Ibid at page 11. The Report notes that there has been an increase in EAWs received from the UK since 2017 as a result of the UKs participation in the Schengen Information System (SIS II) and a policy of sending non-participating States, such as Ireland, all warrants registered on SIS II. So this figure does not reflect the number of people of interest to the UK that they believe to be resident in Ireland, but across the EU in general.

[143] Report on the operation of the European Arrest Warrant Act 2003 (as amended) for the year 2018 made to the Houses of the Oireachtas by the central authority in the person of the Minister for Justice and Equality pursuant to section 6(6) of the *European Arrest Warrant Act 2003*, available here: https://ptfs-oireachtas.s3.amazonaws.com/DriveH/AWData/Library3/Documents%20Laid/pdf/JUQdoclaid020320_020320_110214.pdf.

[144] Ibid at 5.

[145] Briscoe, R. 'Brextradition', *The Law Society Gazette* Jan/Feb 2017, at 38.

The Convention is still in existence and remains the basis for extradition between the EU and certain specified third states, such as South Africa, as well as between EU member states and Non-EU European states.[146]

While extradition under the EAW system is fundamentally based on **mutual recognition of judicial decisions**, the procedure under the Convention is a **diplomatic process**, with the request being made through diplomatic channels.

As stated above, the European Convention on Extradition 1957 was given effect in Irish law by the *Extradition Act 1965*. The following is adapted from Department of Justice and Equality's guidance to foreign authorities on making an extradition request to Ireland under Part II of that Act.[147]

> "An extradition request must be made in writing and must be communicated by the Head of the diplomatic mission of the requesting country accredited to Ireland through the Irish Department of Foreign Affairs or by any other means provided in the relevant extradition provisions.
>
> When a request is received by the Department of Foreign Affairs it is forwarded simultaneously to the Department of Justice and Equality and to the Office of the Attorney General. The Garda Síochána … are normally informed by the Department of Justice and Equality of a request at this stage to enable enquiries to be made to establish the whereabouts of the person whose extradition is being sought.
>
> The Office of the Attorney General advises the Department of Justice and Equality if a request complies with the requirements of the Extradition Acts or the relevant treaty … [If the] extradition request is in order, the Department of Justice and Equality arranges for the formal submission of the request for extradition to the Minister for Justice and Equality …
>
> When satisfied that a request complies with the Act, the Minister certifies that the request has been made. That certificate is produced to a judge of the High Court … . The warrant of arrest is transmitted to the Garda Síochána who are responsible for securing the arrest of the person concerned.
>
> On arrest, the person concerned is brought … before a judge of the High Court … [I]f the High Court is satisfied of [certain matters], it will make an order for the extradition of the person. Where an extradition order is made, the person is committed to prison to await the order of the Minister for his/her extradition."

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[146] Ibid.

[147] Department of Justice and Equality (2015) 'Extradition: A guide to Irish procedures', available here: http://www.justice.ie/en/JELR/Extradition%20-%20A%20Guide%20to%20Procedures%20in%20Ireland.pdf/Files/Extradition%20-%20A%20Guide%20to%20Procedures%20in%20Ireland.pdf.

Legislative changes

Part 16 of the Bill consists of four sections. The provisions of this Part are identical to the existing equivalent provisions in the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019* as passed by the Houses of the Oireachtas, but which were never commenced. The provisions in the 2019 Act are being repealed and replaced by those in this Bill.

Section 103 is a standard provision setting out a single definition to be used in the interpretation of this Part. It defines 'Act of 1965' as referring to the *Extradition Act 1965*.

Section 104 is a technical amendment, the effect of which will be that orders made under the section 23(2) of the Act of 1965 (as inserted by this Bill) must be laid before both Houses of the Oireachtas.

Section 105 substitutes section 14 of the Principal Act. The effect of this substitution is to allow the extradition of Irish citizens on a reciprocal basis, i.e the State will extradite Irish citizens where the requesting State would allow its own citizens to be extradited.

Section 106 makes a number of amendments to section 23 of the Act of 1965. The substantive amendment made is the insertion of a new subsection 23(2). This subsection allows the Minister for Foreign Affairs to make an order allowing for extradition under the Act in relation to a specified country to take place under an alternative process. Under this process, as set out in section 23(2), requests for extradition from the specified country can be made directly to the Minister for Justice and Equality, and can be made electronically. The means of such communication must be arranged with the country by direct agreement.

Implications

The implications of this change will stem largely from the **procedural differences** between the current system of extradition (i.e. the EAW system) and the system under Part II of the *Extradition Act 1965*.

Given the volume of requests between the two jurisdictions, it has been noted that there are certain impracticalities in using the 1957 Convention as a basis for extradition between the two jurisdictions, particularly given the volume of requests. This is largely due to the inherent delays with the required diplomatic procedures.[148] However the amendments made by this Bill, if enacted, are intended to simplify this process somewhat, primarily by allowing requests to be sent electronically, directly to the Department of Justice and Equality, rather than in hard copy through the Department of Foreign Affairs. Speaking to the Joint Committee on Justice about the General Scheme of the Bill, the Minister for Justice and Equality, Helen McEntee T.D., said:

> "What we are attempting to do here is to remove a layer whereby such [extradition] requests would initially come through the Department of Foreign Affairs in a hard copy –

[148] Briscoe, R. 'Brextradition', Law Society Gazette Jan/Feb 2017, at 39.

> essentially, in a diplomatic bag. We are trying to remove that so it comes directly to my Department in order to make the process easier overall."

The Government has acknowledged that using the 1957 Convention is not as effective as the EAW system, but does provide a "workable solution".[149]

[149] https://www.oireachtas.ie/en/debates/debate/dail/2019-02-27/22/.

Part 17: Immigration

Policy context

Part 17 proposes to amend the *Immigration Act 2004* (the 2004 Act), which governs the entry and residence of non-Irish nationals in the State. The main purpose of the proposed amendments under Part 17 of the Bill is to ensure that, following the end of the transition period, UK citizens do not fall within the definition of "non-national"[150] as it applies to sections 11 and 12 of the 2004 Act.

Section 11 of the 2004 Act requires that a person landing in Ireland is in possession of valid documents of identity. An exemption is provided under subsection (4) for those coming from, or embarking for, a place in the State, Great Britain or Northern Ireland. However, the section states that this exemption does not apply to a person who is a non-national, and subsection 5 defines a non-national as anyone who is neither a citizen of Ireland nor a person who enjoys a right of entry under EU law.[151] At the end of the transition period on 1 January 2021, this definition will no longer include British citizens. Section 12 of the 2004 Act provides that every non-national in the State over the age of 16 years shall produce, on demand, a valid passport or equivalent document on request. The same definition of non-national applies in this section as in section 11.

These amendments are proposed within the context of maintaining the current operation of the Common Travel Area (CTA), which is a long-standing informal arrangement between the UK and Ireland. Under the CTA, British and Irish citizens can move freely between and reside in either jurisdiction and enjoy associated rights and privileges. The CTA has been described as an area within which "internal borders are subject to minimal or non-existent border controls".[152] In practice, the CTA allows for freedom of travel across the border between Northern Ireland and Ireland, largely as if no international frontier existed.[153] The Government of Ireland: Brexit Readiness Action Plan[154] (September 2020) has noted that "the CTA will be maintained in all circumstances". On 8 May 2019 the Irish and UK Governments entered into a Memorandum of Understanding (MOU) reaffirming their joint commitment to the CTA, and to maintaining the associated rights and privileges of Irish and UK citizens under this reciprocal arrangement.[155] The proposed revised

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[150] Joint Committee on the Implementation of the Good Friday Agreement, "Brexit and the Future of Ireland Uniting Ireland & Its People in Peace & Prosperity", August 2017.

[151] This is a person who a person who has established a right to enter and be present in the State under the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977), the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997) or the European Communities (Free Movement of Persons) Regulations 2006 and 2008.

[152] Oireachtas Joint Committee on European Union Affairs, Report on the UK/EU Future Relationship: Implications for Ireland (Houses of the Oireachtas (Irish Parliament), June 2015).

[153] Graham Butler and Gavin Barrett, "Europe's 'Other' Open-Border Zone: The Common Travel Area under the Shadow of Brexit", Cambridge Yearbook of European Legal Studies, 20 (2018), pp 252–28.

[154] Government of Ireland: Brexit Readiness Action Plan, September 2020, pp 53 to 54.

[155] It is now accepted by both the UK and the EU that the Common Travel Area can remain whether or not there is a Withdrawal Agreement. Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2019, Second Stage Speech by Charlie Flanagan TD, Minister for Justice and Equality, Dáil Éireann, 27 February 2019.

definition of "non-national" within the 2004 Act ensures retention of the current legal basis for the exemption of citizens of the United Kingdom of Great Britain and Northern Ireland from passport checks within the CTA.

In addition, the Bill also proposes to amend the 2004 Act to add the *European Communities (Free Movement of Persons) Regulations 2015* (S.I. No 548 of 2015) (the '2015 Regulations') to a list of instruments whose operation will not be limited by the 2004 Act. The 2015 Regulations give effect to the EU Citizens' Rights Directive,[156] which sets out the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Legislative changes

Section 107 states that the "Act of 2004" means the *Immigration Act 2004*.

Section 108 proposes to amend s. 2(2)(d) of the 2004 Act. Section 2(2) provides a list of instruments whose operation will not be limited by the 2004 Act. It is proposed that the 2015 Regulations will be added to this list by a new section 2(2)(f).

Section 109 proposes to amend s.11 of the 2004 Act to alter the definition of the term 'non-national'. Section 11 of the 2004 Act governs the entry of non-nationals into the state, requiring inter alia, that every person (other than a person under the age of 16 years) landing in the state shall be in possession of a valid passport or other equivalent document. It is proposed that the definition of a person who is not a non-national for the purposes of sections 11 and 12 should include "a citizen of the United Kingdom of Great Britain and Northern Ireland".

Implications

The proposed amendments will facilitate the continued operation of the current legal position on passport checks and the production of documents for UK citizens. If enacted, Part 17 will provide that UK citizens remain exempt from passport checks within the CTA.

[156] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Part 18: International protection

Policy context

Part 18 of the Bill provides for amendments to current international protection legislation and aims to address the circumstances which may arise if the transition period expires without a relevant agreement being reached on this issue between the UK and the EU. The two key proposed reforms concern, first, the designation of the UK as a safe third country for the purposes of international protection applications and second, the introduction of an appropriate mechanism to return applicants for international protection to the UK.

The International Protection System

When a national of a third country, or a stateless person, makes an international protection application in an EU country, it must be determined which Member State is responsible for examining that application. The Dublin Regulation provides the legal basis and procedural rules for establishing the mechanisms to make that determination. The Regulation will cease to apply to the UK after the Brexit transition period finishes, at the end of 2020. Thus far, there is no agreement regarding the system that will operate from 1 January 2021, so it is necessary to establish a new system in which the current processes for dealing with such applications will continue to operate.

International protection: The need for international protection arises when a person is outside their own state and are unable to return because they would be at risk, and their country is unable or unwilling to protect them. Risks that give rise to a need for international protection include; persecution, threats to life, freedom or physical integrity arising from armed conflict, serious public disorder, or different situations of violence. Other factors include famine or natural disasters.

The *International Protection Act 2015* introduced a "single procedure" in which applications for international protection (for refugee status and for subsidiary protection) are to be considered in one protection application. An application for international protection will be deemed inadmissible if (a) another Member State has granted refugee status or subsidiary protection status to the person or (b) a country other than a Member State is a first country of asylum for the person.

Dublin III Regulation: Dublin III establishes the process for determining the contracting State (EU Member States plus Iceland, Norway and Switzerland) responsible for processing an asylum application. The criteria for establishing responsibility run, in hierarchical order, from family considerations, to recent possession of visa or residence permit in a Member State, to whether the applicant has entered the EU regularly or irregularly. The Regulation also sets out transfer processes and timescales. The *European Union (Dublin System) Regulations 2018* (S.I. No 62 of 2018) give effect to the Regulation in Ireland.[157]

[157] For statistics illustrating the transfers made in 2019 under the Regulation see Asylum Information database – Ireland: Dublin statistics: 2019.

Safe third country: The Asylum Procedures Directive, in which Ireland participates, limits the expulsion of applicants during the asylum process. Member States may send applicants to safe third countries with which the applicant has a connection if it would be reasonable for the applicant to go there and, if the applicant qualifies as a refugee, it is possible for them to receive protection in accordance with the Refugee Convention 1951. In that third country, the applicant must not be at risk of persecution, *refoulement* or treatment in violation of Article 3 of the European Convention on Human Rights.

The Bill proposes to enable the Minister to designate a country as a safe third country provided that country meets specific criteria. This is proposed with a view to designating the UK as a safe third country. Where an applicant for international protection has arrived in Ireland from a safe third country their protection application may be deemed inadmissible.

Return order: A return order is the process whereby the Minister orders a person whose application for international protection is inadmissible to leave the State.

Temporary detention and taking fingerprints

The Bill proposes to provide for the temporary detention of people who are the subject of a return order if there is a risk of their absconding. The Bill provides a list of factors to which the relevant Garda member or immigration officer may have consideration when deciding to temporarily detain a person for this purpose.[158] This proposed system of detention mirrors that provided for by Regulation 10(2) to 10(11) of the European Union (Dublin System) Regulations 2018 (S.I. No 62 of 2018).

Where an individual is being detained in the context of international protection procedures, the right to liberty will be regulated under EU law in art. 28 of the Dublin III Regulation and art. 8 of Directive 2013/33/EU (the Reception Conditions Directive (recast)). Ireland participates in both measures. As a general principle, under these provisions it is not acceptable to detain a person solely because they have lodged an asylum application or are subject to the Dublin III Regulation.

The Bill also proposes to provide for the taking of an applicant's fingerprints for the purpose of checking if a country other than an EU Member State is a first country of asylum or if a person has arrived in the State from a safe third country. The EURODAC System, established by the Eurodac Regulation,[159] is an EU asylum fingerprint database. When someone applies for asylum in the EU,

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[158] It is also necessary that the deprivation of liberty in this context does not violate Article 5 of the ECHR. In its Recommendation on the Return Directive, the European Commission stresses that detention can be essential for enhancing the effectiveness of the EU's return system (§16) and encourages states to use detention, in particular when there is a risk of absconding. European Parliamentary Research Service, "The Return Directive 2008/115/EC - European Implementation Assessment", June 2020, p. 83.

[159] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

their fingerprints are transmitted to the EURODAC central system. The system provides fingerprint comparison evidence to assist with determining the Member State responsible for examining an asylum application made in the EU. Its primary objective is to serve the implementation of the Dublin Regulation, and forms part of the 'Dublin system'.

Judicial review of return orders

It is usually the case that a person who is the subject of some form of negative immigration decision can challenge this decision by way of an application for judicial review under Order 84 of the Rules of the Superior Courts. These matters are first heard in the High Court, and the process entails a review on a point of law under Irish administrative law. Section 5(1) of the *Illegal Immigrants (Trafficking) Act 2000* provides for 14 instances in which such application for judicial review in the context of asylum and immigration matters can be made. The Bill proposes to amend section 5 to include return orders in this list.

The proposed return mechanism and the principle of *non-refoulement*

In establishing an appropriate return mechanism for unsuccessful international protection applicants, the Bill addresses the principle of *non-refoulement*. The Bill requires that the possibility of *refoulement* is to be taken into account by the Minister when designating a country as a safe third country, and in making return orders.

This principle guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment, and other irreparable harm. This principle applies to all migrants at all times, irrespective of migration status.[160] This obligation is provided for in multiple international human rights instruments. The key provisions in Irish legislation that expressly give effect to the State's international legal obligations in respect of the principle of *non-refoulement* are s. 50(1) of the *International Protection Act 2015* and s. 4(1) of the *Criminal Justice (United Nations Convention against Torture) Act 2000*. It is also a requirement, pursuant to the European Convention on Human Rights Act 2003, that when the Minster is performing their functions in respect of deportation, they must do so in a manner that is compatible with the provisions of the ECHR.

The principle was previously addressed in Part 14 of the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019*,[161] which amended the 1999 and 2003 Immigration Acts to confirm that immigration officers, in considering removing or deporting a person from the State, have, in line with EU and international obligations, the power to undertake *refoulement* consideration.

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[160] Office of the United Nations High Commissioner for Human Rights, "The principle of *non-refoulement* under international human rights law". Based on Article 78 TFEU, the 1999 Tampere European Council established a Common European Asylum System (CEAS), to be implemented in two phases, with the aim of affirming the principle of *non-refoulement* and of assuring that nobody is sent back to persecution. In the EU, an area of open borders and freedom of movement, States must have a joint approach to guarantee high standards of protection for refugees. Procedures must at the same time be fair and effective throughout the EU and impervious to abuse.

[161] Part 14 of the 2019 Act was commenced on 15 July 2019.

Legislative changes

Section 110 provides that "the Act of 2015", which is to be amended by Part 18 of the Bill, refers to the *International Protection Act 2015*.

Section 111 provides that the proposed amendments under Part 18 will not affect people whose application for international protection had been deemed inadmissible prior to this Part coming into operation.

Section 112 is a technical amendment to s.2(1) of the 2015 Act, inserting two additional definitions into that section. The amendment provides for the definition of "return order" by reference to the proposed new section 51A and "safe third country" by reference to the proposed new section 72A. Both of those new sections are to be inserted by s.116 of this Bill.

Section 113 proposes to amend s.19(1) of the 2015 Act, which provides for the taking of fingerprints by a member of the Garda Síochána, or an immigration officer, for the purpose of either establishing the identity of a person for any purpose of the 2015 Act, or for the purpose of checking whether the person has previously lodged an application for international protection in another Member State.

It is proposed to add a new paragraph (c) to s.19(1) to provide for the taking of fingerprints for the purpose of checking if a country other than an EU Member State is a first country of asylum or if a person has arrived in the State from a safe third country.

Section 114 proposes to amend s.21 of the 2015 Act. This section provides that a person may not make an application for international protection if that application is inadmissible. The circumstances in which an application is inadmissible are:

> "(a) another Member State has granted refugee status or subsidiary protection status to the person;
> (b) a country other than a Member State is, in accordance with subsection (15), a first country of asylum for the person."

The Bill proposes to add a new paragraph (c) to the above list, in line with Article 25 of the Procedures Directive;[162]

> "(c) the person arrived in the State from a safe third country that is, in accordance with subsection (17), a safe country for the person."

The Bill proposes to add new subsections (17) and (18) to section 21. Subsection (17) sets out what is a safe country for a person – a country is safe if the person:

- has a sufficient connection with the country concerned, on the basis of which it is reasonable for him or her to return there;
- will be re-admitted to the country concerned; and

[162] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

- will not be subjected in the country concerned to the death penalty, torture or other inhuman or degrading treatment or punishment.

In order to determine if a sufficient connection exists between the person and relevant safe country (for the purposes of the new paragraph 21(17)(a)), subsection (18) states that regard must be had to a number of matters, including the following:

> "(a) the period the person concerned has spent, whether lawfully or unlawfully, in the country concerned;
> (b) any relationship between the person concerned and persons in the country concerned, including nationals and residents of that country and family members seeking to be recognised in that country as refugees;
> (c) the presence in the country concerned of any family members, relatives or other family relations of the person concerned;
> (d) the nature and extent of any cultural connections between the person concerned and the country concerned."

This list is not intended to be exhaustive.

Section 115 of the Bill proposes to insert a new s.50A, which provides that a person must not be expelled or returned in any manner to a territory where they are at risk of torture or serious harm, contrary to the principle of *non-refoulement*. The section proposes that the Minister, in forming their opinion on the possibility of *refoulement*, must have regard to any materials submitted by the person or information presented during the course of their interview or appeal under s.21(6).

Subsection 3 provides that a person is obliged to inform the Minster if they become aware of a relevant change in circumstances. Under subsection 5, once the Minister has decided that there is a possibility of *refoulement* per subsection 1, they must notify the person or the person's legal representative.

Section 116 proposes to amend the 2015 Act to insert new sections 51A to 51C.

Section 51A provides for the making of return orders for people whose application for international protection is inadmissible. A "return order" is the process whereby the Minister orders a person whose application is inadmissible to leave the State.

The person may be returned if the country to which they are being returned meets the criteria for a "safe country". It is also proposed that the Minster must notify the person of their legal representative of the making of a return order.

Section 51B(1) provides that an immigration officer or a member of the Garda Síochána, when effecting a return order, may require:

- That the person present themselves in a particular place, at a specified date and time;
- If necessary, temporarily surrender their passport;
- That they cooperate with the Garda or immigration officer arranging their travel documents;
- That they reside in a particular place pending their return.

Subsection (4) provides for the person's possible temporary detention. Where a person is the subject of a return order and there is a significant risk that they may abscond , it is proposed that

the immigration officer or Garda may arrest the person without warrant, and the person may then be taken to a prescribed place of detention and detained for a period not exceeding seven days. For the purposes of this section, Garda or immigration officers may enter and search premises, including dwellings, if there is a reasonable suspicion that the person ordinarily resides there or they believe on reasonable grounds that the person is within the dwelling.

Subsection (6) provides a list of matters that the Garda or immigration officer may have regard to when deciding if the person is at risk of absconding. These include their previous failure to comply with requirements under this section; if they previously provided false documents or otherwise misrepresented or omitted facts when establishing their identity; previous failures to co-operate with arrangements; an explicit expression of their intention not to comply with the return order; and previous instances where the person has failed to comply with the law of the State.

Subsections (7) and (8) propose that persons under 18 years of age who are the subject of return orders will not be subject to arrest and detention in the manner provided in subsections (4) and (5) of this section. There is an exception which allows for detention if the officer or Garda reasonably believed that the person was over 18 years of age.

Subsections (10) to (12) provide that a person may be detained and placed in a vehicle that is about to leave the State. They may be detained in the vehicle for a period not exceeding 12 hours.

Section 51C - Proposes to provide that a person who is the subject of a return order may be returned while the order is still in effect. An order shall remain in effect for a period of six months or, if a person absconds, for a period of 12 months. If the subject of the order applies to the High Court to judicially review the return order, and the Court suspends the order pending the Court's determination of the matter, the order will remain in effect for six months from the date of the Court's final decision.

Subsection (5) provides that where the return order ceases to have effect, and the person has not yet been returned, they will be deemed to have made an application for international protection. The Minister will send the person of their legal representatives notice of this effect.

Section 117 proposes to amend the 2015 Act to provide a new s.72A empowering the Minister to designate a country as a safe third country. The Minister may do this if satisfied that the person being returned will not have their life or liberty threatened as a result of their membership of a particular group or class of people; if the principle of *non-refoulement* is respected; that they will not be subject to cruel, inhuman or degrading treatment; and that the possibility exists that, if they are found to be a refugee, they will receive appropriate protection.

Subsection (3) sets out a range of sources of information to which the Minister may have regard in making this decision. Subsection (4) provides that the Minister shall regularly review the situation in the designated safe country.

Section 118 proposes to amend s.5(1) of the *Illegal Immigrants (Trafficking) Act 2000*, which provides that a person may challenge certain immigration related decisions by way of an application for judicial review under Order 84 of the Rules of the Superior Courts. It is proposed to add return orders, as provided for in the proposed section 51A of the 2015 Act, to this list.

Implications

The primary aim of the proposed changes is to, as far as possible, maintain the current system for the transfer of international protection applicants between Ireland and the UK following the end of the transition period on 31 December 2020.[163] This is to be done by enabling the Minister to designate a country as a safe third country, provided that country meets specific criteria. This is proposed with a view to designating the UK as a safe third country. Where an applicant for international protection has arrived in Ireland from a safe third country, their protection application may be deemed inadmissible, and, it is proposed, the Minister may then make a return order in relation to that applicant. The Bill also proposes amendments in support of this process, including provision for the detention of the applicant in certain circumstances, fingerprinting of the applicant and for the option to judicially review a removal order. The Minister for Justice, Helen McEntee T.D., has indicated that it is not anticipated that the quantity of cases will increase under the new measures, noting:

> "In terms of the Dublin regulation, the situation as it currently stands is that the vast majority of cases that we see under the Dublin regulation are coming from the UK already. I do not think that will change. That is why it is important that we have these measures in place and that there is a reciprocal agreement in place. I do not think the numbers will change much because we already see that the vast majority are coming from them." [164]

The Dublin III Regulation will cease to apply to the UK after the transition period ends.[165] The UK government has indicated that it does not intend to replicate the provisions of the Dublin Regulation when devising a system to replace the existing procedures.[166] The House of Lords European Union Committee called on the UK Government and EU to negotiate an interim agreement, such as the temporary extension of the current arrangements, if a successor agreement is not in place before the Dublin Regulation ceases to have effect in the UK.[167] There is significant uncertainty as to whether a new system will be in place before the end of the transition period, and what form this system will take. In a recent oral evidence session (September 2020),[168] the Home Affairs Committee requested that Home Office officials confirm what will be the default

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[163] Minister for Justice, Helen McEntee - Joint Committee on Justice debate - Tuesday, 6 October 2020.

[164] Ibid. For statistics illustrating the transfers made in 2019 under the Regulation see Asylum Information database – Ireland: Dublin statistics: 2019.

[165] House of Commons Library, "Brexit: the end of the Dublin III Regulation in the UK", Number 9031, 14 October 2020, p. 6.

[166] House of Lords, European Union Committee, "Brexit: refugee protection and asylum policy" 48th Report of Session 2017–19, HL Paper 428, October 2019, p. 94; House of Commons Library, "Brexit: the end of the Dublin III Regulation in the UK", Ibid., p. 9; "The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU", Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union, October 2018.

[167] House of Lords, European Union Committee, "Brexit: refugee protection and asylum policy" 48th Report of Session 2017–19, HL Paper 428, October 2019.

[168] Home Affairs Committee Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU, HC 705, Thursday 3 September 2020.

legal position on returning third-country nationals to EU countries after 31 December 2020. The officials were unable to provide adequate clarity.[169]

In the absence of clarity or certainty as to the future operation of procedures in this area, it is necessary to implement the proposed amendments to ensure that there is a functioning system in place in the event that an agreement is not in place before 1 January 2021.

The Minister for Justice, Helen McEntee T.D., has noted that, in addition to the amendments under Parts 17 and 18, it will be necessary to provide a statutory instrument which designates the UK as a safe third country after Brexit for the purpose of processing international protection claims.[170]

[169] House of Commons Library, "Brexit: the end of the Dublin III Regulation in the UK", Ibid., p. 21.

[170] Joint Committee on Justice debate - Tuesday, 6 Oct 2020

Part 19: Recognition of certain divorces, legal separations and marriage annulments

Policy context

Part 19 (sections 119 to 121) deals with how the recognition of certain divorces, legal separations and marriage annulments will be dealt with once the transition period is over at the end of 2020. Currently, divorces granted in the UK or Gibraltar are recognised in Ireland under EU rather than Council of Europe[171] rules and this will change following transition unless new legislation is introduced.

Recognition under EU rules is based on habitual residence, rather than domicile under the Council of Europe. Domicile is more difficult to establish and could lead to a longer divorce process. The difference between habitual residence and domicile is seen in Box 3 below.

Box 3: Domicile v. habitual residence

> **Murdoch and Hunt's Encyclopaedia of Irish Law**
>
> **Domicile[172]**
>
> The place in which a person has a fixed and permanent home, and to which, whenever he is absent, he has the intention of returning. It depends on the physical fact of residence in addition to the intention of remaining.
>
> **Habitual resident[173]**
>
> When adjudicating upon the habitual residence of a person, an official must consider all the circumstances of the case, including: (a) the length and continuity of residence in the State or any particular country; (b) the length and purpose of any absence from the State; (c) the nature and pattern of the person's employment; (d) the person's main centre of interest; and (e) the future intentions of the person concerned as they appear from all the circumstances. See Social Welfare and Pensions Act 2007 s.30.

The aim of Part 19 is to ensure that the recognition in Ireland of divorces granted in the UK or Gibraltar continues on the basis of habitual residence, as is the case under EU legislation, rather than the domicile rules applicable to divorces granted in non-EU States.

Part 3 of the *Family Law Act 2019* which provided for recognition of UK divorces in the event of the UK leaving without a deal is repealed by s.4 of the Bill.

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171 For Council of Europe members who are not EU members

172 Brian Hunt, 'Domicile', *Murdoch and Hunt's Encyclopaedia of Irish Law*.

173 Brian Hunt, 'Habitual residence', *Murdoch and Hunt's Encyclopaedia of Irish Law*.

Legislative changes

Section 119 provides definitions for Part 19. “Relevant jurisdiction” is defined as meaning England and Wales, Scotland, Northern Ireland or Gibraltar. The section also provides that s.5 of the *Domicile and Recognition of Foreign Divorces Act 1986* will not apply to a divorce to which s.120 or 121 *of the Bill* applies.

“Council Regulation’ refers to EU Council Regulation 2201/2003 (or Brussels IIa Regulation). It sets out the current rules governing the jurisdiction, recognition and enforcement of matrimonial and parental responsibility orders in the EU.

Section 120 provides that a divorce, legal separation or marriage annulment granted under the law of a relevant jurisdiction that, prior to the coming into operation of the section, was recognised under the Council Regulation(Brussels IIa Regulation) will continue to be recognised.

Section 121 provides for recognition of divorces, legal separations or marriage annulments granted under the law of a relevant jurisdiction on or after the coming into operation of the section. It also sets out the grounds for refusal of recognition of a divorce, legal separation of marriage annulment granted under the relevant jurisdiction, which correspond with the grounds set out in the Council Regulation.

Implications

The amendments in this Part aim to ensure that the current EU rules in relation to the recognition of certain divorces, annulments and separations in the UK and Gibraltar will continue following the transition period. Their recognition will continue to be on the basis of habitual residence, rather than domicile.

Part 20: Amendment of *Childcare Support Act, 2018*

Policy context

Part 20 of the Bill seeks to amend the *Childcare Support Act 2018* (Act of 2018) an Act which provides for the establishment of the Affordable Childcare Scheme under which financial support is made available in respect of childcare costs, out of resources allocated to the Minister for Children[174]. Its introduction marked the first statutory entitlement to financial support for childcare. The Affordable Childcare Scheme was subsequently renamed the National Childcare Scheme (NCS).[175]

The scheme opened for online applications on 20 November 2019 and opened for paper-based applications on 13 March 2020. According to information supplied in a Ministerial briefing document from the Department, the scheme aims to:

- improve outcomes for children;
- reduce poverty;
- facilitate labour market activation; and
- tangibly reduce the cost of childcare for tens of thousands of families.[176]

The Scheme comprises two types of subsidies:

- A **universal subsidy** is payable for children between the ages of 24 weeks and 36 months (or until the child qualifies for the Early Childhood Care and Education (ECCE) programme – whichever is sooner) who are availing of childcare services from an approved childcare service provider. The universal subsidy is not means-tested and is available to all qualifying families of any income level.
- An **income-related subsidy** is payable for children from 24 weeks to 15 years of age who are availing of childcare services from an approved childcare service provider. The level of subsidy is calculated based on the family's assessable income (i.e. gross income minus tax, PRSI and other deductibles and minus any applicable multiple child discount).

A person can apply for the subsidy online or by post. When applying for an income-related subsidy, the person can choose to avail of an automated income assessment made possible through data transfer arrangements with the Revenue Commissioners and the Department of Employment Affairs and Social Protection. This option, according to the Ministerial briefing from

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[174] *Childcare Support Act 2018* http://www.irishstatutebook.ie/eli/2018/act/11/enacted/en/html?q=Childcare+Support+Act+2018.

[175] National Childcare Scheme website: https://www.ncs.gov.ie/en/ ; Department of Children, Equality, Disability, Integration and Youth press release, updated 20 August 2019 https://www.gov.ie/en/press-release/8fa170-minister-launches-the-national-childcare-scheme-for-ireland/ ; *New National Childcare Scheme: Nine essential points for parents*, Irish Times article, 27 August 2019 https://www.irishtimes.com/life-and-style/health-family/new-national-childcare-scheme-nine-essential-points-for-parents-1.3991852.

[176] DCYA, *Introductory Material for Minister for Children and Youth Affairs*, pp 190-191 https://www.gov.ie/en/publication/7fd0a-department-of-children-and-youth-affairs-incoming-ministers-briefing-june-2020/.

the Department "*aims to reduce the paperwork burden on parents and significantly increase the speed with which applications are processed and subsidies awarded.*"[177]

Where an applicant qualifies for a subsidy, they are provided with a unique code, the Childcare Identifier Code Key (or CHICK) which they can bring to any registered childcare service provider (including any registered childminder) participating in the Scheme. Once the parent and the provider have agreed the amount of childcare required, the provider will register the CHICK on the Scheme's online system, and the parent will approve the registration, in order to redeem the subsidy. The subsidy will then be paid directly to the provider on the parent's behalf, reducing the parent's fee.

Subsidies are available on a progressive income-tested basis. Applicants with a net income of up to €26,000 per annum will receive the highest level of subsidies. The subsidies are available on a tapered basis up to a maximum net income threshold of €60,000 per annum. According to the Department some families with a gross income of up to €100,000 per annum could still avail of the subsidies once allowable deductions are calculated.

Legislative changes

Part 20 of the Bill will amend the *Childcare Support Act 2018* (the 'Act of 2018'). The Explanatory Memorandum which accompanies the Bill states that Part 20 makes provision for citizens of the United Kingdom of Great Britain and Northern Ireland to access the National Childcare Scheme on the same basis as Irish citizens.[178]

Section 122 provides a definition for the purposes of this part (Part 20) for the 'Act of 2018' which refers to the *Childcare Support Act 2018*.

Section 123 amends section 1 of the *Childcare Support Act 2018* to include citizens of the Channel Islands and the Isle of Man in the definition of a "citizen of the United Kingdom of Great Britain and Northern Ireland".[179]

Section 124 of the Bill amends section 7 of the *Childcare Support Act 2018* to make specific reference to the eligibility of citizens of the United Kingdom of Great Britain and Northern Ireland to apply for financial support under the 2018 Act[180].

Section 7 of the Act of 2018 sets out the eligibility criteria for a person applying for financial support in respect of a child under the NCS. This currently includes:

> (1)(a) the person or his or her partner is a parent of the child,

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[177] https://www.gov.ie/en/publication/7fd0a-department-of-children-and-youth-affairs-incoming-ministers-briefing-june-2020/.

[178] Explanatory memorandum accompanying the Bill, Part 20 Amendment of the *Childcare Support Act 2018*, pp 15-16 https://data.oireachtas.ie/ie/oireachtas/bill/2020/48/eng/memo/b4820d-memo.pdf The memo refers to the *Childcare Support Act 2020*, presumably in error.

[179] S. 1 of the *Childcare Support Act 2018* http://www.irishstatutebook.ie/eli/2018/act/11/enacted/en/print#sec1.

[180] S.7 of the *Childcare Support Act 2018* *http://www.irishstatutebook.ie/eli/2018/act/11/enacted/en/print#sec7*.

(b) the person or his or her partner is:

(i) ordinarily resident in the State, or

(ii) an applicant within the meaning of section 2 of the Act of 2015, or

(iii) a programme refugee within the meaning of section 59 of the Act of 2015, or

(iv) a national of a Member State of the European Union, of the Swiss Confederation or of a State which is a contracting State to the EEA Agreement, or

(v) formerly employed or self-employed in the State, provided that the formerly employed or self-employed person continues to be covered against one of the contingencies listed in Article 3 of Regulation 883/20041 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, whether by means of a statutory entitlement under the Act of 2005 or through a voluntary contract of insurance,

(c) the child is under the age of 15 years,

(d) the person or his or her partner has care of the child for the period of time each week in respect of which the financial support is payable,

(e) the person and the child have a personal public service number (PPSN),

(f) the person is not in receipt of financial support under section 14 in respect of that child, and

(g) in the case of income-related financial support, the person's partner and any other children who reside with him or her have a PPSN.

(2) For the purposes of this section (s.7), a person who does not have a right to reside in the State shall not be regarded as being ordinarily resident in the State.[181]

Currently, section 7 of the Act of 2018 does not make specific provision for citizens of the United Kingdom. In order to address this, section 124 of the Bill will amend section 7(1)(b) of the Act of 2018 by inserting a new subparagraph after subparagraph (iv):

"(iva) a citizen of the United Kingdom of Great Britain and Northern Ireland, or".

This will ensure citizens of the United Kingdom will be eligible to apply.

Section 125 of the Bill amends section 15 of the *Childcare Support Act 2018* to provide that payment will **not** be made where the person does **not** satisfy the eligibility criteria in section 7 of the 2018 Act (as amended by section 124).[182] These determinations are made by the NCS scheme administrator Pobal.[183]

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[181] S.14 of *Childcare Support Act 2018* http://www.irishstatutebook.ie/eli/2018/act/11/section/14/enacted/en/html#sec14.

[182] S.15 of *Childcare Support Act 2018* *http://www.irishstatutebook.ie/eli/2018/act/11/section/15/enacted/en/html#sec15*.

[183] https://www.pobal.ie/programmes/national-childcare-scheme-ncs/.

Section 15(2) of the Act of 2018 deals with the circumstances in which a person is deemed ineligible for financial support under section 12.[184] This occurs if:

> (a) the child is under the age of 24 weeks or over the age of 15 years, or
> (b) neither the applicant nor his or her partner has care of the child for the period of time each week in respect of which the financial support is payable, or
> (c) neither the applicant nor his or her partner is:
>
> (i) ordinarily resident in the State, or
> (ii) an applicant within the meaning of section 2 of the Act of 2015, or
> (iii) a programme refugee within the meaning of section 59 of the Act of 2015, or
> (iv) a national of a Member State of the European Union, of the Swiss Confederation or of a State which is a contracting State to the EEA Agreement, or
> (v) formerly employed or self-employed in the State, provided that the formerly employed or self-employed person continues to be covered against one of the contingencies listed in Article 3 of Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, whether by means of a statutory entitlement under the Act of 2005 or through a voluntary contract of insurance, or
>
> (d) the applicant is in receipt of financial support under section 14 in respect of that child.

Currently the Act of 2018 makes no specific provision for citizens of the United Kingdom. Therefore section 125 of the Bill will amend section 15(2)(c) of the Act of 2018 by inserting a subparagraph after subparagraph (iv) which will read as follows:

> "(iva) a citizen of the United Kingdom of Great Britain and Northern Ireland, or".

Implications

The General Data Protection Regulation (GDPR) came into effect in May 2018. These regulations enhance the rights of European citizens to data privacy and control of their data, where that data is collected and processed by organisations. GDPR gives private individuals the ability to take civil actions against organisations that contravene their data protection rights, and to sue for compensation, without having to prove material damage or financial loss.

The Early Years (EY) division of the Department of Children is responsible for the National Childcare Scheme including the processing of personal data gathered through this scheme. The EY division also engages the services of a number of data processors tasked with processing data on its behalf, the largest of which is Pobal. According to a Ministerial briefing document published earlier this year the Department is aware of the potential challenges which the withdrawal of the United Kingdom may present and as such has liaised with Pobal regarding their responsibilities in relation to data processing and Brexit. The Division has convened an Early Years GDPR Implementation group to establish the GDPR readiness of the Division and the steps needed to guarantee compliance.

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[184] Section 12 of the *Childcare Support Act 2018* http://www.irishstatutebook.ie/eli/2018/act/11/enacted/en/print#sec12.

However, it is unclear from the Bill whether the retention of personal data belonging to citizens of the UK who apply for financial support for childcare costs under the NCS will create challenges for the Department once the transition period expires on 31 December 2020.

Part 21: Construction products – market surveillance authority

Policy context

Part 21 of the Bill is concerned with the operation of two EU regulations, the Construction Products Regulation[185] (CPR) and the Market Surveillance Regulation.[186]

The **CPR** sets out harmonised rules for the marketing of construction products in the EU. By using a common technical language, it allows professionals, public authorities and consumers to compare the performance of products across manufacturers, and countries.[187]

Under the Regulation Conformité Européenne (CE) markings are provided by notified bodies, designated by the notifying authority of each member state. In Ireland the Department of Housing, Local Government and Heritage (DHLGH) is the notifying authority.[188] Most construction products require a CE marking to be sold within the European Internal Market.[189]

The **Market Surveillance Regulation** sets out the requirements for accreditation and market surveillance, relating to the marketing of products. The regulation includes obligations for EU countries to prohibit the marketing of non-compliant products. In addition, it enables market surveillance authorities to:

- obtain documentation from manufacturers,
- enter manufacturers' premises and take samples for testing; and
- in certain cases, to destroy products.[190]

The European Commission has described market surveillance as crucial for the "smooth functioning of the single market", given its importance in protecting consumers and workers against unsafe products and non-compliance, as well as protecting business from unfair competition from those that ignore the regulations.[191]

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[185] Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC.

[186] Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93.

[187] European Commission. (2020). Internal Market, Industry, Entrepreneurship and SMEs.

[188] Department of Housing, Local Government and Heritage. (2020). Construction Products Regulation.

[189] European Commission. (2020). CE marking for construction products 'step-by-step' guide now available in all EU languages.

[190] European Commission. (2020). Market surveillance for products.

[191] Ibid.

General principles of market surveillance[192]

- Market surveillance is concerned with ensuring that construction products comply with the requirements set out in the CPR.
- Primary responsibility for demonstrating compliance rests with the manufacturer of the product.
- It is not the responsibility of a market surveillance authority to certify products.

Each member state has responsibility for its own market surveillance activities. In Ireland the *European Union (Construction Products) Regulations 2013* (S.I. No 225 of 2013) ("the Regulations of 2013") provide for market surveillance of construction products, and the establishment of building control authorities (local authorities as per s.2 of the *Building Control Act 1990*), to carry out market surveillance. The Minister may appoint other competent authorities to undertake market surveillance in respect of specific product areas.

At present each building control authority (local authority) has been designated as a market surveillance authority for construction products which fall under the CPR. The powers of each authorised officer are limited to the administrative area of their local authority. The Department states that this structure leads to duplication in cases where non-compliant products affect many administrative areas.[193]

In early 2020, Dublin City Council (DCC) agreed, in principle, to take on a national role in market surveillance of construction products, by forming a new pillar of the National Building Control Management Project, within the National Building Control Office (NBCO).[194] NBCO is based in DCC, and operates as a shared service for the 31 Building Control Authorities. The Department has stated that it is working with NBCO to strengthen its surveillance function.[195]

Withdrawal of the UK from the European Union and the effect on supply of construction products to Ireland

Once the UK withdraws from the EU, it will become a 'third country' to the EU. This will mean that UK notified bodies will no longer be able to provide a CE mark, to sell construction products within the single market. A notified body in Northern Ireland, however, may continue to certify products in certain circumstances.[196] Under current arrangements, many Irish exporters have their products certified by UK bodies.[197]

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[192] Government of Ireland. (2019). NSAI Briefing on Impacts of Brexit on the Construction Sector.

[193] Department of Housing, Local Government and Heritage. (2020). *Briefing on Part 21 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2020*, received through correspondence with the L&RS.

[194] Ibid.

[195] Reply to Parliamentary Question dated 05/11/2019, reference 45137/19.

[196] Department of Housing, Local Government and Heritage. (2020). Brexit – Construction Products Regulation.

[197] Enterprise Ireland. (2020). The issue of certification post Brexit.

In February 2019 the then Joint Committee on Housing, Planning and Local Government published a report titled Examining the Potential Impacts of Brexit on Ireland's Housing Market. The report notes:

> "If UK companies who provide construction materials to countries across the EU do not receive a CE marking from another member state quickly following Brexit, then these products will no longer be eligible for use in Ireland. Delays in obtaining construction products will impact completion times."

From 1 January 2021, Ireland will no longer be able to rely on UK market surveillance authorities to monitor compliance of construction products coming into Ireland. Market surveillance authorities in Ireland, therefore, will have a statutory responsibility to undertake more market surveillance checks.[198]

Legislative changes

Section 127(1) of the Bill provides that the Minister may prescribe a person, (including a body corporate, an unincorporated body of persons as well as an individual) to be a 'competent authority' for the purposes of carrying out the functions of a market surveillance authority under *European Union (Construction Products) Regulations 2013* (S.I. No.225 of 2013).

Section 127(3) provides that where a competent authority is a local authority, it will have jurisdiction throughout the administrative areas of all local authorities, for the purposes of carrying out its functions with respect to market surveillance under the Regulations of 2013.

Section 128 amends regulation 10(2)(b) of the Regulations of 2013 to broaden the responsibilities of a market surveillance authority appointed under regulation 10(1)(b), to cover all construction products, and not just those specified by the Minister.

Section 128 amends the Regulations of 2013 by inserting a definition of 'competent authority', to mean a competent authority prescribed by the Minister by regulations made under s.127 of the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020*.

Implications

The Department expects that post-Brexit:

> "…additional capacity will be required to undertake market surveillance activity of construction products. It is likely that there will be significantly concentrated activity at ports, airports etc. It will be necessary to have authorised officers available to liaise with Customs personnel and carry out enforcement duties in a timely manner. It is important to have the flexibility to operate at local and national level, in addition to liaising and co-operating at European and international levels (e.g. with other Member States, the Commission)."

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[198] Government of Ireland. (2019). Preparing for the withdrawal of the United Kingdom from the European Union: Contingency Action Plan Update.

The main purpose of Part 21 of the Bill is to provide a definition of 'competent authority' that would include a local authority. This would allow the Minister to appoint a local authority as a market surveillance authority. The Department has stated that this is to support the policy decision to appoint Dublin City Council as a market surveillance authority with a national role.[199]

Changes proposed by s.128 would mean that Dublin City Council can be the competent authority for all relevant construction products, and not limited to specific products.[200]

The Department has stated that any market surveillance authority, operating on a national basis, under Regulation 10 of the Regulations of 2013, must have a "solid and unimpeachable legal basis", and for this reason primary legislation is required; an agreement under Part 10 of the *Local Government Act 2001* would not be sufficient in the circumstances.

This provision will allow NBCO to include market surveillance in its remit. The Department state that this will offer the benefits of a centralised structure, and capitalise on its close relationship with building control authorities.[201]

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[199] Department of Foreign Affairs. Part 21 of the General Scheme of the Brexit Omnibus Bill 2020.

[200] Ibid.

[201] Including market surveillance in its scope, capitalises on all the benefits of a centralised structure and its close relationship with building control authorities who are also the market surveillance authorities for construction products.

Contact:

Houses of the Oireachtas
Leinster House
Kildare Street
Dublin 2
D02 XR20

www.oireachtas.ie
Tel: +353 (0)1 6183000 or 076 1001700
Twitter: @OireachtasNews

Library & Research Service
Tel: +353 (0)1 6184701
Email: library.and.research@oireachtas.ie