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Bill Digest

General Scheme of the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019

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Abstract

This analysis is based on the General Scheme of the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019. Overall, the aim of the General Scheme (and the Bill) is to maintain current arrangements under the Common Travel Area in the case where the UK leaves the EU without a deal.

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General Scheme published on 24 January 2019

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Legal Disclaimer

Introduction

This Digest is an analysis of the **General Scheme** of the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019 as published on the 24th January 2019. The Government has indicated that it plans to publish the text of the Bill on Friday 22nd February and to debate the Bill in the Dáil from the 26th February.

Given the short time frame between the publication of the Bill and the time available to Members post publication, the L&RS has decided to write a Digest on policy areas outlined in the **General Scheme**.

Members should be aware that there may be minor or significant changes between the General Scheme and the Bill when it is published. However, while there may be changes to the legislative provisions in the General Scheme, the policy context for each Part outlined in the Digest will remain valid.

Overall, the aim of the General Scheme (and the Bill) is to maintain arrangements in the case where the UK leaves the EU without a deal. The introduction to the General Scheme states that:

> 'Protecting and maintaining the Common Travel Area (CTA) and the associated rights and benefits is a key part of our planning and preparations. This is vital in the context of the Good Friday Agreement and the Northern Ireland Peace Process, as well as broader UK-Ireland relations. Both the Irish and British Governments are committed to maintaining the CTA in all circumstances, and have committed to undertaking all the work necessary, including through legislative provision to ensure that the CTA rights and privileges are protected. That commitment is reflected in measures proposed in the areas of Healthcare, Education, Justice and Social Protection in particular.'

The Common Travel Area (CTA) is a special travel zone between the UK, Ireland, the Isle of Man and the Channel Islands. It dates back to the establishment of the Irish Free State in 1922. It predates the UK and Ireland's entry to the European Union, and is, therefore, not dependent on the outcome of Brexit. The CTA facilitates the principle of free movement for British and Irish citizens between the UK, Ireland, the Channel Islands and the Isle of Man. Citizens of these countries enjoy reciprocal rights and entitlements to public services when in the other jurisdictions. These provisions enable UK and Irish citizens to be treated almost identically within each country.[1] Many of the arrangements are implicit rather than formalised in specific legislation and are instead based on bilateral agreements. The CTA is however recognised in EU law.[2]

The introduction to the General Scheme also states that:

> 'The Bill is intended to be consistent with and complementary to the steps currently underway at EU level to prepare for the UK's withdrawal, notably as regards the implementation of the European Commission's Contingency Action Plan and the associated legislative measures. The Bill and the Parts contained within it may be updated or adjusted further in light of ongoing developments, including in respect of EU legislative measures currently under consideration and any additional measures taken collectively by the EU27 Member States, including Ireland.'

[1] Sylvia de Mars et al., "The Common Travel Area: Prospects After Brexit," 2017.
[2] Protocol No. 20 to the Treaty on European Union and Treaty on the Functioning of the EU.

Summary of the provisions of the General Scheme

The General Scheme is made up of 17 parts and some 112 Heads. The Table below summarises each Part.

Summary of provisions
Part 1: Preliminary and General Head 1 provides that the short title of the Bill may be cited as the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019. The explanatory note to the Head states that the short title of the Bill may change. It also notes that each Part of the Bill (except for Part 1) is subject to its own commencement provision. This means that different parts of the Bill can be commenced independently of each other.
Part 2: Healthcare Arrangements This Part proposes to amend the *Health Act 1970*, and the *Health Act 2004* to enable reciprocal healthcare arrangements to be maintained between Ireland and the UK including reimbursement arrangements in the case of a no-deal Brexit. The Common Travel Area (CTA) facilitates access to health services in the UK and Ireland, including access to emergency, routine and planned care and Part 2 seeks to put in place an appropriate legal framework in Ireland to ensure the continuation of CTA arrangements in respect of healthcare.
Part 3: Industrial Development Miscellaneous Provisions This Part deals with proposals to amend the *Industrial Development Act 1986,* the *Industrial Development Act 1995* and the *Industrial Development (Enterprise Ireland) Act 1998*. The Explanatory Note to the General Scheme says that the proposed amendments: "… will enable Enterprise Ireland to further support businesses through investment, loans and RD&I grants, therefore, limiting the negative effects Brexit could have on vulnerable enterprises."
Part 4: Transitional power to modify licence conditions concerning the Commission for the Regulation of Utilities, Brexit and the Single Electricity Market, etc. This Part provides for the modification of electricity licences to ensure that, in the event that the United Kingdom leaves the European Union without a withdrawal agreement in place, the Commission for the Regulation of Utilities (CRU) has sufficient powers to facilitate Ireland's compliance with the EU energy acquis and the ability to amend licences as is necessary to ensure this compliance in a timely manner without leave for licencees to appeal the modifications by recourse to a Ministerial Appeal Panel.
Part 5: Student Support This Part deals with student supports in Higher Education. 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 European Union (EU). The purpose of this part of the General Scheme is to ensure continuity of: commitment to maintaining the rights and privileges bestowed by the Common Travel Area (CTA), and eligibility for SUSI grants even in the event of a 'no deal' Brexit.
Part 6: Taxation This Part proposes amendments to legislation governing Income Tax, Capital Gains Tax, Capital Acquisitions Tax and Stamp Duty. The proposed amendments are all intended to preserve arrangements that are contingent upon the UK remaining a member of the European Union. In many cases, the proposed amendments will simply add a reference to the United Kingdom to existing references to Member States of the EU or EEA.

Part 7: Financial Services: Settlement Finality (Third Country Provisions)
This Part of the General Scheme introduces 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.

Part 8: Financial Services: Amendment to the European Union (Insurance and Reinsurance) Regulations 2015 and the European Union (Insurance Distribution) Regulations 2018
This Part 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 new insurance contracts in Ireland until they obtain a relevant authorisation under the EU insurance supervisory regime. Provisions in this Part … are consistent with Ireland's full support for the agreed EU position in Gibraltar in the context of Brexit. They do not constitute a new agreement and are designed simply to provide a temporary run-off regime for contracts entered into in advance of the UK's withdrawal."

Part 9: Railway services
The main policy issue in Part 9 relates to ensuring that appropriate procedures and safety systems are in place where a foreign rail operator is operating a service in Ireland. This Part aims to ensure that there is a seamless transition in the event of a no-deal Brexit and that the Enterprise railway service will continue to operate without disruption.

Part 10: Bus and coach services
This Part will make the National Transport Authority (NTA) the competent authority to regulate bus services between Ireland and third countries, with enforcement by the Road Safety Authority, the NTA, and An Garda Síochána (as is the case with existing services and their existing regulatory rules). The intention is that these Heads 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

Part 11: Amendments to the *Social Welfare (Consolidation) Act 2005*
This Part provides for amendments to the social welfare code embodied in the main by the *Social Welfare (Consolidation) Act 2005*. The aim of the suggested amendments reflects the Government's commitment to maintain the CTA between the Ireland and the UK and to provide for the continuation of the relevant social welfare payments.

Part 12: Amendment of *Protection of Employees (Employers' Insolvency) Act 1984*
The draft Withdrawal Agreement between the EU and the UK provides for the continuation of arrangements to deal with cross border insolvency, including the protection of employees. In the event of a no-deal Brexit, the UK will enact draft regulations to provide for pan-European insolvency. In this case the situation of employees will depend on the particular context in each Member State. Part 12 of proposes legislative changes to the 1984 Act which should provide for the smooth transitioning of employee protection should a company become insolvent under the laws of the UK.

Part 13: Amendment to the *Interpretation Act 2005*
This Part is intended to deal with situations that will arise if the UK leaves the EU subject to an agreed transition period (as opposed to a 'no-deal' exit). Part 12 will deem the UK to be a 'Member State' for the duration of the transition period as that term is defined in the *Interpretation Act 2005.* As a result, references in legislation to 'Member States' will be deemed to include the UK during that period, unless the legislation expressly states otherwise.

Part 14: Amendments to the *Extradition Act 1965*
The departure of the UK from the EU means that it will cease to be part of the European Arrest Warrant (EAW system which currently governs the extradition of individuals between EU member states. Part 14 of the General Scheme seeks to address this potential vacuum in the event of a no-deal Brexit scenario by making amendments to the *Extradition Act 1965* to allow extradition between Ireland and the UK.

Part 15: Amendments to the *Immigration Acts 1999 and 2003*
These amendments are technical in nature but are necessary to bring clarity to important aspects of immigration law. In particular, it is necessary to clarify the duty of the Minister to consider the international law principle of non-refoulement in making deportation orders.

Part 16: Amendments to the *Data Protection Act 2018*
This Part proposes amendments to the *Data Protection Act 2018* relating to personal data concerning immigration, asylum and naturalisation. They aim to facilitate the continued sharing of such data with UK authorities in the event that the UK leaves the European Union without an withdrawal agreement providing for such exchanges.

Part 17: Exchange of immigration data with the UK
This Part seeks to address data protection concerns relating to immigration and naturalisation by giving the Minister for Justice specific statutory authority to share personal data with relevant authorities. The General Scheme proposes two alternative approaches to this: the first proposes cooperation with "relevant authorities [in the] Common Travel Area", while the second mirrors the approach used by the GDPR, providing for the Minister to assess the adequacy of data protection measures of any country with which he or she proposes to share such personal data.

Principal Provisions of the General Scheme of the Bill

The Digest examines the 17 Parts of the General Scheme under the following headings:

- Policy context;
- Legislative changes; and
- Implications.

The Parts are as follows:

1. Preliminary and General
2. Industrial Development Miscellaneous Provisions
3. Transitional power to modify licence conditions concerning the Commission for the Regulation of Utilities, Brexit and the Single Electricity Market (SEM), etc.
4. Student Support
5. Taxation
6. Financial Services: Settlement Finality (Third Country Provisions)
7. Financial Services: Amendment to the European Union (Insurance and Reinsurance) Regulations 2015 and the European Union (Insurance Distribution) Regulations 2018
8. Railway services
9. Bus and coach services
10. Amendments to the *Social Welfare (Consolidation) Act 2005*
11. Amendment of *Protection of Employees (Employers' Insolvency) Act 1984*
12. Amendment to the *Interpretation Act*
13. Amendments to the *Extradition Act*
14. Amendments to the *Immigration Acts 1999* and *2003*
15. Amendments to the *Data Protection Act 2018*
16. Exchange of immigration data with the UK

Part 1: Preliminary and General

Head 1 deals with the short title of the Bill and provides that it may be cited as the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019. The explanatory note to the Head states that the short title of the Bill may change. It also notes that each Part of the Bill (except for Part 1) is subject to its own commencement provision. This means that different parts of the Bill can be commenced independently of each other.

Part 2: Healthcare arrangements

Policy context

Part 2 of the General Scheme proposes to amend the *Health Act 1970*, and the *Health Act 2004* to enable reciprocal healthcare arrangements to be maintained between Ireland and the UK including reimbursement arrangements. The Common Travel Area (CTA) facilitates access to health services in the UK and Ireland, including access to emergency, routine and planned care.[3] The Explanatory Note states that the British and Irish Government have committed to maintaining the CTA and its associated rights and privileges and that Part 2 seeks to put in place an appropriate legal framework in Ireland to ensure the continuation of CTA arrangements in respect of healthcare.

The Common Travel Area

The Common Travel Area (CTA) is a long-standing arrangement between Ireland and the UK which enables Irish and UK citizens to travel and reside in either jurisdiction without restriction and provides for associated rights and entitlements in both jurisdictions.[4] These rights and entitlements include access to employment, healthcare, education, and social welfare benefits, as well as the right to vote in certain elections.[5]

The CTA allows for unrestricted access to healthcare on the same basis as Irish and British citizens in their own countries.[6] It is important to note that the Common Travel Area applies to Irish and UK citizens only.[7] The access to healthcare services that CTA allows differs from that provided by EU reciprocal schemes, in that Irish citizens are not required to show official documentation

[3] Explanatory Note to Part 2 of: Government of Ireland, "General Scheme of the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019" (Department of Foreign Affairs, January 24, 2019), https://www.dfa.ie/media/dfa/eu/brexit/brexitnegotations/General-Scheme-of-Miscellaneous-Provisions.pdf.
[4] "Common Travel Area Information Note from Ireland to the Article 50 Working Group," accessed February 8, 2019, https://www.google.com/search?q=Common+Travel+Area+Information+Note+from+Ireland+to+the+Article+50+Working+Group&ie=utf-8&oe=utf-8&client=firefox-b.
[5] "Brexit Preparations – Thursday, 7 Feb 2019 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (6150/19)," accessed February 13, 2019, https://www.oireachtas.ie/en/debates/question/2019-02-07/55?highlight%5B0%5D=brexit&highlight%5B1%5D=brexit.
[6] Robin Barnett, British Ambassador to Ireland, "The Common Travel Area Is in Safe Hands," *The Irish Times*, December 5, 2018, https://www.irishtimes.com/opinion/letters/the-common-travel-area-is-in-safe-hands-1.3720077.
[7] "Brexit Preparations – Thursday, 7 Feb 2019 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (6150/19)."

such as the European Health Insurance Card when availing of healthcare in the UK and visa versa.[8]

The Common Travel Area pre-dates Irish and UK membership of the EU and is not dependent on it.[9] It is recognised in Protocol 20 to the EU Treaties and is also acknowledged in the Protocol on Ireland and Northern Ireland to the Agreement on the withdrawal of the UK from the EU which was endorsed by the European Council and the UK Government on 25 November 2018.[10] The UK Government has issued guidance stating that in a 'no deal scenario' that the CTA will be maintained and that Irish citizens in the UK and British citizens in Ireland will continue to have the same associated rights and entitlements to public services, including access to healthcare.[11]
In a Joint Committee debate in January 2018, Mr. Muiris O'Connor, of the Department of Health noted that the December 2017 joint report of the EU and UK negotiators recognised that Ireland and the UK can continue to make bilateral agreements relating to the movement of people between their territories, while taking account of Ireland's EU obligations. He also outlined what the commitment to continuance of the CTA and associated rights means in terms of healthcare access:

> "There is a commitment to the continuation of the common travel area, CTA, and associated rights. In plain terms, this means that across sectors, including health, there will be no change in the right of Irish citizens to move freely North and South, east and west and to live, work, study and access health and social benefits in the UK on the same basis as UK citizens. Reciprocal arrangements will apply to UK citizens in Ireland. Particularly important from a Department of Health perspective is the commitment on the maintenance of the common travel area in terms of access to health care and allowing the freedom of movement that we currently have for Irish and UK citizens."

EU reciprocal healthcare schemes

Under EU law, citizens of the EU, the European Economic Areas (EEA) and Switzerland benefit from rights to reciprocal healthcare when they are in any other of those States. When treatment is provided in another country, it is reimbursed by the patient's country of citizenship. There are a number of EU-wide schemes which allow citizens of the EU, the EEA and Switzerland, including Ireland and the UK, to access medical treatment in another of those countries:

- The European Health Insurance Card;
- Treatment Abroad Scheme; and
- Cross-Border Healthcare Directive.

The potential impact of Brexit for residents in Ireland and Northern Ireland using these schemes to access medical treatment across the border is discussed in a Committee debate in January 2018. A brief description of each of these schemes is provided below:

The European Health Insurance Card

The European Health Insurance Card or EHIC allows EU/EEA and Swiss citizens to access necessary public health care services **when travelling to or during a temporary stay** (e.g., a holiday) in another of those countries. It cannot be used to cover urgent or planned care.

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[8] British Medical Association, "BMA - Reciprocal Healthcare," accessed February 8, 2019, https://www.bma.org.uk/collective-voice/influence/europe/brexit/bma-brexit-briefings/reciprocal-healthcare.
[9] "Common Travel Area Information Note from Ireland to the Article 50 Working Group."
[10] "Brexit Preparations – Thursday, 7 Feb 2019 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (6150/19)."
[11] British Medical Association, "BMA - Reciprocal Healthcare."

Therefore, Irish nationals may use the EHIC to access necessary medical access treatment during a visit to the UK and visa versa.[12]

Treatment Abroad Scheme

The Treatment Abroad Scheme (TAS) is a EU wide scheme[13] which enables all EU/EEA and Swiss public patients, including Irish and UK patients, access to the same level of medical expertise and treatments regardless of their state of residence.[14] EU or EEA or Swiss public healthcare patients who require treatment that **is not available in their country** may be able to use the Treatment Abroad Scheme to get the treatment in another of those countries.

Cross-Border Healthcare Directive

EU, EEA and Swiss patients who **have a referral for public healthcare** in their country of residence, may opt to avail of that care in another of those countries, and be repaid the cost if they meet the requirements. This is provided for under the Cross-Border Healthcare Directive and therefore Irish public patients can access treatment in the UK under this scheme and visa versa.[15] The Directive differs from the Treatment Abroad scheme in that the Directive covers all healthcare providers in the EU and is not limited to public providers. Also, prior authorisation will not be required in all cases as is currently the case for planned medical treatment under the Treatment Abroad Scheme. It is important to note that in Ireland, treatments that qualify for funding under the Treatment Abroad Scheme are excluded for reimbursement under the Cross-Border Healthcare Directive.[16]

Cross border cooperation on healthcare

There are a range of initiatives which involve North-South collaboration in the health and social care sector. This joint working takes place though a range of formal and informal mechanisms. North-South cooperation in health and social care services has often been primarily concerned with the border counties. In more recent years there have been collaborative developments on major public health issues particularly health promotion, disease epidemics and other emergency planning areas, and health and social care services that are of relevance to the whole population of the island. Box 1 provides a brief summary of some of these areas of cross border cooperation.

Box 1. Cross-border cooperation

At a Joint Oireachtas Committee meeting on Implementation of the Good Friday Agreement in May 2015 the then Minister for Health, Leo Varadkar, TD, referred to a number of examples of cross-border co-operation in health, such as radiotherapy services in Altnagelvin Hospital in Derry for all of west Ulster, the paediatric congenital cardiac service for the island, based in Our Lady's

[12] Citizensinformation.ie, "The European Health Insurance Card," accessed February 8, 2019, http://www.citizensinformation.ie/en/travel_and_recreation/travel_abroad/e111.html.
[13] It was established under Council Regulation (EEC) No 1408/71 (and operated under Council Regulation (EEC No 574/72).
[14] The Ombudsman, "Treatment Abroad Scheme" (Office of the Ombudsman, 2018), https://www.ombudsman.ie/publications/reports/treatment-abroad-scheme/.
[15] EU Directive 2011/24/EU
[16] European Commission, "Frequently Asked Questions about Accessing Medical Treatment in Other Countries in Europe," Ireland - European Commission, June 22, 2016, https://ec.europa.eu/ireland/services/frequently-asked-questions-health_en.

Children's Hospital in Crumlin, health promotion, e-health and food safety. He also highlighted the benefits of North-South cooperation for patients:[17]

> "The challenges facing health and social care providers, planners and policy makers on both parts of the island are similar. There is no doubt that patient benefits will accrue from pooling expertise and resources and exchanging good practice. I am committed to strengthening and increasing North-South health co-operation."

The Minister also stated that North-South Cooperation on health matters takes place through the North-South Ministerial Council (NSMC) as well as Joint Departmental Projects. He also referred to Cooperation and Working Together (CAWT) which is a partnership between the Health and Social Care Services in Northern Ireland and the Republic of Ireland that facilitates cross-border collaborative working in health and social care. He noted that CAWT has played a significant role over the past 20 years in promoting cross-border health and social care co-operation, particularly in the Border area. For example, CAWT delivered 12 cross-border health and social care projects funded through the European Union INTERREG IVA programme.[18]

The projects included expanding and enhancing acute hospital services, establishing additional clinics for sexually transmitted infections, providing additional supports for older people and providing extra supports for people with a disability. Under this programme, CAWT received €30 / £24 million until 2014/2015.[19] The programme benefitted 53,000 service users and CAWT estimates that up to 80% of services/projects delivered under the 12-project programme have been either fully or partially mainstreamed or adapted into core services.[20]

The current EU programme, INTERREG V covering the period 2014-2020 has four priority areas, one of which is health.[21] For the health priority, the funding available for the duration of the Programme is €62m, €53m of which is EU funding. The projects will be led by the Health Service Executive on behalf of the Co-Operation and Working Together (CAWT) Partnership. These projects are in the areas of Mental Health, Acute Services; Health and Wellbeing and Children's Services. In addition, CAWT is a partner in a project on Primary Care and Older People which is led by NHS 24 (Scotland).[22]

[17] "Joint Committee on the Implementation of the Good Friday Agreement Debate - Thursday, 28 May 2015," accessed February 13, 2019, https://www.oireachtas.ie/en/debates/debate/joint_committee_on_the_implementation_of_the_good_friday_agreement/2015-05-28/2.
[18] "Joint Committee on the Implementation of the Good Friday Agreement Debate."
[19] Janice Thompson, "Health and Social Care in NI - Areas of EU Competence, Action and Support - Potential Areas of Impact on Health and Social Care as a Result of EU Referendum Decision," Research and Information Service Briefing Paper (Northern Ireland Assembly, October 13, 2016).
[20] Thompson.
[21] "Health Services Data – Tuesday, 2 Oct 2018 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (39545/18)," accessed February 13, 2019, https://www.oireachtas.ie/en/debates/question/2018-10-02/362.
[22] "Health Services Data – Tuesday, 2 Oct 2018 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (39545/18)."

Legislative changes

Section A – Provision of Healthcare

Heads 1 to 5 seek to enable existing healthcare sharing arrangements between Ireland and the UK to continue after Brexit.

Head 1 amends section 45 of the *Health Act 1970* to provide full eligibility for public healthcare (i.e. medical cards) without means testing to persons in the following categories:

1. **Frontier workers, who reside in Ireland and work in the UK**, for as long as they continue to be employed or self-employed in the UK;

2. **Workers posted to Ireland from the UK** - for the duration of their posting in Ireland, or for a period not exceeding 24 months, whichever is the lesser;

3. **Pensioners** in receipt of a UK Contributory State Pension and not in receipt of an Irish contributory State pension or who are not making social security contributions in Ireland;

4. **Dependents of categories 1 – 3** above provided they are not employed or in receipt of certain social security payments in Ireland; and

5. **Dependents resident in Ireland of a UK-resident worker**, provided they are not employed in, or in receipt of, certain social security payments in Ireland.

This draft Head seeks to maintain eligibility for these groups to public healthcare following Brexit.

Head 2 amends section 45 of the *Health Act 1970* to provide full eligibility for healthcare to certain categories of persons who are not ordinarily resident in Ireland:

1. **UK residents who are on a temporary visit to Ireland** who require necessary medical care during their stay, taking into account the nature of the healthcare required and the expected length of their stay;

2. **UK students who are pursuing a course of study in Ireland**, taking into account the nature of the healthcare required and the expected length of their stay; and

3. **UK-resident Frontier Workers, working in Ireland** - for as long as they continue to be employed or self-employed, in Ireland and the HSE has taken into account the overall financial situation of the Frontier Worker.

Head 3 amends section 46 of the *Health Act 1970* (as amended) to provide for the following category of persons to be considered to have limited eligibility for healthcare services:

1. **UK Resident Frontier Workers, working in Ireland** - for as long as they continue to be employed, or be self-employed, in Ireland[23] and who have been determined by a means test as not having full eligibility for healthcare in Ireland.

Head 4 amends the *Health Act 2004* to enable the HSE to facilitate the provision of, and authorisation for, a person ordinarily resident in the State, to access necessary and appropriate public healthcare in the UK where such healthcare is not currently provided in the State and to facilitate reciprocal access for UK residents. The Treatment Abroad Scheme enables EU, EEA or Swiss public healthcare patients who require treatment that is not available in their country to get treatment in another of those countries. These provisions therefore seek to put in place an equivalent scheme to the Treatment Abroad Scheme to facilitate such healthcare sharing between Ireland and the UK to continue post- Brexit.

Head 5 amends the *Health Act 2004* to provide that the HSE may refund a person who is ordinarily resident in the State for healthcare, which is among the benefits provided in the State, and which a person accesses and pays for, in the UK. This care may be accessed in both public and private facilities.

Under the Cross Border Health Directive, EU, EEA or Swiss patients who have a referral for public healthcare in their country of residence, may choose to avail of that care in another of those countries, and be repaid the cost if they meet the requirements.[24] The Explanatory Note points out that the Department of Health wishes to operate an analogous scheme to the Cross-Border Directive and that if this proves possible, the HSE would require the necessary legislative framework to establish and operate this scheme. This Head therefore seeks to enable the HSE to reimburse Irish patients to access such services in the UK post-Brexit through an analogous scheme to the EU Cross Border Directive.

Section B – Reimbursement Arrangements

Heads 6 -17 seek to enable reimbursement arrangements for health sharing schemes between Ireland and the UK to continue post-Brexit.

Head 6 seeks to empower the Minister to make payments and arrange for payments to be made in respect of costs associated with the provision of healthcare to Irish residents while on a short-term stay in the UK. The European Health Insurance Card (EHIC) allows EU/EEA and Swiss residents to access necessary public health care services when travelling to or on holiday in another of those countries. This provision therefore seeks to continue the reimbursement arrangements with the UK arising from temporary visits by Irish residents to the UK (currently provided for under the EHIC scheme).

Head 7 empowers the HSE to refund Irish residents who have paid charges, incorrectly levied, for health care access in the UK while on a temporary stay. This provision seeks to continue the arrangements, as set out in Article 25 of EU Regulation 987/2009, which allows reimbursement of healthcare costs paid by an Irish resident while on a temporary stay in UK.

Head 8 enables the Health Service Executive to make payment in respect of the cost of public healthcare provided in the UK to an Irish resident, who accesses care under an equivalent scheme to the EU Treatment Abroad Scheme.

[23] Head 3 refers to persons who are employed or self –employed in the UK rather than Ireland. This appears to be a drafting error.
[24] EU Directive 2011/24/EU

Heads 9 and 10 empower the Minister to make payments and arrange for payments to be made in respect of costs associated with the provision of healthcare in the UK to:

- UK-resident dependents of persons who are employed, or self-employed, and resident in Ireland;
- UK-residents in receipt of an Irish contributory State pension who are neither employed, or self-employed, or in receipt of a UK social security payment or pension, and their dependents.

These Heads seek to provide for continuation of the reimbursement arrangements between Ireland and the UK in relation to such health sharing arrangements.

Heads 11-14 enable the Minister to raise charges and receive payments in respect of costs associated with the provision of healthcare by the HSE, or other bodies, to:

- a UK resident while on a temporary stay in Ireland;
- a UK resident who accesses care under an analogous scheme to the EU Treatment Abroad Scheme; and
- An Irish resident who is a dependent of a person who is employed, or self-employed, and resident in the UK.

These Heads seek to provide for continuation of the reimbursement arrangements between Ireland and the UK in relation to such health sharing arrangements.

Head 15 enables the Minister to make regulation to provide for the raising of charges, receipt of payments and the making of payments in respect of costs associated with the provision of healthcare. Regulations may for example:

- specify or describe levels of payments and how they are to be calculated; and
- specify or describe persons in respect of whom payments may be made.

The current reimbursement arrangements between member states of costs arising from the provision of healthcare benefits in kind are provided under EU Regulation. Additionally, Chapter I Title IV of Implementing Regulation 987/2009 sets out procedures and methodologies to underpin such reimbursement. Currently the reimbursement arrangements are agreed bilaterally between member states. The Explanatory Note states that Ireland and the UK currently reimburse costs associated with certain categories of persons on a negotiated net lump-sum basis, calculated by reference to estimated costs and estimated numbers, others on an actual costs basis while some costs are mutually waived.[25] The purpose of this Head is to enable for the continuation of existing, and the development of additional, administrative arrangements surrounding reciprocal reimbursement.

Head 16 empowers the HSE or other authorised body, to process personal data where it is considered necessary for the purposes of implementing, operating or facilitating the doing of anything under or by virtue of Part 2 of the Act. This provision allows the HSE to continue to process personal data as necessary to establish entitlement to healthcare and to reimburse healthcare costs between Ireland and the UK.

Head 17 enables the HSE, or other authorised body, to exchange personal data with other bodies, in Ireland and the UK, where it is considered necessary for the purposes of implementing,

[25] Explanatory Note to: "General Scheme of the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019."

operating or facilitating the doing of anything under or by virtue of Part 2 of the proposed Act. This provision permits the exchange of personal data between authorised bodies such as the HSE and the NHS which is necessary (and in line with the General Data Protection Regulation) to understand which country is responsible for the payment of costs associated with the provision of health care under Part 2 of the proposed Act.

Head 18 provides for the commencement of Part 2 by way of Ministerial order(s)
The proposed Act is to be commenced by way of Ministerial orders(s) and may be commenced in whole or in part and at various dates and for different purposes.

Implications

EU law and maintaining the CTA

A 2017 paper by four UK legal academics argues that operating the CTA between Ireland and the UK may be problematic post-Brexit, as it would cover territories *within* and *outside* the EU and would grant EU-level rights (and even more rights in some areas) to non-EU nationals (i.e. UK nationals).[26] They contend that Ireland may not be permitted by EU law to continue the practice of healthcare sharing with the UK. The authors also state that "if the UK leaves the EU and the single market, significant parts of the CTA will necessarily be dismantled and the border will become harder" (p. 8). They conclude that the relationship between the EU and the CTA is complex and that in light of EU citizenship law, "the EU will have to extend considerable leeway to Ireland and the UK's relationship, if it is to continue on a reciprocal basis" (p. 8).[27]

Application of CTA to non-citizen residents of UK and Ireland

Many of the provisions in the Part 2 refer to UK and Irish residents, but some Irish and UK residents are not citizens of Ireland or the UK. The Common Travel Area currently applies to Irish and UK citizens only.[28] As such, if these provisions are based on maintaining the Common Travel Area arrangements, then residents of the UK and Ireland, who are not UK or Irish Citizens, may **not** be able to partake of the healthcare and other CTA-based arrangements set out in this General Scheme.

Other healthcare domains

A number of commentators have discussed the wide-ranging impact of a 'no deal' Brexit on the Irish health system.[29,30,31] Part 2 covers reciprocal healthcare arrangements between Ireland and the UK, but does not cover other areas in which the Irish health system may be affected in a 'no deal' scenario such as mutual recognition of professional qualifications and the continuity of medicine supply to the Irish market. These two areas will be discussed further below by way of

[26] de Mars et al., "The Common Travel Area: Prospects After Brexit."
[27] de Mars et al.
[28] "Brexit Preparations – Thursday, 7 Feb 2019 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (6150/19)."
[29] Anthony Staines, "Brexit and the Irish Health System," DCU Brexit Institute, May 2, 2018, http://dcubrexitinstitute.eu/2018/05/brexit-and-the-irish-health-system/.
[30] Health Management Institute of Ireland, "The Effect of Brexit on Irish Health Services | Health Manager," November 2016, https://www.healthmanager.ie/2016/11/the-effect-of-brexit-on-irish-health-services/.
[31] "Brexit and Its Possible Impact on Health Provision in Ireland," *Irish Medical Times*, March 22, 2018, https://www.imt.ie/features-opinion/brexit-and-its-possible-impact-on-health-provision-in-ireland-22-03-2017/.

example, but it is outside the scope of this document to discuss all facets of the Irish health system which may be impacted under a 'no deal' scenario.

Mutual recognition of professional qualifications

In regards to mutual recognition of qualifications, the Minister for Education, Richard Bruton, TD, noted in January 2019 that should the UK leave the EU without a deal, the EU Directive on Mutual Recognition of Professional Qualifications (MRPQ) will no longer apply in the UK with effect from 29 March 2019.[32] He also pointed out that the Department of Education is leading work, in collaboration with Department of Foreign Affairs and Trade and others, to ensure that arrangements are in place with the UK to recognise professional qualifications. As part of this process, the Department is encouraging dialogue between regulatory bodies in Ireland and the UK to facilitate the continued recognition of qualifications, including the development of protocols for transferring personal data in accordance with the GDPR.[33]

Supply of medicines

A January 2019 article in the *Irish Examiner* by the Irish Pharmaceutical Healthcare Association's (IPHA) director of communications and advocacy, Bernard Mallee, states that 60-70% of Ireland's medicines come from, or through, the UK, but after Brexit, the UK will no longer be part of a single, harmonised regulatory jurisdiction. He points out that the journey a medicine makes, from early research through development and adoption by patient can take up to 13 years, with the rest of the 20-year patent life used as time on the market before others are allowed to make copies of the drug. All of these steps in the process can cross multiple geographies, with the European Medicines Agency acting as the regulatory body for the EU single market for medicines. He states for that for more than two years, the pharmaceutical industry have been reorganising supply chains and revising regulatory approvals to minimise the risk of disruption to the supply of medicines to patients after Brexit. He also states that the industry has engaged closely with all the relevant State bodies: the Health Products Regulatory Authority (HPRA), the HSE, the Department of Health, Customs, and others and he emphasised the importance of a collective Brexit response, coordinated centrally by the State.

A PQ response by the Minister for Health, Simon Harris, TD, in relation to arrangements that have been made to address the security of the supply chain for medications post-Brexit highlighted that the framework for the regulation of medicines is complex and that addressing the various consequences of the UK leaving this framework is not straightforward.[34] He noted however that ensuring the continued supply and availability of medicines to patients in Ireland post-Brexit is a key priority for the Department and the HPRA, as the competent authority for the regulation of medicines in Ireland.
He also detailed the HRPA's activities in this domain including the establishment of an internal working group:[35]

[32] "Brexit Issues – Tuesday, 22 Jan 2019 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (2916/19)," accessed February 12, 2019, https://www.oireachtas.ie/en/debates/question/2019-01-22/199.
[33] "Brexit Issues – Tuesday, 22 Jan 2019 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (2916/19)."
[34] "Medicinal Products Supply – Thursday, 5 Jul 2018 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (29757/18)," July 5, 2018, https://www.oireachtas.ie/en/debates/question/2018-07-05/213.
[35] "Medicinal Products Supply – Thursday, 5 Jul 2018 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (29757/18)."

> "The HPRA's Brexit-related activities are focused on protecting the availability of medicines for Irish patients and the integrity of Ireland's medicines market. The authority established an internal working group which has developed plans for all possible outcomes and scenarios that may arise when the UK leaves the European Union. The HPRA continues to engage with the pharmaceutical companies who are the marketing authorisation holders of medicines in Ireland in order to quantify the scale of potential challenges and to offer the agency's support in maintaining products on the Irish market."

The HPRA has also identified a number of risk mitigation measures in relation to maintaining the supply of medicine's to Ireland post-Brexit including:

- maintaining joint labelling with the UK, where possible;
- fast-tracking assessment of mutual recognition applications for critical medicines;
- authorising medicines through the new national authorisation procedure on the basis of public health need;
- identifying alternative EEA countries for parallel imports; and
- establishing increased collaboration and bilateral agreements with other Members States.[36]

Part 3: Industrial Development Acts

Policy Context

Part 3 of the General Scheme deals with proposals to amend the *Industrial Development Act 1986*, the *Industrial Development Act 1995* and the *Industrial Development (Enterprise Ireland) Act 1998*. The Explanatory Note to the General Scheme says that the proposed amendments:

> "… will enable Enterprise Ireland to further support businesses through investment, loans and RD&I grants, therefore, limiting the negative effects Brexit could have on vulnerable enterprises."

Previous examination of proposals in Part 3

In November 2018 the Joint Committee on Business, Enterprise and Innovation considered these proposals (apart from Head 8) in its pre-legislative scrutiny of the General Scheme of the Industrial Development (Miscellaneous Provisions) Bill 2018. (See the Joint Committee's debate on 7 November 2018 here.) The General Scheme considered by the Joint Committee also included proposals to permit IDA Ireland to enter into certain types of property partnerships and to remove an ambiguity relating to the application of the *Freedom of Information Act 2014* to Enterprise Ireland. These are not included in the current General Scheme.

[36] "Medicinal Products Supply – Thursday, 5 Jul 2018 – Parliamentary Questions (32nd Dáil) – Houses of the Oireachtas (29757/18)."

Legislative changes

The amendments proposed in Part 3 deal with the following matters:

- Head 2: amendment of section 29(2)(a) of the *Industrial Development Act 1986* to facilitate the provision by Enterprise Ireland of grants for training, research and development in the horticulture sector;
- Head 3: amendment of section 29(2) of the *Industrial Development Act 1986* (by means of an amendment to section 43, *Industrial Development (Enterprise Ireland) Act 1998*) to allow greater use of Enterprise Ireland research grants to fund research activities outside the State as well as within it;
- Head 4: amendment of section 29(4) of the *Industrial Development Act 1986* to align Irish law with EU state aid rules by removing the existing restriction of Enterprise Ireland research and development grants to 50% of the overall cost of a research project;
- Head 5: amendment of section 29(4) of the *Industrial Development Act 1986* to allow advance partial payment of Enterprise Ireland research and development grants to companies, regardless of their size;
- Heads 6 and 7: insertion of new sections 7A and 7B in the *Industrial Development (Enterprise Ireland) Act 1998* to give Enterprise Ireland statutory powers to invest in companies by means of convertible and non-convertible loans;
- Head 8: : insertion of a new section 7C in the *Industrial Development (Enterprise Ireland) Act 1998* setting a cap for grants and investments by Enterprise Ireland in any particular enterprise of €7.5 million (with provision for increase subject to prior Government approval).

Implications

Head 2: Grants for horticulture

The existing statutory criteria for research grants are strongly oriented towards research into industrial processes and products, including those that use agricultural products or natural resources. Head 2 proposes two amendments to these:

- allowing grants for research into “non-industrial” as well as industrial processes, methods or products, and

- including a reference to “horticultural products” among those (local materials, agricultural products and natural resources) to be used in the processes, methods or products being researched.

Enterprise Ireland’s web site estimates the ‘farmgate’ value of horticulture in Ireland at €400 million. It lists key crops as mushrooms, potatoes, field vegetables, fruit, nursery stock, cut foliage, Christmas trees and bulbs. The principal export crop is said to be mushrooms, with exports to the UK accounting for 75% of Irish production. Berries (principally strawberries) and nursery stock are also mentioned as contributing to horticultural exports.

Head 3: Grants for Research outside the State

The existing statutory criteria for research grants require research supported by grants from IDA Ireland or Enterprise Ireland to be conducted wholly or mainly in the State, and to be sponsored wholly or mainly by industrial undertakings in the State.

Head 3 of the General Scheme proposes amendments that would allow Enterprise Ireland to grant aid research projects in which a greater portion of the research is to be conducted outside the State. Up to 50% of qualifying research grants could be spent on research conducted outside the State, provided at least the same amount is spent on research in the State. The foreign component could be grant funded up to 100% of its cost, provided the aggregate spent abroad does not exceed the amount spent in the State, and the overall financial limits are observed. In this way, it is proposed that essential research can be funded without 'exporting' the full benefit of research grants.

The Department of Business, Enterprise and Innovation says in the Explanatory Notes to Head 3 that these may become necessary under Brexit and will facilitate provision of grant aid to large indigenous companies that are leaders in the veterinary and pharmaceutical industries. In a presentation on this proposal to the Joint Committee on Business, Enterprise and Innovation in November 2018, Mr Kevin Sherry of Enterprise Ireland said that this proposal was intended to facilitate development projects in cases where suitable research or development facilities, such as for testing, were not available in the State.[37] He noted that:

> "…the amount of support that would be provided for the activities within the State would exceed the amount that would be devoted towards activities outside the State. The ultimate objective is that the resulting product or service would benefit Ireland in the form of additional jobs, sales and value added."

Head 4: Research Grants up to EU Limits

Current legislation sets financial limits on the proportion of research projects that Enterprise Ireland may funded through grants (maximum 50%) and the overall amount of individual grants (maximum of €7.5 million in any particular case, but subject to increase if approved by Government). The 50% limit is more restrictive than the proportion allowed – in some cases – by EU state aid rules, particularly Commission Regulation No 651/2014. That Regulation allows grant funding above 50% of the cost in certain cases:

- if the recipient is a medium-sized enterprise, the rate may increased by 10%;
- if the recipient is a small enterprise, the rate may be increased by 20%;
- in certain other cases, the rate may be increased by 15%.

The additional allowances under Article 25(6) can permit increases of the level of research grant funding permitted under the Regulation to a maximum of 80% of eligible costs. (Note however that the Regulation does not impose any financial limit, while section 29 of the 1986 Act sets the maximum grant at €7.5 million.) The 50% limit in current Irish legislation therefore limits the amount of research grants to an extent that is not required by EU law. Head 4 proposes to address this by deleting the reference to 50% of the research costs.

The financial limit of €7.5 million would remain, but the proposed amendment would allow the maximum percentage of allowable research costs to be governed by the Commission Regulation. In a presentation on this proposal to the Joint Committee, Mr Richard Scannell, Principal Officer, Department of Business, Enterprise and Innovation, said that these proposals were intended to

[37] Joint Committee on Business, Enterprise and Innovation, debate, 7 November 2018, pre-legislative scrutiny of general scheme of the Industrial Development (Miscellaneous Provisions) Bill 2018, available here.

"remove legal uncertainty to allow Enterprise Ireland to permit research grants up to EU state aid limits" and "allow Irish companies to operate on a level playing field with their EU competitors".[38]

Head 5: Partial Advance Payment of Research Grants

Section 29(5) of the *Industrial Development Act 1986* provides for IDA Ireland and Enterprise Ireland paying up to one third of research grants in advance of the relevant costs being incurred. This facility is expressed to be available only "in the case of small undertakings as defined from time to time by the Minister [for Business, Enterprise and Innovation]". No such definition has ever been made, so advance payments of research grants cannot, and have not, been made.
Head 5 of the General Scheme proposes to remove the reference to "small undertakings" and the provision for the Minister to define that term. The effect would be to allow advance payments of up to one third of research grants to undertakings of any size.

Head 6: Non-convertible Debt Instruments

Head 6 of the General Scheme proposes an amendment to the *Industrial Development (Enterprise Ireland) Act 1998* giving Enterprise Ireland power to lend money to client companies. The qualifying conditions for enterprises that are receive loans are framed in terms similar to those for other supports such as grants and share investments. The maximum loan investment in any particular company is limited to €7,500,000, though this may be increased with the prior consent of the Government.
The Minister for Business, Enterprise and Innovation, Heather Humphries TD, raised this proposal during debates on the Industrial Development (Amendment) Bill 2018, saying that they would "increase the flexibility to support enterprise development and to manage those investments on a par with private sector investors."[39]

Head 6: Non-convertible Loan Notes

Head 6 proposes to give Enterprise Ireland express statutory powers to invest in qualifying companies by means of non-convertible loan notes. This mirrors existing powers under the *Industrial Development Act 1986*, but whereas that Act applies both to IDA Ireland and Enterprise Ireland, the new provision will give a statutory power exclusively for Enterprise Ireland. This provision is phrased in terms similar to those under Head 7, which is discussed in greater detail below.

Head 7: Convertible Loan Notes

Head 7 of the General Scheme proposes to give Enterprise Ireland express statutory powers to invest in qualifying companies by means of convertible loan notes. It proposes a new section 7B in *Industrial Development (Enterprise Ireland) Act 1998*. This new provision is based in part on section 31 of the *Industrial Development Act 1986*, which currently governs share investments by IDA Ireland and Enterprise Ireland: the proposed amendment would remove Enterprise Ireland from the ambit of section 31 and replace its provisions in relation to Enterprise Ireland's share investments. As under Head 6, the maximum investment in any particular company is €7.5 million, subject to increase with prior approval by the Government.

(Note that the General Scheme numbers the nine subsections of the proposed new section 7B as (4) to (11), followed by a paragraph (c). This numbering seems to have resulted from typographical errors in preparation of the General Scheme.)

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[38] Joint Committee on Business, Enterprise and Innovation, debate, 7 November 2018
[39] Select Committee on Business, Enterprise and Innovation debate, 9 May 2018, Industrial Development (Amendment) Bill 2018 - Committee Stage, available here.

In a presentation to the Joint Committee on Business, Enterprise and Innovation on the General Scheme of the Industrial Development (Miscellaneous Provisions) Bill 2018, Mr Richard Scannell of the Department noted that convertible loan finance was favoured by both private sector investors and other countries' development agencies.[40] He added:

> "This will in no way change the developmental approach of Enterprise Ireland. The amendments are simply aimed at increasing its flexibility to support enterprise development and ensure that Enterprise Ireland is not at a financial disadvantage to the private sector when providing investment to a company in a funding round. Moreover, as lending is more secure than taking equity, the State's investment in these situations would be better protected."

At the same presentation, Mr Kevin Sherry of Enterprise Ireland explained that the use of convertible loan notes would therefore allow Enterprise Ireland to invest on a *pari passu* basis with private sector investors.

Subsections (5) to (8) of the proposed new section 7B (erroneously numbered (8) to (11) in the General Scheme) provide for Enterprise Ireland to deal with investments in companies in a manner similar to other corporate investors, and to prevent statutory requirements unnecessarily preventing or restricting it from responding to commercial opportunities.
The proposed measures apply where Enterprise Ireland has purchased or is purchasing shares under the powers conferred by the proposed new section 7B(1) discussed above. They deal with cases where:

- Enterprise Ireland is offered additional shares in the company by way of rights issue, share sale or allotment (subsection (5));
- the company offers shares in a related company that owns intellectual property rights licensed to it (subsection (6));
- Enterprise Ireland is offered shares in a separate company in full or part exchange for the shares it holds in the original company (subsection (7)); or
- Enterprise Ireland converts loan notes acquired under section 7B(1) into shares.

In these cases, Enterprise Ireland will, at the time of its original investment, have evaluated whether the company met the qualifying criteria for investment as set out in the 1986 Act. For that reason, requiring the company to demonstrate again its compliance with those criteria would simply duplicate steps already taken at the time of the original investment, and could significantly hinder or delay a time-critical decision on further investment.
The proposed new section 7B is intended to provide a stand-alone statutory basis for Enterprise Ireland's investment in convertible loans. For that reason, the final subsection of the proposed new section (erroneously labelled (c) in the General Scheme) provides that section 31 of the 1986 Act will cease to apply to Enterprise Ireland. That section will in future give power to invest in shares only to IDA Ireland.

Head 8: Aggregate Limit on Investment Aid

Head 8 is proposed to provide a separate statutory provision limiting the aggregate amount of investment aid (that is, grants and investments such as convertible and non-convertible loans) that Enterprise Ireland may provide to individual undertakings. The current provision – section 34 of the *Industrial Development Act 1986* – was enacted to apply only to IDA Ireland but was subsequently

[40] Joint Committee on Business, Enterprise and Innovation, debate, 7 November 2018

extended to Enterprise Ireland. The proposed new provision will provide specifically for Enterprise Ireland and will take account of provisions specific to that agency, including those relating to convertible and non-convertible loans provided for in Heads 6 and 7 of the General Scheme. The proposed new provision will add a new section 7C to the *Industrial Development (Enterprise Ireland) Act 1998*. It will limit grants and investments in particular undertakings to a maximum aggregate of €7.5 million, but with provision for additional investments with the prior approval of the Government.

Part 4: Transitional power to modify licence conditions concerning the Commission for the Regulation of Utilities, Brexit and the Single Electricity Market, etc.

Policy context

As detailed in the General Scheme:

> "This new section provides for the modification of electricity licences to ensure that, in the event that the United Kingdom leaves the European Union without a withdrawal agreement in place, the Commission for the Regulation of Utilities (CRU) has sufficient powers to facilitate Ireland's compliance with the EU energy acquis and the ability to amend licences as is necessary to ensure this compliance in a timely manner without leave for licencees to appeal the modifications by recourse to a Ministerial Appeal Panel."

The UK's electricity market is integrated with the EU internal energy market whereby common rules govern their operation. Ireland's electricity requirements are highly dependent on the UK through interconnection. If the UK leaves this energy market as a result of a 'no deal as European energy law will no longer apply to the UK, and the UK's electricity market will be 'decoupled' from Ireland.

A 'no deal' specifically threatens the secure, coherent and efficient functioning of the shared, cross border, all-Ireland Single Electricity Market (SEM). The SEM comprises the two separate jurisdictional electricity markets of both Ireland and Northern Ireland. In effect since 1 November 2007, the SEM provides for electricity to be bought and sold through a single, mandatory pool across the whole island. It is established in national law in both the UK and Ireland and is viewed as tangible evidence of successful cross-border cooperation following the Good Friday Agreement in 1998[41] The SEM has also modernised its design and expanded over time. On 1 October 2018, the Integrated SEM (I-SEM) went live. I-SEM is the 'next step' regulatory regime for the provision of wholesale electricity on the island and aims build upon existing cross-border progress to maximise the efficient use of interconnection[42] with the rest of the EU in compliance with the EU's integrated Energy Union.

The CRU jointly regulates the SEM with the Utility Regulator of Northern Ireland. Ireland's electricity grid is operated by EirGrid which owns its Northern Irish equivalent, the Northern Ireland Transmission Systems Operator (SONI). The SEM is supported by the Single Electricity Market Committee (SEMC) which acts as the decision-making collaborative authority for all SEM matters,

[41] IIEA. 2016. IIEA Policy Brief: Whats does Brexit Mean for the Energy Section in Ireland? June 2016.
[42] The island of Ireland is connected to the UK through 3 gas pipelines (2 in the Republic, 1 in Northern Ireland).

and includes representation from both regulators. The benefits of the SEM include increased competition (and lower consumer prices), improved market efficiency and enhanced security of supply. Maintaining the existing security of supply is considered the primary challenge in a 'no deal' Brexit scenario, as this directly impact on market participants i.e. licence holders.

Northern Ireland's electricity market is separate from the rest of the UK, and the British Government has acknowledged that different considerations apply.[43] In the event of a 'no deal' Brexit, the UK would cease to be a Member of the EU internal market for energy, meaning that EU rules pertaining to the that part of the SEM no longer in the EU (i.e. to Northern Ireland) will cease to apply, leaving no legal basis for key elements of the SEM, and ultimately creating a two-tier electricity market on the island with no safeguards. Companies which currently trade in power will therefore (in the absence of any agreement) face licencing implications, and traders will require separate licences to operate in the EU (i.e. Ireland) and the UK. All existing market participants will therefore need to register with an EU regulatory authority to avoid a disruption in cross-border trade within the SEM, and trade within the wholesale energy markets.

Legislative changes

The General Scheme notes that:

> 'the proposed legislative change is precautionary, time-limited and would only be commenced in the event of a departure of the United Kingdom from the EU without a contingency or withdrawal agreement in place to maintain (or closely replicate) the current regulatory structure.'

Head 1 of the General Scheme will allow the CRU, in its role as joint national regulator on the island of Ireland, to amend the licences of electricity market traders (without recourse to an appeal panel, as is currently the case where licences are modified) for the purpose of facilitating the continued operation of the SEM.

Currently, under the existing section 14 of the *Electricity Regulation Act 1999,*[44] a licence granted by the CRU shall be subject to modification under certain conditions, including where the holder (or authorisation) of that licence requests it, though the CRU may amend it with or without the consent of the holder (or authorisation) if required (as set out in s.19(2) of the 1999 Act). Similarly, where the CRU is of the opinion that a condition or requirement of a licence requires modification and specifically relates to a Public Service Obligation (s.39) or a transitional arrangements (s.40), the CRU may modify those conditional or requirements without the consent of the holder.

Head 1 introduces Section 14B to the Principal Act, which specifies that the CRU may modify the conditions of a licence for the purpose of amending, or facilitating the operation of, the SEM (in the context of Brexit). Section 14B specifies the nature and extent of such modification, and consultation with the licence holder. The General Introduction to Part 4 refers to the Ministerial Appeal Panel. A Ministerial Appeal Panel may be established under s.29 and s.30 of the 1999 Act. Section 29(2) provides that, following a decision to modify a licence (or authorisation), a licence holder may, within 28 days, request the Minister establish an independent Appeal Panel. The functions of the Appeal Panel are set out in s.30 of the 1999 Act. The Appeal Panel may, under s.30(7) confirm the modification or direct the CRU not to make it. By amending the Principal Act through the addition of section14B, the recourse to a Ministerial Appeal Panel will no longer apply

[43] UK Government. 2018. Trading electricity if theres no Brexit deal. 12 October 2018.
[44] http://www.irishstatutebook.ie/eli/1999/act/23/enacted/en/html

to licence holders specifically for the purpose of amending, or facilitating the operation of, the SEM in the context of Brexit.

Head 2 provides for the commencement of the Part.

Implications

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

- **Consumers:** A disrupted wholesale electricity market may result in less consumer choice, and higher retail energy prices for both electricity and gas customers (up to 8%)[45] as well as higher transactional costs passed down;
- **Producers / competition**: A number of existing market participants may choose to exit the wholesale market on the island due to market instability, a loss of transparency and complications to existing operating systems and supply networks. Similarly, prospective market entrants / participants and investors may view the reduced Irish market as less attractive and avoid entry until regulatory certainty is assured and stability returns;
- **Climate action commitments**: Disruption to the efficient operation of the single electricity market may challenge the Government's climate action commitments as resources are redirected to maintaining, as far as possible, the existing (pre-Brexit) regulatory structure. The existing rates of renewable energy penetration may also be challenged;
- **Regulatory distortion and burdens**: If regulatory structures diverge between Ireland and Northern Ireland, there is a likelihood of divergent rules, creating market imbalances and inefficiencies due to the duplicated regulatory burden associated with dual or multiple regimes;
- **Cross-border trade:** Significant negative impact on the nature and level of cross-border trade and energy policy integration in the short to medium term which will undermine (or effectively suspend, or terminate) the existing SEM / I-SEM. The prospect of energy tariffs must also be considered;
- **Electricity generation / supply:** Security of energy and electricity supply will be placed substantially at risk in both jurisdictions, particularly due to lack of interconnection between Ireland and mainland Europe. This increases the prospect of blackouts in the absence of fall back arrangements, most conceivably in Northern Ireland and in border areas;
- **Investment in alternatives to address market disruption:** May lead to prioritised investment in renewable, sustainable energy sources, as well as investment in the oil and gas industry in Ireland to reduce significant Ireland's import dependency on all external markets, including the UK;
- **Investment in infrastructure to address lack of interconnection:** Due to Ireland's geographical location, a reprioritisation of investment in new infrastructure may be considered to establish a permanent link to mainland European energy supplies to reduce Ireland's vulnerability and dependence on the UK (e.g. by allocating capital to build the Celtic Interconnector between Ireland and France).

[45] https://www.cru.ie/wp-content/uploads/2018/11/CRU18122-Electricity-Security-of-Supply-Report-2018.pdf p. 76

Part 5: Student support

Policy context

Part 5 of the General Scheme deals with student supports in Higher Education. 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 European Union (EU). The purpose of this part of the General Scheme is to ensure continuity of:

- Commitment to maintaining the rights and privileges bestowed by the Common Travel Area (CTA), and
- Eligibility for SUSI grants even in the event of a 'no deal' Brexit.

The Common Travel Area (CTA)

As stated previously membership of the CTA means that citizens of one jurisdiction enjoy reciprocal rights and entitlements to public services when in the other jurisdictions.

These rights and entitlements encompass access to education, including financial supports to students attending approved educational institutions, when other qualifying criteria are met (such as means, residency, previous academic record, etc.) According to the explanatory note accompanying Part 5 of the General Scheme of the Brexit Bill, the amendments proposed in the Bill "*are consistent with Ireland's commitments under the CTA."*[46]

SUSI (Student Universal Support Ireland)

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 sixty-six local awarding authorities which previously processed student grant applications.[47] Grant assistance is available, through SUSI, to eligible students through SUSI for undergraduate courses only, except in the case of a limited number of institutions in Northern Ireland, where certain approved courses qualify. Grant funding is available to eligible students to pursue approved Postgraduate courses in approved institutions in Ireland and in four approved institutions in Northern Ireland only.

The approved institutions and approved courses available in Northern Ireland are:

- Queen's University, Belfast: Any full-time Postgraduate course of at least one year duration;
- University of Ulster: Any full-time Postgraduate course of at least one year duration;
- St. Mary's College of Education, Belfast: A Postgraduate Certificate in Education (Irish Medium); and
- Stranmillis College, Belfast: A Postgraduate Certificate in Education.

For eligible students studying approved courses outside of Ireland, are entitled to claim a SUSI maintenance grant. However, students studying outside Ireland are not eligible to claim a fee grant and so do not qualify for 'free fees' for institutions in other countries.[48] Students from Ireland attending approved institutions in the UK or Northern Ireland are also entitled to avail of the same

[46] "General-Scheme-of-Miscellaneous-Provisions.Pdf," accessed February 13, 2019, https://www.dfa.ie/media/dfa/eu/brexit/brexitnegotations/General-Scheme-of-Miscellaneous-Provisions.pdf.
[47] "SUSI Website About SUSI," SUSI, accessed February 14, 2019, https://susi.ie/about/.
[48] https://susi.ie/eligibility/student-studying-outside-the-state/

fee structure as UK students, by virtue of membership of the EU. These fees vary but are typically between £9,250 (€10,300) in England and £4,275 (€4,762) in Northern Ireland. 'International' students (from outside the EU) are required to pay much higher tuition fees (up to £35,000 or €38,990). Eligible students from Ireland are also entitled to apply for tuition fee loans in the UK in the same way that eligible UK students are. These loans are paid directly to the third level institution. It is the responsibility of the student to pay back the loan.[49]

Third level students from Ireland are required to pay a registration fee (also known as a student services fee) of €3,000, unless they qualify for 'free fee' grants. Eligible students from the UK and Northern Ireland, attending approved courses at approved institutions in Ireland can also benefit from 'free fees' and maintenance grants, in the same way as Irish students can.

In general, students from the UK and Northern Ireland, attending third level institutions in Ireland, can access the same fee structures as Irish students. If, following Brexit, UK students were to be categorised as 'international' students, they would be required to pay much higher registration fees of almost €10,000.

In the current academic year (2018/2019) 1,418 students (1,352 undergraduates and 66 post-graduates) from Ireland are studying in the UK or Northern Ireland while in receipt of SUSI grants. Furthermore, a total of 213 students, both undergraduate (196) and postgraduate (17), usually domiciled in the UK are currently studying in Ireland and in receipt of a SUSI grant. This equates to 1,631 students in total who are receipt of SUSI grant assistance for the 2018/2019 academic year.

A detailed breakdown of these and figures for previous academic years are available on the Bill's Tracker page[50] of the Library & Research Service section of the Plinth.

Legislative changes

The *Student Support Act 2011* (the Principal Act) is the main piece of legislation providing for financial supports for third level students.[51] The *Student Grant Scheme* is legislated for by Statutory Instrument (S.I.) No. 100 of 2018 and the *Student Support Regulations* are legislated for by S.I. No. 101 of 2018.

Head 1 of Section 5 (Student Supports) of the General Scheme amends Section 2[52] of the Principal Act. This head deals with definitions and inserts a definition for the term *Common Travel Area*, as well as amending the definition of "tuition student".

Head 2 amends Section 7[53] of the Principal Act and defines *"an approved institution"* for the purposes of the grant scheme. These are publicly funded higher education bodies situated in existing member states. Once the United Kingdom leaves the EU, it ceases to be a member state and becomes a "third country". The amendment to section 7 of the Principal Act will allow higher education institutions in the UK (including those based in Northern Ireland) to be included in the definition of approved institutions.

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[49] "Student Finance: EU Students - GOV.UK," accessed February 14, 2019, https://www.gov.uk/student-finance/eu-students. https://www.gov.uk/student-finance/eu-students
[50] "Northern Ireland and U.K. SUSI-Funded Students – Bills Tracker," accessed February 14, 2019, http://eolas.library.oireachtas.local/northern-ireland-and-u-k-susi-funded-students/.
[51] "Student Support Act 2011," accessed February 13, 2019, http://www.irishstatutebook.ie/eli/2011/act/4/enacted/en/html.
[52] http://www.irishstatutebook.ie/eli/2011/act/4/enacted/en/print#sec2
[53] http://www.irishstatutebook.ie/eli/2011/act/4/section/7/enacted/en/html#sec7

Head 3 amends Section 8[54] of the Principal Act through minor deletions (such as the deletion of the word 'or' in subsections 8(2)(k)(ii)(I) and 8(2)(k)(ii)(II) and the insertion of a new paragraph after subsection 8(2)(k)(ii)(II) which defines what constitutes *"an approved course"* , for the purposes of the grant scheme. The recognition of qualifications, as set out in the Principal Act extends only to courses offered by institutions in the State or in other Member states. Amendment to the Act is required to include recognition of qualifications granted by institutions based in the UK, following Britain's exit from the EU.

Head 4 of the Student Support section of the General Scheme is the largest head within the section (s.5). Head 4 amends s.14 of the Principal Act[55] and deals with approved interpretations of the term 'student' for the purposes of the grant scheme.

Section 14(1) of the Principal Act states that "a "student" means a person who is ordinarily resident in the State, who has been accepted to pursue, or is pursuing, an approved course at an approved institution and is –

(*a*) a national of—

(i) a Member State,

(ii) a state which is a contracting state to the EEA Agreement,

(iii) the Swiss Confederation,

Up to this point UK nationals have met the definition of student as set out under s.14(1)(a)(i) of the Principal Act above. Post –Brexit, an amendment will be required so that students from the UK (as a third country) are captured in the definition. Head 4(12) suggests the insertion of two paragraphs after subsection 14(1)(a)(iii) to address this:

"Subsection 14(1)(a)(iv) a person., other than to whom (i), (ii) or (iii) refers, who –

(i) Is a national of a country prescribed by the Minister, subject to subsection (5),

(ii) Is a UK or Irish national that is ordinarily resident in Northern Ireland, prescribed by the Minister, subject to subsection (6) and (7)"

Head 4(13) amends s.14 by inserting a paragraph after s.14(3) which states that the Minister, having consulted with the Higher Education Authority and the Minister for Finance may prescribe a national of a third country as being an approved student. The Minister may also prescribe a UK or Irish national that is ordinarily resident in Northern Ireland as an approved student.

Head 4 also amends s.14 through the insertion of subsection 14(5) which sets out a list of "matters to which the Minister shall have regard for the purposes of prescribing a national of a country pursuant to subsection (4). In particular, these include:

(a) Whether there are reciprocal arrangements in place with the country of the nationals to be prescribed **(e.g. Common Travel Area)[56], ……**
(d) Resources available for the provision of student support."

[54] http://www.irishstatutebook.ie/eli/2011/act/4/section/8/enacted/en/html#sec8
[55] http://www.irishstatutebook.ie/eli/2011/act/4/enacted/en/print
[56] Emphasis author's own

The student grant scheme contains a residency criterion which requires students to be resident in the State for 3 out of 5 years prior to commencing studies. S.14(4)(b) of the Principal Act recognises temporary residency in another Member State for study purposes. Post-Brexit, an amendment is required to this section so that the UK as a third country is captured in the residency criterion. Subsection 14 (4) of the Principal Act will be amended to become subsection 14(8) and the text in subsection 14(8)(b)(ii) is replaced with the following text:

"*is temporarily resident outside of the State by reason of pursuing a course of study or post-graduate research at an educational institution outside of the State but within a Member State, a state prescribed by the Minister under section 14 or Northern Ireland prescribed by the Minister under s.14, leading to a qualification that is recognised in accordance with the laws of the Member State, a state prescribed or Northern Ireland, concerned for the recognition of qualifications that correspond to the arrangements, procedures and systems referred to in s.8(2)(k)(i), or if such recognition is not provided by those laws in that manner then otherwise in accordance with the laws of that Member State a state prescribed or Northern Ireland …"*

Under s.14(5), a person cannot "derive any benefit from a period of unlawful presence in the State", when seeking to meet the residency criterion. S.14(6) sets aside the question regarding unlawful presence if the person is an Irish citizen (section 14(6)(a)) or has benefits under the freedom of movement within the EU (s.14(6)(b)). Post-Brexit, an amendment is required to s.14(6) to cover the rights of UK nationals.

Subsequent amendments are minor and relate to changes in the numbering of subsections of the Principal Act (once amended) as a result of the insertion of the new paragraphs above.

For example:
Subsection 14(7) is now subsection 14(11);
Subsection 14(8) is now subsection 14(12);
Subsection 14(9) is now subsection 14(13), etc.

Implications

The provisions in Part 5 of the General Scheme of the Bill provide for continuity of student supports in the event of a 'no deal Brexit' whereby the UK and Northern Ireland become 'third countries'. In a statement on the 11th January 2019, Minister for Education and Skills, Joe McHugh, T.D. and Minister of State with responsibility for Higher Education, Mary Mitchell O'Connor, T.D. confirmed that:

> "Eligible Irish and EU nationals wishing to enrol on approved courses in the UK for the 2019/20 academic year will be able to avail of SUSI grants. Eligible UK students who enrol for eligible courses for the current 2019/20 academic year in a third level college recognised for the purposes of free fees and student grant purposes, will be eligible to avail of the Department's Free Fees and Student Grant schemes. This includes the student contribution fee for Irish and EU citizens which currently stand at €3,000 for the 2018/19 academic year."[57]

[57] "11 January, 2019 - Ministers McHugh and Mitchell O'Connor Announce Decision to Continue Supports for Prospective Higher Education Students Wishing to Study in the UK and UK Nationals Wishing to Take up Studies in Ireland for the 2019/2020 Academic Year," Department of Education and Skills, accessed

However, arrangements for subsequent academic years have yet to be determined. A recent briefing on the Bill provided by the Ministers to the Joint Oireachtas Committee on Education and Skills[58] confirmed SUSI grant support for Irish students studying in approved UK and Northern Irish institutions and UK nationals studying in Ireland for the next academic year (2019/2020). However, the Ministers stated that given the fluctuating circumstances currently surrounding Brexit, they would be unable to provide assurances beyond this date at this point.

The impact of this decision may bring uncertainty to students from Ireland and students from the UK or Northern Ireland considering approved courses in the other jurisdiction. In a 2018 report by the Higher Education Authority (HEA) which analysed flows of students to Higher Education Institutions (HEIs) between the State and Northern Ireland specifically made the following observations:

> "Despite the many benefits of cross border student flows, there are challenges coming downstream; not least the planned exit of the UK from the EU. For instance, NI students coming to ROI HEIs to study may in the future be liable for non-EU fees, which can be considerable. This may reduce the flow of students from NI to the ROI in the aftermath of the UK exit from the EU. Issues such as this need to be given serious consideration by policy makers both sides of the border."[59]

Cost Implications

In 2017/2018[60] SUSI funding of €5,245,689 (this includes both fees and maintenance grant funding) was provided for undergraduate and postgraduate students from Ireland who were studying in the UK or Northern Ireland. A further €727,064 in funding was provided for the same academic year to both undergraduate and postgraduate students from the UK and Northern Ireland who were studying in approved institutions in Ireland. Any future change in the number of eligible students qualifying for the SUSI grant who intend to study outside of Ireland or from the UK who wish to study in Ireland will have an impact on expenditure.

Part 6: Taxation

Policy context

Part 6 of the General Scheme proposes amendments to legislation governing Income Tax, Capital Gains Tax, Capital Acquisitions Tax and Stamp Duty. The proposed amendments are all intended to preserve arrangements that are contingent upon the UK remaining a member of the European Union. **In many cases, the proposed amendments will simply add a reference to the United Kingdom to existing references to Member States of the EU or EEA.**

If the UK leaves the EU without a withdrawal agreement that provides for these contingencies, the provisions proposed in Part 6 can be commenced and invoked to preserve the *status quo* pending the conclusion of new arrangements.

February 14, 2019, https://www.education.ie/en/Press-Events/Press-Releases/2019-press-releases/PR19-01-11a.html.

[58] Transcript not yet available to view on Oireachtas website.

[59] "ROI-NI-Student-Flows-Report-December-2018-FINAL.Pdf."

[60] The latest academic year for which there are figures

Legislative provisions:

Income Tax

- Head 1: abatement from income tax in relation to restricted shares (section 128D, Taxes Consolidation Act 1997 (TCA))
- Head 2: Key Employee Engagement Programme, section 128F TCA 1997
- Head 3: Payments from UK-based Hepatitis-C compensation schemes (section 191 TCA 1997)
- Head 4: Foster care payments from UK authorities (section 192B TCA 1997)
- Head 5: Payments to UK residents under the Artists' Exemption (section 195 TCA 1997)
- Heads 6 and 7: Income of charities from property and donations in the State (sections 208A, 208B and 848B TCA 1997
- Head 8: Mortgage interest relief (sections 244, 244A and 245 TCA 1997)
- Head 9: Relief for Insurance against expenses of illness (sections 470 and 470B TCA 1997)
- Head 10: Seafarers' Allowance (section 472B TCA 1997)
- Head 11: Fishers' Allowance (472BA TCA 1997)
- Head 12: Relief for fees paid for third level undergraduate education (section 473A TCA 1997)
- Head 13: Taxation of pensions (sections 770, 772A, 784, 784A, 787A, 787G, 787M, 787N, 790AA, and 790B TCA 1997)
- Head 14: Sportspersons' Relief (section 480A TCA 1997)
- Head 15: Relief for Investment in Corporate Trade (section 489 TCA 1997)

Capital Taxes

- Head 16: Exemptions from tax for Government and other public securities of EU/EEA Member States (section 42(1) *Taxes Consolidation Act 1997*)

Capital Gains Tax

- Head 17: Tax treatment of certain venture fund managers (section 541C(1) TCA 1997)
- Heads 18 and 19: Non-resident persons and trusts (section 806(11)(a) TCA 1997)
- Head 20: Relief for certain disposals of land and property (section 604A(2) TCA 1997)

Capital Acquisitions Tax

- Head 21: Agricultural Relief (section 89(1)(a) *Capital Acquisitions Tax Consolidation Act 2003)*

Corporation Tax

- Head 22: Charges on income for corporation tax purposes (section 243(4) TCA 1997)
- Head 23: Group loss relief (sections 410 and 411 TCA 1997)
- Head 24: Equalisation reserves for credit insurance and reinsurance business (section 81B TCA 1997)
- Head 25: Loans to participators (section 438 TCA 1997)
- Head 26: Relief for certain start-up companies (section 486C TCA 1997)
- Head 27: Tax credit for R&D expenditure (section 776 TCA 1997)

Stamp Duty

- Head 28: Relief for intermediaries (section 75, Stamp Duties Consolidation Act 1999)
- Head 29: Relief for clearing houses (section 75A, Stamp Duties Consolidation Act 1999)
- Head 30: Reconstructions or amalgamations of companies (section 80, Stamp Duties Consolidation Act 1999)
- Head 31: Demutualisation of assurance companies (section 80A, Stamp Duties Consolidation Act 1999)
- Head 32: Mergers of companies (section 87B, Stamp Duties Consolidation Act 1999)
- Head 33: Certain premiums of life assurance (section 124B, Stamp Duties Consolidation Act 1999)
- Head 34: Certain premiums of insurance (section 125 Stamp Duties Consolidation Act 1999)
- Head 35: Health Insurance Levy (section 125A, Stamp Duties Consolidation Act 1999)
- Head 36: Commencement: to provide for commencement of each of the provisions proposed in Part 6.

Part 7: Financial Services: Settlement Finality (Third Country Provisions)

Policy context

As detailed in the General Scheme:

> "Euronext Dublin, formally known as Irish Stock Exchange, uses a UK based CSD (CREST) 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."

A CSD is a specialist 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 Central Securities Depository (CSD). The Irish and UK securities clearing systems are harmonised, and there is a high degree of sharing of financial markets infrastructure. Since the 1990s, Ireland has relied on UK-based CREST[61], operated by London-based Euroclear UK & Ireland (EUI[62]) to clear / settle trades on the Irish stock exchange[63]. 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. However, Irish market participants may use different CSDs in the EU to settle trades.

[61] CREST is an acronym and stands for Certificateless Registry for Electronic Share Transfer.
[62] Euroclear UK & Ireland is a division of Brussels-based Euroclear.
[63] Known as Euronext Dublin since its acquisition by Paris-based Euronext in 2017 for €137 million.

Box 2: 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 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.

As a result of Brexit uncertainty, and the risk of disruption to the Irish securities market, questions have arisen over the viability and sustainability of the existing settlement system. The following events are particularly 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 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] Each EU Member State is however 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 at 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.

In a 'no-deal' scenario, under the CSD Regulation (CSDR), Euronext Dublin would not be able to continue using the CREST system as the UK would become a third country, outside the EU.

Box 3: 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-28 and those 3 countries).

[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 11.2.19).

However, following the **February 2019** agreement between the Bank of England and the ESMA, the disruption will be minimised as the regulatory framework of the UK CSD will be in accordance with the CSDR in a 'no deal' scenario. As such, this General Scheme proposes to introduce a temporary, time-bound (2-year, from the date the UK leaves the EU) and conditional 'equivalence decision' to allow sufficient time for the transition of the Irish securities market to an EU-based CSD. Since March 2017, there is 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.

Separately, under the Settlement Finality Regulations (SFD), EU Member States are 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 and the enforceability of a collateral SFD does not provide for a third country (equivalence) regime. The General Scheme 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').

Legislative changes

The proposed legislative change is precautionary, time-limited and would only be commenced in the event of a departure of the United Kingdom from the EU without a contingency or withdrawal agreement in place to maintain (or closely replicate) the current regulatory structure.

Head 1 of the General Scheme is a standard legislative provision for the inclusion of additional definitions. This will be applied through a Statutory Instrument, in exercise of the Minister for Finance's powers under the CSDR.

Head 2 will provide for the Minister for Finance to designate a third country system (i.e. non-EEA) for the purposes of the Settlement Finality Regulations which will extend the protections of the CSD Regulations to Irish firms using settlement / payment systems in a third country (i.e., the UK). This will provide the necessary statutory basis for the European Commission's equivalence decision, and provide for a transition period for the Irish securities market.

Head 3 provides for commencement of this Part.

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 market participants such as central counterparties, clearing houses, and trading venues;
- **Stamp duty / Exchequer**: The current system, 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 €392 million in 2016;

Part 8: Financial Services: Amendment to the European Union (Insurance and Reinsurance) Regulations 2015 and the European Union (Insurance Distribution) Regulations 2018

Policy context

As detailed in the General Scheme:

> "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).
>
> 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 new insurance contracts in Ireland until they obtain a relevant authorisation under the EU insurance supervisory regime.
>
> Provisions in this Part of the Bill are consistent with Ireland's full support for the agreed EU position in Gibraltar in the context of Brexit. They do not constitute a new agreement and are designed simply to provide a temporary run-off regime for contracts entered into in advance of the UK's withdrawal."

Insurance undertakings (i.e. companies) operating in Ireland but established in the UK or Gibraltar require a licence from the Central Bank of Ireland. 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 8 of the General Scheme provides for the establishment of a time bound (3-year) interim "run off" servicing regime which will 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.

Legislative changes

The proposed legislative change is precautionary, time-limited and would only be commenced in the event of a departure of the United Kingdom from the EU without a contingency or withdrawal agreement in place to maintain (or closely replicate) the current regulatory structure.

Head 1 of the General Scheme provides for an amendment of the European Union (Insurance and Reinsurance) Regulations 2015 by the addition of a new regulation (13(A)) which introduces an interim, temporary "run off" period for servicing of existing insurance policy portfolios held by Irish policyholders by UK/Gibraltar-based insurers (collectively defined as "insurance undertakings") for a period of 3-years only. These undertakings must satisfy certain criteria, as follows:

1. Are authorised in the UK / Gibraltar;
2. Have exercised their right to carry on insurance business in Ireland through FOE (Freedom of Establishment) / FOS (Freedom of Services);[65]
3. Have ceased to write new business here; and
4. Exclusively administers its existing portfolio.

This timeframe applies from the date of the withdrawal of the UK from the UK. Notably, section 13(A) (3) also provides that, where an undertaking does not continue to satisfy the servicing requirements (either progress towards terminating its business within the allotted period and/or the business ultimately terminated), the Central Bank of Ireland may withdraw its authorisation. These undertakings will also remain subject to all existing provisions under the 2015 Regulations. This amendment will apply only to those undertakings authorised in the United Kingdom or Gibraltar, pursuant to Directive 2009/138/EC, as an insurance undertaking i.e. a direct life or non-life insurance undertaking (i.e. general insurance e.g. motor, home, pet insurance etc.) authorised by the relevant regulatory and supervisory authority / authorities for the purpose of conducting business i.e. the Central Bank of Ireland.

Head 2 of the General Scheme similarly provides for an amendment of the European Union (Insurance Distribution) Regulations 2018 by the addition of a new regulation (3(A)). This covers other types of insurance undertakings which are not covered by the amendment to the 2015 Regulations (above), e.g. brokers, agents, insurance / reinsurance or ancillary insurance intermediaries (etc.) active in the distribution of insurance and reinsurance products. This amendment will apply only to those undertakings authorised in the United Kingdom or Gibraltar, pursuant to Chapter III of Directive (EU) 2016/97, as an insurance undertaking.

Head 3 provides for commencement of the Part 8.

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 premia for policyholders;
  - Existing policyholders may also, in the absence of alternatives, suffer inconvenience as they seek replacement policies during the 3-year period;
  - 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;

[65] For more information on FoS and FoE, see: William Fry. 2017. Establishing a Life Insurer in Ireland. 28 February 2017. Available at https://www.williamfry.com/newsandinsights/news-article/2017/02/28/establishing-a-life-insurer-in-ireland-key-considerations

- **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 9: Railway services

Policy context

Part 9 of the General Scheme relates to railway services. Of particular relevance to this Part of the General Scheme is the Enterprise service connecting Connolly Station in Dublin with Layton Place Station in Belfast, and stopping at six intermediate locations.[66] The Enterprise Service is jointly owned and operated by Irish Rail and Translink.[67] This service is of strategic importance for both Ireland and Northern Ireland. There are 8 daily trains (Monday to Saturday) between Dublin and Belfast circulating in each direction, and 5 in each direction on Sundays. The average rail journey time between Dublin and Belfast is two hours and ten minutes. In 2017/2018 there were approximately 1 million passengers travelling between Belfast and Dublin on cross-border rail services.[68]

The main policy issue which in Head 1 relates to **ensuring that appropriate procedures and safety systems are in place where a foreign rail operator is operating a service in Ireland.** In relation to Heads 2 and 3 the objective of these provisions will be to ensure that there is a seamless transition in the event of a no-deal Brexit and that the Enterprise railway service will continue to operate without disruption.

The European Commission have noted that subject to any transitional arrangements contained in a withdrawal agreement EU rules in relation to rail services will cease to apply as of the 29th March 2019.[69] They note that this will have implications in relation to:

- The management and use of railway infrastructure;
- Railway safety;
- Railway interoperability; and
- Train driver certification.

Translink provided written evidence to the House of Lords EU Internal Market Sub-Committee in October 2018. In their submission they note that:

> "5.4 Translink and IE [Iarnrod Éireann] operate cross-border services collaboratively across the rail networks in NI and the ROI. The cross-border Enterprise rail service is

[66] More information about the Enterprise service is available at http://www.irishrail.ie/media/enterprise_strategy_booklet.pdf.
[67] Transport in Northern Ireland is completely devolved from the rest of the UK, with Translink operating the nationalised rail services.
[68] *Ibid*, at 2.
[69] European Commission, Directorate-General for Mobility and Transport, (10 July 2018) *Notice to stakeholders, Withdrawal of the United Kingdom and EU rules in the field of rail transport*. Available at https://ec.europa.eu/info/sites/info/files/file_import/rail_transport_en.pdf.

essential to further strengthening economic links and is key to building competitiveness and increasing close communication links between Belfast and Dublin. The service also provides social and environmental benefits by decongesting roads, promoting all-Ireland tourism and reducing carbon emissions. Ultimately, it is critical (in the interests of the day-to-day lives of individuals on both sides of the border) that such international services continue to operate unhindered.

5.6 For practical reasons, Translink and IE need to operate to a consistent set of technical standards. **Currently, these are provided under the EU regulations governing railway safety and interoperability**. The networks are managed by the respective Infrastructure Management bodies, while operating safety certificates and vehicle authorisations are issued by the respective safety authorities – DfI and the Commission for Rail Regulation in the ROI. Both approval processes are mutually recognised on both sides of the Irish Border in accordance with EU regulations.

5.7 **Translink and IE also both operate under a common "Rulebook" which exists for all rail services in both jurisdictions.** This joint Rulebook, which governs safety processes and operating protocols is unique in the EU in that it covers the rules of operation of railways within two separate national jurisdictions. In addition to the Rulebook, both infrastructure and rolling stock technical standards of NI and the ROI are on a convergent path towards the full introduction of EU Technical Standards for Interoperability [**TSI**].

5.8 Translink would not welcome any divergence from EU technical regulation which hinders the current cross-border services or the planned enhancements. Translink does not consider that there is any practical need for this to occur as the infrastructure, standards and operating practices on both sides of the border are currently aligned (and different to elsewhere in Europe). As such, accepting the same technical standards provides continuity.

5.9 Translink is concerned that divergence from current standards would have a detrimental impact on cost and, in this regard, recognises the benefits of continuing to work towards EU technical standards post-Brexit. This is of particular significance given the relative size of the rail networks on NI/ROI, which are not of sufficient size to make adoption of two divergent sets of standards economically or operationally viable.

5.10 Translink consequently anticipates that cross-border rail services will continue to require some alignment with EU regulation post-Brexit in order to operate effectively. Translink considers that the introduction of the TSI has helped bring both NI and ROI together with regards to rail standards and it would wish to see existing TSIs continue to be applied post-Brexit (subject to local adjustments to best reflect the operation of the ROI and NI railways) to enable continuity either directly or indirectly – for example, by incorporation into the National Technical Rules."[70]

[70] Lords EU IMSC, Written Evidence – Translink (TRA0020), 1 October 2018. Available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/future-ukeu-transport-arrangements/written/90612.html.

Joint Committee on Transport, Tourism and Sport

The Joint Committee on Transport, Tourism and Sport met on 6th February 2019 to discuss the topic of Brexit and Transport in Ireland.[71] The Minister for Transport, Tourism and Sport, Shane Ross TD set out the preparations and effects of a no-deal Brexit and its implications for rail transport. The Minister discussed the provisions of Part 9 of the General Scheme and noted:

> "When engagement with the Office of the Parliamentary Counsel regarding formal drafting of these rail provisions commenced, some matters came to light which required further consideration and legal advice. Analysis is ongoing with a view to establishing whether these rail provisions are best made in the form of primary legislation or whether secondary legislation might be more appropriate. Given the high priority attached to all Brexit-related legislation, we are deeply engaged to determine this. Pending that, work is also taking place on the development of draft secondary legislation to address the contingency that a statutory instrument may also be required to supplement the provisions in the current heads relating to rail.
>
> **Our main goal here is to ensure that an appropriate safety regulatory regime can apply in the case of rail services into the North post-Brexit. I am committed to maintaining the same level of safety as currently applies to the now EU-regulated cross-Border rail services from Dublin to Belfast.**
>
> As I said earlier, it is evident that the Enterprise rail line is recognised as a symbolic and strategic cross-Border corridor, a key link between North and South. Legislation is one of the important building blocks as we aim to ensure that this important rail service continues. However, I can assure the committee that a range of measures are under consideration in the context of wider contingency plans."[72]

The Minister also highlighted that "exploratory talks" have been ongoing between his Department, the British Government and NI Railways. He suggested that on the basis of these talks that train services on the Enterprise service will continue to operate under present arrangements until a bilateral treaty can be entered into. He also outlined that such a bilateral treaty would be entered into at an early stage after 29th March 2019.

Legislative changes

Head 1 – Amendment of section 41 of the *Railway Safety Act 2005* (International services)

International services relate to services between Members States and third countries. This section will apply in respect of reaching a bilateral agreement in relation to cross-border rail services with the UK.

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[71] Joint Oireachtas Committee on Transport, Tourism and Sport, *Pre-Legislative Scrutiny on The Heads of the Parts of the Bill (Miscellaneous Provisions – Withdrawal of the United Kingdom from the European Union on 29 March 2019)*. The full hearing is available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_transport_tourism_and_sport/2019-02-06/3/.

[72] Joint Oireachtas Committee on Transport, Tourism and Sport, *Pre-Legislative Scrutiny on The Heads of the Parts of the Bill (Miscellaneous Provisions – Withdrawal of the United Kingdom from the European Union on 29 March 2019)*, Opening Statement of Deputy Shane Ross. Available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_transport_tourism_and_sport/submissions/2019/2019-02-06_opening-statement-shane-ross-td-minister-for-transport-tourism-and-sport-2_en.pdf.

Head 2 – Cross-border rail agreement

This Head will provide for the making of a cross-border rail agreement with the UK in accordance with Article 14 of Directive 2012/34/EU. Article 14 provides that a Member State can enter into negotiations with a third country in relation to the provision of cross-border rail services, however, these agreements must comply with EU law and the Commission must be notified of these negotiations and where appropriate invited to act as an observer. This section will provide the Minister with the power to make a bilateral agreement and to make regulations.

Head 3 – Recognition of Certification Document of Train Drivers from Third Countries

This Head will provide for the recognition of document certification for train drivers from third countries who are operating exclusively on cross-border rail sections in accordance with Directive 2007/59/EC. The European Communities (Train Drivers Certification) Regulations 2010 [S.I. No. 399/2010] transposed Directive 2007/59/EC into Irish law. This Directive provides that train drivers must have an appropriate licence, indicating the driver meets the minimum requirements in relation to their medical fitness and educational background, and a harmonised complementary certificate indicating the railways and type of trains for which the driver is authorised to operate.

Head 4 – Commencement

This is a standard commencement section.

Part 10: Bus and coach 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'.[73] Part 1 of the General Scheme will make the NTA the competent authority to regulate bus services between Ireland and third countries, with enforcement by the Road Safety Authority, the NTA, and An Garda Síochána (as is the case with existing services and their existing regulatory rules). The intention is that these Heads 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.[74]

Part 10 in the context of the Interbus Agreement

A protocol of the Interbus Agreement of 2002[75] 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. However ratification of the protocol has not yet been completed and recent indications have suggested that the ratification will now be completed by end 2019.[76] Hence the need for the provisions in part 10 of the bill which grant the NTA the authority – for the period where the UK has not yet acceded to the Interbus Agreement - to conclude a bilateral agreement with the UK. These issues are explored in detail below.

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[73] Government of Ireland, "Getting Ireland Brexit Ready. Preparing for the Withdrawal of the United Kingdom from the Europeand Union on 29 March 2019." (Government of Ireland, December 2018), http://opac.oireachtas.ie/AWData/Library3/TAOdoclaid201218_120821.pdf.
[74] Information supplied to researcher by officials in Department of Tourism, Transport and Sport 06/02/18
[75] 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.
[76] Information supplied to researcher by officials in Department of Tourism, Transport and Sport 13/02/18

The UK have suggested that if they re-join the Interbus Agreement of 2002[77] as an independent member it is would enable UK operators to run occasional services (coach holidays and tours) into the EU. [78] However, the existing agreement does not allow for regular services (scheduled cross-border bus and coach services) or special regular services (a regular service which provides for the carriage of specified categories of passengers to the exclusion of other passengers; e.g. taking students to and from school). Nor does it allow for cabotage (picking up and dropping off passengers in the same jurisdiction).

Limitations of current formulation of the Interbus Agreement:

Representatives from the transport sector north and south of the border have expressed concerns about the Interbus Agreement as a solution for the full continuation of cross-border bus services. Translink runs 70 cross-border bus services some of which "meander" across the frontier several times in the course of a journey. In November 2018, Translink Chief Executive Officer, giving oral evidence to the House of Lords Select Committee on the European Union, Internal Market Sub-Committee, said the suggestion that the UK would join the Interbus Agreement still offers no clear way forward as to how to operate cross border services.[79]

> From an Irish perspective, the Interbus Agreement does not go far enough for us. It does not cover regular services, of which we have over 70 a day, and it does not cover cabotage—and 50% of our services involve cabotage. So it would not be operational from a Northern Ireland to southern Ireland perspective. There is a concern that we have not really had an answer to it yet. Transport is devolved from a Northern Ireland perspective. Even if the UK acceded to the Interbus agreement, would Northern Ireland have to pass legislation in Stormont to do that? Given that we do not have a sitting Government at the minute, that might be a complexity as to how it could be achieved in the next 100 days. The Northern Ireland Office put out a figure recently estimating that the number of persons crossing the border is around 100 million annually, which gives you the context of the amount of people crossing the border and the amount of bus, coach and rail services used to facilitate that.[80]

Anne Graham of the National Transport Authority, has expressed concern about the Interbus Agreement as a solution to regulating bus and coach services between Ireland and the UK post Brexit.[81] She has stated that the following provisions within the Interbus Agreement would require clarification:

- the evidenced-based rational for granting or refusing an application;
- inclusion of own-account transport and the grounds upon which an operator could temporarily be denied access to a territory and the maximum duration of such a suspension.
- The National Transport Authority would have serious concerns regarding the imposition of the Interbus model on the domestic market as that would render the *Public Transport*

[77] European Committee, "Interbus Agreement: The International Occasional Carriage of Passengers by Coach and Bus."
[78] "Prepare to Drive in the EU after Brexit: Bus and Coach Drivers," GOV.UK, accessed February 8, 2019, https://www.gov.uk/guidance/prepare-to-drive-in-the-eu-after-brexit-bus-and-coach-drivers#community-licences-and-the-interbus-agreement.
[79] House of Lords, "Future UK-EU Transport Arrangements," § Select Committee on the European Union, Internal Market Sub-Committee (2018), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/future-ukeu-transport-arrangements/oral/92320.html.
[80] House of Lords.
[81] Anne Grahan, National Transport Authority, "Engagement with Representatives of the Transport Sector," § Seanad Special Committee on the withdrawal of the United Kingdom from the European Union (2017), https://www.oireachtas.ie/en/debates/debate/seanad_special_committee_on_the_withdrawal_of_the_united_kingdom_from_the_european_union/2017-05-11/speech/4/.

> *Regulation Act 2009* (PTR Act)[82] defunct, with the result that the authority could not regulate competition between commercial providers in the public interest based on the demand or potential demand for services, as is currently the case. The PTR Act has created a level playing field where a diverse and vibrant commercial bus sector, with a growing number of commercial operators holding route public bus passenger licences.

These comments made by the CEOs from Translink and the National Transport Authority were made in November 2018 and May 2017 and it is possible that the concerns expressed will be met by the very recent protocol to the Interbus Agreement discussed below but this researcher has not been able to confirm that in the time available.

Protocol to Interbus Agreement

The Government of Ireland's contingency action plan in relation to Brexit, published in December 2018, indicates that a protocol extending the agreement's scope to include regular and special regular services has recently been agreed and is being ratified. [83] The contingency action plan indicates that this development will mean bilateral agreements between individual Member States and the United Kingdom will not be needed.[84]

The L&RS sought clarification on the status of the protocol to the Interbus Agreement and its relationship to the part 10 of this General Scheme and the Department of Transport, Tourism and Sport gave the response below on the 13th of February 2019.

Box 3: Clarification from Department of Transport, Tourism and Sport[85]

The above information [Contingency Action Plan statement that protocol will mean bilateral agreements will not be necessary] was provided last year at a point when the Department had been given to understand that ratification of the extended Interbus Agreement was going to happen very soon. However ratification has not yet been completed and recent indications have suggested that the ratification will now be completed by end 2019.

As is known, EU law including EU measures regarding the regulation of intra-EU international bus services applies up until Brexit date. The relevant measure is Regulation (EC) No 1073/2009[86] of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services.

After Brexit, the UK will become a third country. Regulation (EC) 1073 allows a Member State including Ireland to enter a bus bilateral with a third country, provided that country has not yet acceded to the Interbus Agreement. This means – for the period where the UK has not yet acceded to the Interbus Agreement - Ireland will have competence to conclude a bilateral agreement with the UK.

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[82] *Public Transport Regulation Act 2009* http://www.irishstatutebook.ie/eli/2009/act/37/enacted/en/html.
[83] Government of Ireland, "Getting Ireland Brexit Ready."
[84] Government of Ireland.
[85] Information supplied to researcher by officials in Department of Tourism, Transport and Sport 13/02/18
[86] Council of the European Communities, "Council Directive 80/987/EEC on the Approximation of the Laws of the Member States Relating to the Protection of Employees in the Event of the Insolvency of Their Employer," Pub. L. No. 80/987/EEC (1980), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31980L0987:EN:HTML.

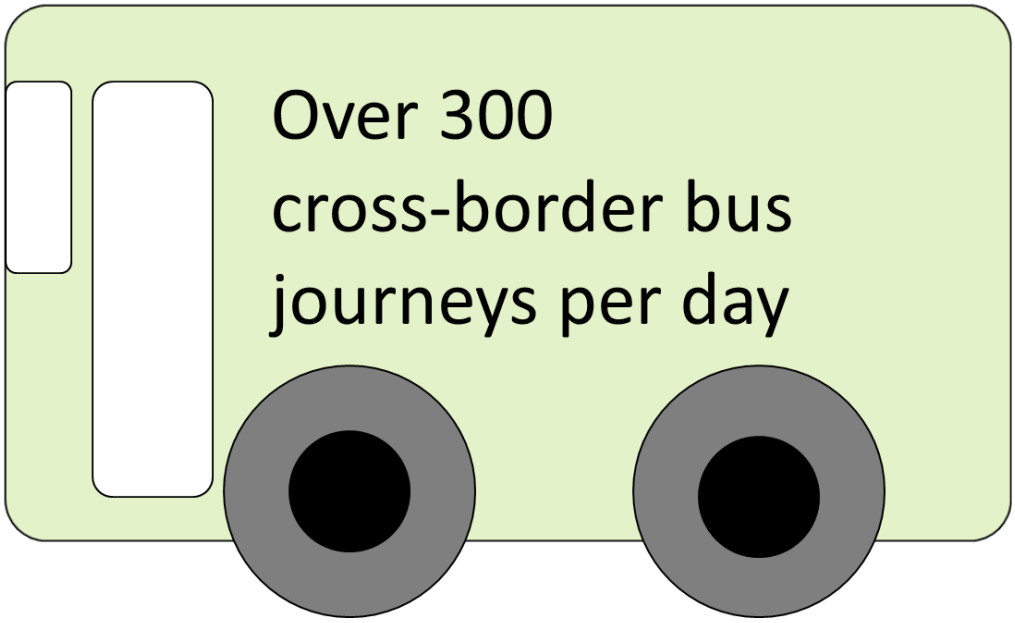
The EU Commission is also proceeding with its preparations for the possible event of a no-deal Brexit and the Irish Government is working closely with the Commission in the context of those preparations.

Part 10 of the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill is intended to set out the administrative provisions that will apply for the regulation of third country bus services. These provisions can form the basis of discussions with a third country leading to a bus bilateral, should one be needed.

This analysis is echoed by a statement by the UK Government that post-Brexit "if necessary, the UK will also seek to put in place bilateral agreements with countries at the earliest opportunity to provide bus and coach access to the EU".[87]

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: L&RS graphic from information supplied by Department of Tourism, Transport and Sport

On a daily basis, Monday to Friday - there are over 300 cross-border bus journeys authorised by the National Transport Authority (NTA).[88] These services range from daily regular services to Local Link services. They are operated by both private and public companies. This figure does not take into account 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.

[87] "Prepare to Drive in the EU after Brexit."
[88] Information supplied to researcher by officials in Department of Tourism, Transport and Sport 06/02/18

Stakeholder Perspectives

Public Transport Sectors (Island of Ireland)

The Department of Transport, Tourism and Sport carried out all-island sectoral dialogues on transport & logistics and tourism & hospitality in January 2017.[89] 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 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.[90,91]

Significant potential impacts noted by participants that relate to Part 10 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 people and goods could re-emerge as a significant activity.[92]

Legislative changes

Head 1: Amendment of section 2 of the *Public Transport Regulation Act 2009* (Definitions) to provide for additional definitions (i.e. 'carrier', and 'third country service') and to update existing definitions and terminology (i.e. 'international service').

Head 2 and Head 3: Insertion of new *section 47 and Section 48 in the Public Transport Regulation Act 2009* (Definitions) to allow, post Brexit, the National Transport Authority (NTA) to issue authorisations and control documents and to authorise cabotage operations between Ireland and third countries. This will give the NTA the same powers as it has now for coach and bus services travelling to Member States. "Cabotage" refers to the transport of passengers between two places in the State by a transport operator from a third country.

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[89] Department of Transport, Tourism and Sport, "All-Island Sectoral Dialogues on Transport & Logistics and Tourism & Hospitality 23rd January 2017," February 2017, http://www.dttas.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.
[90] Cathal McCall, "Smuggling in the Irish Borderlands – and Why It Could Get Worse after Brexit," The Conversation, accessed February 12, 2019, http://theconversation.com/smuggling-in-the-irish-borderlands-and-why-it-could-get-worse-after-brexit-111153.
[91] Department of Transport, Tourism and Sport and Department for Infrastructure, "Public Road Border Crossings Between the Republic of Ireland and Northern Ireland," n.d., 34.
[92] McCall, "Smuggling in the Irish Borderlands – and Why It Could Get Worse after Brexit."

Head 4: Insertion of new section 49 in the *Public Transport Regulation Act 2009* (Authorisations - Obligations) which deals with authorisations and to provide stipulations for holders of authorisations as well as setting down a number of offences.

Head 5: Insertion of new section 50 in the *Public Transport Regulation Act 2009* (Control documents - Obligations) to provide for a number of offences relating to incorrect usage of control documents (e.g. journey forms).

Head 6: Insertion of new section 51 in the Public Transport Regulaton Act 2009 (Cabotage) to provide that the Minister may make provision relating to cabotage.

Head 7: Insertion of new section 52 in the Public Transport Regulation Act 2009 (Transport tickets) provides for obligations and offences for carriers in relation to transport tickets for certain coach and bus services travelling to/from a third country.

Head 8: Insertion of new section 53 in the *Public Transport Regulation Act 2009* (Authorised Officers) to provide for RSA transport officers, NTA authorised officers and member of An Garda Síochána to be authorised officers for the purposes of enforcing rules/provisions relating to coach and bus services travelling to/from third countries.

Head 9: Insertion of new section 54 in the Public Transport Regulation Act 2009 (Summary proceedings) provides for the person/body who may bring forward proceedings for an offence under this Part.

Implications

The intention is that these heads 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 a number of factors that could potentially challenge the continuity of cross-border bus and coach services post Brexit.

- Maintaining the CTA is critical. Should it come to an end the flow of people will be severely affected with negative consequences for travel delays and employment rights.[93] 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 if people can no longer travel easily from one side to the other for work.[94] Disruption minimising actions have been called for:[95]
    - 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

[93] Department of Transport, Tourism and Sport, "All-Island Sectoral Dialogues on Transport & Logistics and Tourism & Hospitality 23rd January 2017."
[94] Department of Transport, Tourism and Sport.
[95] Bus Users UK, "Response to Inquiry on the Future of UK-EU Transport."

to ensure such consistency is maintained and has had on-going engagement with the European Commission as regards contingency planning.[96]

- 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.[97]
- 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.[98]
- It has been suggested that as Northern Ireland does not currently have a sitting government this could add a complexity if Northern Ireland was required to pass legislation relating to bus and coach services.[99]

Part 11: Amendments to the *Social Welfare (Consolidation) Act 2005*

Part 11 of the General Scheme provides for amendments to the social welfare code embodied in the main by the *Social Welfare (Consolidation) Act 2005*. The aim of the suggested amendments reflects the Government's commitment to maintain the Common Travel Area between the Ireland and the UK and in this regard provide for the continuation of the relevant social welfare payments.

Policy context

The *Social Welfare (Consolidation) Act 2005*,[100] the "Principal Act", is the main piece of legislation providing for the interpretation, rules and operation of the social protection system in Ireland. 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.

Irish social security system

Generally, systems of social security fall into one of two broad categories: categorical or universal. Categorical, sometimes referred to as selective, refer in the main to payments based around qualifying conditions including contribution requirements based on social insurance benefits or means test for social assistance allowances, in Ireland examples of the former are state

[96] Information supplied to researcher by officials in Department of Tourism, Transport and Sport 06/02/18
[97] Houses of the Oireachtas, "Implications of Brexit for Transport, Tourism and Sport.," § Joint Committee on Transport, Tourism and Sport (2017), https://www.oireachtas.ie/en/debates/debate/joint_committee_on_transport_tourism_and_sport/2017-05-31/3.
[98] Bus Users UK, "Response to Inquiry on the Future of UK-EU Transport."
[99] House of Lords, Future UK-EU transport arrangements.
[100] 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 2019, of October 2018.

contributory pension and the later state non-contributory pension. Universal schemes in contrast provide one system which is equally accessible to all, the primary example in Ireland is child benefit.[101]

The Irish social security system has its roots in the liberal model of welfare, which reflects the colonial link with Britain. The legacy of this model is reflected today in the Irish system in respect of a trend towards assistance-based means tested payments over a comprehensive social insurance, although the Irish system does entail a sizeable social insurance element.[102]

Daly and Yeates (2003) have argued that the Irish and UK social security systems have diverged gradually over the last two decades through becoming more expansive in expenditure terms and more inclusive. This includes a becoming a comparatively more generous system, recognising a greater range of needs including those in respect of caring and children and broadening the number of payments being made on a social insurance or universal basis.[103] However, despite this Irish system still retains a reliance on means tested payments (Considine and Dukelow, 2009) and NESC have described the Irish system as a 'hybrid' one with "a mix of means-tested, insurance based and universalist income support and service arrangements".[104]
In a European comparative context however, Cousins (2007) notes that Ireland and UK's social security systems remain closely related, particularly in relation to means testing.[105]

Common Travel Area

The Common Travel Area (CTA) exists between Ireland and the UK (including the Channel Islands and the Isle of Man). The CTA is a long-standing arrangement which provides for associated rights and privileges including access to employment, healthcare, education, and social benefits, as well as the right to vote in certain elections.[106]

According to Government memorandum in respect of the planned exit of the UK from the EU:[107]

> …"The CTA is an arrangement that is valued on both islands. Both the Government of Ireland and the UK Government have committed that the CTA will be maintained in all circumstances. The CTA pre-dates Irish and UK membership of the EU and is not dependent on it. The CTA is recognised in Protocol 20[108] to the EU Treaties, which acknowledges that Ireland and the UK may continue to make arrangements between themselves relating to the CTA while fully respecting the free movement and other rights of EU citizens and their dependents. Protocol 20 will continue to apply to Ireland after Brexit."
> …
>
> "Neither Irish citizens in the UK nor British citizens in Ireland are required to take any action to protect their status and rights associated with the CTA. After the UK leaves the EU, both Irish citizens in the UK and British citizens in Ireland will continue to enjoy these rights. Both Governments have committed to undertaking all the work necessary, including through legislative provision, to ensure that the agreed CTA rights and privileges are protected."

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[101] McCashin, A, (2004), *Social security in Ireland*. Dublin: Gill and MacMillan
[102] Considine, M. and Dukelow, M. (2009), *Irish social policy: A critical introduction*. Dublin: Gill and Macmillan
[103] Daly, M. and Yeates, N. (2003) *'Common origins, different paths: adaptation and change in social security in Britain and Ireland'*, Policy and Politics Vol. 31, No.1 January, 85-97.
[104] NESC (2005: 35) *The Developmental Welfare State*. NESC: Dublin
[105] Cousins, M (2007). *European Welfare States: comparative perspectives*. London: Sage.
[106] For more, see here from citizensinformation.ie.
[107] https://mailchi.mp/dfa/government-brexit-update-issue-457337
[108] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F20

One of the key aims of the social welfare part of this General Scheme is to maintain the social security arrangements currently in operation between Ireland and the UK in the context of the CTA and related EU frameworks.

Bilateral agreements

Ireland has in place a number of bilateral agreements on social security. According to the Department of Employment Affairs and Social Protection, the purposes of these agreements are twofold: [109]

1. "to protect the pension rights of persons who have paid social insurance contributions in Ireland and have reckonable periods in the other country" [110]
2. In addition, the protection of pension entitlements, the agreements contain provision to "determine the correct legislation applicable in situations where double liability for social insurance contributions might exist: e.g. workers who are sent on temporary assignments from Ireland to a country with which we have a bilateral agreement and vice versa."

The provisions (which vary in the different agreements) ensure that such persons are subject to the legislation of a single country.

Table 1: Current bilateral social security agreements

Country:	Date of Commencement:	Statutory Instrument:
Australia	1 April 1992	S.I. No. 84 of 1992
Australia (Revised)	1 January 2006	S.I. No. 799 of 2005
Austria	1 December 1989	S.I. No. 307 of 1989
Canada	1 January 1992	S.I. No. 317 of 1991
Japan	1 December 2010	S.I. No. 527 of 2010
New Zealand	1 March 1994	S.I. No. 57 of 1994
Quebec	1 October 1994	S.I. No.120 of 1995
Republic of Korea	1 January 2009	S.I. No. 552 of 2008
The Swiss Confederation	1 July 1999	S.I. No. 206 of 1999
The United Kingdom	1 October 2007	S.I. No. 701 of 2007
The United States Of America	1 September 1993	S.I. No. 243 of 1993

Source: Department of Employment Affairs and Social Protection.

Consultation

As part of the Government's preparations for the withdrawal of the UK from the European Union, the then Department of Social Protection held a consultation event on 16 February 2017 entitled "sectoral dialogue on Social Insurance, Social Welfare Rights and Entitlements and Social Welfare Pensions". The consultation event sought to gather views from stakeholders on the following key themes / questions:[111]

- Has Brexit affected you to date? If so, how?
- What, if any, are your particular concerns with regard to Brexit? What feedback have you received from your members?
- Where do you see the priority issues from your perspective / sector?
- Are there actions that you are taking or plan to take in the coming weeks, months and years to prepare for the impact of Brexit?

[109] Ibid.
[110] Department of Employment Affairs and Social Protection, Bilateral agreements – Guidelines on application of bilateral agreements. Operational Guidelines, available here.
[111] Department of Social Protection (2017), *All-island Brexit stakeholder engagement event*. Dublin: Department of Social Protection.

- What do you think are the most appropriate responses to the anticipated effects of Brexit from the perspectives of both government [central and local] and social partners?

In the Government's report on the outcomes of the consultation processes across a range of sectors and issues, the main issues emerging in the consultation process under the heading "Social Insurance, Social Welfare Rights and Entitlements and Social Welfare Pensions" was the following:[112]

- Concern about the impact of Brexit on the current reciprocal arrangements for social insurance (which includes pensions) and social assistance (means tested schemes linked to residency rights) and child benefit between Ireland and the UK, including Northern Ireland; this included impacts on current rights and entitlements and concerns as to the possible erosion of rights accrued into the future;
- Concerns about the future direction of social welfare policy and the potential for discrepancy with Ireland moving forward as part of the EU27 while also having to negotiate and manage a relationship with the UK and Northern Ireland;
- Possibility of a hard border presents real and present hazards for people, impacting on the fabric and reality of daily life for cross-border and frontier workers, students, commuters and for families. Contributors at the event gave examples of current impacts with regard to living standards and the impact that currency fluctuations has had on British Retirement Pension recipients.
- Government should focus on ensuring that these social welfare rights and entitlements, which currently exist for Irish and UK citizens moving within the Common Travel Area on the island of Ireland and between Ireland and Britain, are safe-guarded;
- The 'interconnectedness of everything' also presented opportunities across all of the different sectors but this will need strong Government-led communications, with clear and factual information provision the key. Opportunities exist to deepen existing alliances and build new ones given Ireland's good track record at EU level in the area of social policy and social security while preserving and developing the strong attachments to the UK; in addition, there is potential to attract more talent acknowledging the pressures that this could mean for social services generally.
- Calls for Government to be joined-up in its thinking and approach and to be very clear that the social dimension remains to the fore during the negotiations: Ireland should be advocating that there is explicit articulation of social rights, entitlements and responsibilities in any agreement with the UK.

Figure 1: Frequently Asked Questions on the impact of 'Brexit' on social welfare arrangements (from DEASP)

1. Will the vote by the UK to leave the EU have any impact on social welfare entitlements?
Following the vote by the UK to leave the EU all social welfare payments made by the Department of Employment Affairs and Social Protection, including pensions and Child Benefit, will continue to be paid as normal.

2. Living in UK and getting a social welfare payment from Ireland: will the vote to leave the EU have any implications?
The vote by the UK to leave the EU will have no immediate impact on a person's entitlement to payment. The operation of the current arrangements for coordinating social security payments

[112] Government of Ireland (2017), *Ireland and the negotiations on the UK's withdrawal from European Union: The Government's Approach*, Dublin: Irish Government Publication

between the UK and the other EU Member States, including Ireland, will be one of the matters that will have to be determined as part of the process of negotiating the UK's exit from the EU. As this will be a complicated process, there will be no change in the current arrangements for some time to come.

3. Living in Ireland and getting a social security payment from the UK: will the vote to leave the EU have any implications?
This is a matter for the UK to determine as part of the process that will have to be undertaken for negotiating its exit from the EU. As this will be a complicated process, there will be no change in the current arrangements for the payment of UK social security payments to people living in Ireland for some time to come.

4. In the future posted to work in the UK or working in both the UK and Ireland?
If a person is currently posted to work in the UK or if they are working in Ireland and the UK, the current arrangements for paying social security contributions will not be affected.
The future operation of arrangements for determining liability for social security contributions in these circumstances will be determined as part of the process of negotiating the UK's exit from the EU. These negotiations will be complicated, so there will be no change in the current arrangements for some time to come.

5. Living in Dundalk and working in Northern Ireland?
The current arrangements for the payment of Northern Irish social security contributions in these circumstances will not be affected. If a person in this situation were to become unemployed, the current arrangements for the payment of benefits will continue to apply. This will mean that if a person living in this situation were to be become fully unemployed, Ireland will be responsible for paying Jobseeker's Benefit and if a person were to become partially or intermittently unemployed, Northern Ireland will be responsible for paying Jobseeker's Benefit. The future operation of arrangements for determining liability for social security contributions and for the payment of Jobseeker's Benefit in these circumstances will be determined as part of the process of negotiating the UK's exit from the EU. These negotiations will be complicated, so there will be no change in the current arrangements for some time to come.

6. What will happen if there are significant fluctuations in sterling which affect a means tested pension?
In the event that serious currency fluctuation should arise, resulting in significant negative impact for means-tested pensioners, the Department will take steps to adjust and rebalance the amounts payable to these pensioners to minimise the possibility of hardship.

Source: L&RS, adapted from the Department of Employment Affairs and Social Protection website

Legislative changes

This Part of the Bill, that is that concerned with amendments to social welfare legislation, consists on 9 Heads, eight of which are substantive and dealt with in the relevant section below.

Amending regulations governing the administration of social welfare

Section 4 of the Principal Act provides the Minister with general powers to make regulations were necessary under the Act. The Bill proposes to insert a new subsection after subsection (1) to give the Minister power to continue to treat "benefit, facts or events" related to the UK. The reciprocal arrangements between Ireland and the UK are provided for under section 287 of the Principal Act – "Reciprocal arrangements".

Eligibility of social insurance payments made in the UK

Head 2 of the Bill proposes to insert a new section after section 38A. Section of 38 of the Principal Act entitled "Limitation on return of contributions". In the Bill, the new section is numbered 38B.[113] The effect of the Bill's proposal is to allow the Minister for Employment Affairs and Social Protection to make regulations that provide for social insurance contributions paid in a third country (and thus the UK) to count in respect of eligibility for social insurance payments in Ireland, including contributory state pensions.

Changes to the Habitual Residence Condition

The "Habitual Residence Condition" is the condition set out under the social welfare code which requires individuals to satisfy certain conditions for certain social welfare payments including Child Benefit. The condition came into effect on 1 May 2004 and is applicable to all applicants regardless of their nationality. Habitual residence is where individuals are resident in Ireland and have a clear proven link to the state. Factors concerning proofing such a link include, among other things:[114]

- Satisfying the right to reside;
- Length of time you have spent in the Republic of Ireland;
- Continuity of your residence; and
- General nature of your residence.

The habitual residence condition must be satisfied for the following payments:

- Back to Work Family Dividend;
- Blind Pension;
- Carer's Allowance;
- Disability Allowance;
- Domiciliary Care Allowance;
- Guardian's Payment (Non-Contributory);
- Jobseeker's Allowance;
- Jobseeker's Transitional Payment;
- One-Parent Family Payment;
- State Pension (Non-Contributory);
- Supplementary Welfare Allowance (other than once-off exceptional and urgent needs payments) and;
- Widow's, Widower's or Surviving Civil Partner's (Non-Contributory) Pension.

The Right to Reside Condition is set out in s.246 (5) of the *Social Welfare Consolidation Act 2005* (as amended). This provides that a person who does not have the right to reside in the Republic of Ireland would not be regarded as being habitually resident in the Republic of Ireland. Subsection (6) sets out a list of persons who shall be taken as having a right to reside:

- Irish nationals have a right of residence in Ireland;
- UK nationals coming in from the CTA also have a right to reside here under the CTA agreement;
- EEA nationals who are employed or self-employed in Ireland have a right to reside; and,
- Non-EEA nationals who have a residency or work permit to legally reside and work in the State.

However, in certain circumstances the provisions of EU law override national legislation.

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[113] It should be noted that there is already a section 38B in the Principal Act as inserted by section 7 of the *Social Welfare and Pensions Act 2014*.

[114] For more, see here.

The Bill proposes to include a new subsection after ss (8) in section 246 (Habitual Residence Condition). The effect of this will be to allow the Minister to make regulations that adapt the Habitual Residence Condition as it apples to sections 168(5) (guardian's payment – non-contributory), 173(6) (one-parent family payment), 186D(1) (domiciliary care allowance), 220(3) (qualified person), and 238B(5) (back to work family dividend). This will allow for the continuation of these payments to people resident in the UK as is currently the case.

Avoiding social welfare multiple payments across jurisdictions

Head 4 of the Bill proposes to insert a new s.247 (13) in the Principal Act. Section 247 provides for the avoidance of multiple payments. The effect of the proposed amendment is to ensure, where an individual is entitled to receive two payments based on the same period of social insurance in both Ireland and the UK, e.g. Jobseekers Benefit and Jobseeker's Allowance (contribution-based) payment from the UK, only one would be paid.

It should be noted in this regard that Article 10 of EU Regulation 883/2004[115] (on the co-ordination of social security systems) provides for the "[p]revention of overlapping benefits". According to the Department of Employment Affairs and Social Protection, this (EU) rule prevents a person from claiming benefits "of the same kind in different EEA States in respect of the same period of compulsory insurance".[116]

Regulation (EC) No. 883/2004 also allows EEA States to lay down their own national rules against overlapping payments. Regulation (EC) No. 883/2004 provides that rules of national law governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked even where such benefits or income was acquired under the law of another EEA State.

Absences from the State

Head 5 of the Bill proposes to amend s.249 (absences from the State or imprisonment) of the Principal Act by inserting a new subsection (17A) following the existing ss. 17. The effect of this to allow the Minister to make regulations that ensure that the provision in the Principal Act with respect to absences from the State continue in respect of certain social welfare payments to persons living in the UK in line with the current arrangements.

Provisions relating to entitlement

Head 6 proposes inserting two new subsections after s.249 of the Principal Act that is a proposed new s.249A and s.249B. The purpose of proposed new s.249A is to permit the Minister to make regulations regarding frontier workers where the border crossed is that between Ireland and the UK in order to maintain the current arrangements.

A frontier worker is defined by Regulation (EC) No. 883/2004, Article 1(f) as: 'any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which [s/]he returns as a rule daily or at least once a week'. In this way, frontier workers are different from migrant workers, who leave their country of origin completely in order to live and work in a different country.[117]

The purpose of the proposed new section 249B is to permit the Minister to make regulations which serve to calculate the value of supplementary payments where a person is in receipt of family benefit payments from both Ireland and the UK as is currently the practice.

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[115] Article 10 of EU Regulation 883/2004, available here.
[116] Department of Employment Affairs, *An introduction to Regulation 883/2004*.
[117] See here for more.

Exchange of information to the UK

Section 261 of the Principal Act is concerned with the exchange of information. Head 7 proposes to insert new ss. (4) after subsection (3). The purpose of the Head is to permit the Minister to provide information held for the purposes of the Act or the control of schemes administered by or on behalf of the Minister and the Department of Employment Affairs and Social Protection to be exchanged with the proper authorities in the UK.

It should be noted that Article 64 (4) of EU Regulation 883/2004 states the following:[118]

> "The arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the competent Member State and the Member State to which the person goes in order to seek work shall be laid down in the Implementing Regulation."

The explanation accompanying the Head in the General Scheme of the Bill states also that the Head is intended to allow the Minister to make regulations:

> "to ensure that the UK can continue to be covered by existing data exchange provisions. This will be done in line with the provisions of the General Data Protection Regulation (GDPR)."

Accounting for changes in the reciprocal arrangements with UK

Under the Principal Act's s.287, "Reciprocal arrangements", 2005's explanatory guide for the Act states the purpose of the section as follows:[119]

> "The Minister may make orders to give effect to reciprocal agreements on social security between the State and international organisations, states or governments in connection with social insurance and the social insurance-based benefits…The Minister may amend or revoke any such order."

Following various amendments to the Principal Act, section 287 reads as of September 2018:[120]

> "(1) The Minister may make such orders as may be necessary to carry out any reciprocal or other arrangements made with any international organisation, any other state or government or the proper authority under any other government, in respect of matters relating to insurance and benefits under Part 2, *State pension (non-contributory) and blind pensions, widow's (non-contributory) pension, widower's (non-contributory) pension, surviving civil partner's (non-contributory) pension, guardian's payment (non-contributory), jobseeker's allowance and child benefit* and may by any such order make any adaptations of and modifications in respect of these matters that he or she considers necessary.
>
> (2) The Minister may by order amend or revoke an order under this section."

Head 8 proposes to amend s.287. In subsection 1, it seeks to delete references marked in *blue italics* above and replace this with "social assistance payments under Part 3 and child benefit" ostensibly to ensure consistency with the proposed new subsections (3) and (4) discussed below.

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[118] EU Regulation 883/2004, available here.
[119] Department of Social and Family Affairs, 2005, Social Welfare Consolidation Act 2005 – Explanatory Guide
[120] *Social Welfare Consolidation Act 2005.* Revised Act available from the Department of Employment Affairs and Social Protection website here.

Part 3 of the Principal Act is entitled "Social Assistance". Section 139 of the Principal Act describes as the following:[121]

- jobseeker's allowance;
- pre-retirement allowance;
- State pension (non-contributory);
- blind pension;
- widow's (non-contributory) pension, widower's (non-contributory) pension, surviving civil partner's (non-contributory) pension and guardian's payment (non-contributory);
- widowed or surviving civil partner grant (paid by virtue of one-parent family payment or State pension (non-contributory) under this Part);
- one-parent family payment;
- carer's allowance;
- domiciliary care allowance;
- supplementary welfare allowance;
- disability allowance; and,
- farm assist.

Head 8 proposes to amend the Principal Act's section 287 after ss. (2) by inserting new ss. (3) and ss. (4). The wording of the proposed new ss. (3) includes the following which is of particular relevance (L&RS emphasis):

> "The Minister may make such orders *as may be appear to be desirable to enable coordination*, *whether on foot of an arrangement or not*, between the social security systems of Ireland and any third country which is a former member of the EU, *of a type similar to the coordination between those two social security systems which existed prior to the departure of that country from the EU* or *prior to the end of any transition period before such departure"*

The proposed new ss. (4) provides that orders made under subsection 1 may, regardless of the arrangement made with the third country (UK), amend these orders that provide for the arrangements between Ireland and the UK.

The explanatory note accompanying this Head states that the above in necessary so as to ensure maintenance of the current arrangements with the UK.

Implications

The implication of the proposals set out in this Part of the General Scheme 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 Common Travel Area.

[121] https://www.welfare.ie/en/downloads/RunningConsolidation-of2005Act.pdf

Part 12 - Amendments to the *Protection of Employees (Employers' Insolvency) Act 1984*

Policy context

The Insolvency Payments Scheme is a scheme to protect the pay-related entitlements of employees whose employer becomes insolvent. In line with EU law, the scheme covers employees who are employed or habitually employed in Ireland by an employer who becomes insolvent in another EU Member state. This part of the General Scheme makes provisions for employees to be covered under the Insolvency Payments Scheme where their employer has been made insolvent in the UK.

The UK has developed draft regulations which deal with insolvency and protection of employees in the event of employer insolvency. These regulations will come into force if a Brexit deal is not reached, as under these circumstances EU provisions on insolvency will cease to apply in the UK. Commentators have pointed out that these regulations would *not* be necessary if a deal is reached as the Withdrawal Agreement (Article 63)[122] would allow for the continued application of EU provisions on insolvency. If there is no deal then the post-Brexit situation with regard to insolvency proceedings commenced in the UK will depend on an individual country's domestic laws. Interests groups in the UK, such as R3 the UK's insolvency and restricting trade body, are keen to ensure that the reciprocity of insolvency arrangements are maintained after Brexit. Commentators such as Hamish Anderson, consultant at Norton Rose Fulbright LLP, have suggested that the provisions of insolvency in the draft exit agreement are not controversial in the UK.

While not a Brexit specific issues, the overall scheme is currently under review because in December 2018 the Supreme Court upheld a decision that the Scheme does not adequately transpose EU law. This decision relates to the fact that the Irish scheme applies to situations where there is a *formal* insolvency decision and not where there is an *informal* insolvency situation, so the rights of employees to apply to the scheme are more restricted than envisaged under EU law.

In considering the protection of employees in situations of insolvency, it is useful to consider two core, potentially competing, questions: (1) the extent to which the rights of employees are protected, and (2) the potential costs to the State and more specifically to the tax payer. This section of the briefing on the General Scheme will deal with the policy context and history of the Insolvency Payments Scheme, including the implications of the recent Supreme Court case. This section describes the proposed changes to the *Protection of Employees (Employers' Insolvency) Act 1984*, and concludes by considering the potential implications of these changes, and flagging several question which have been identified as potentially relevant to discussions of these changes.

[122] Commission to UK, "Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community" (2018), https://ec.europa.eu/commission/sites/beta-political/files/negotiation-agreements-atom-energy-15mar_en.pdf.

According to the Government's Guide to Insolvency Payments,[123] an employee normally makes a claim through the liquidator or receiver, and 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. Payments are made from the Social Insurance Fund – any part of the claim that is recovered in the final winding-up of the business is paid back into the Social Insurance Fund.

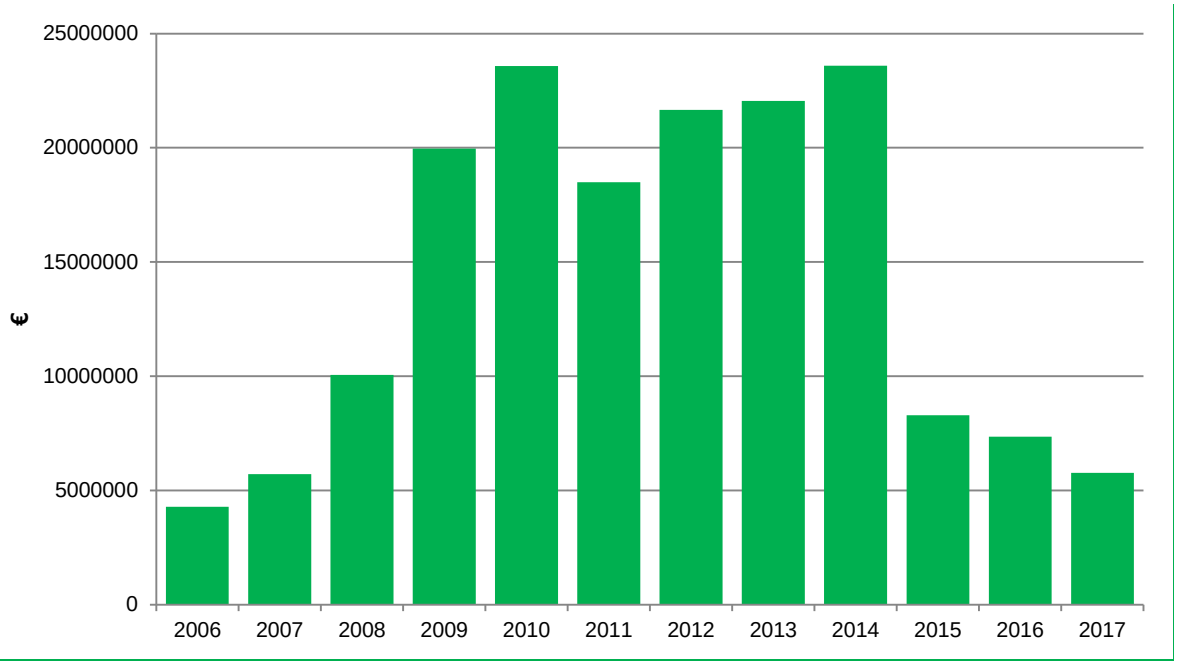
The Insolvency Payments Scheme operates under the *Employees (Employers' Insolvency) Act 1984*.[124] The 1984 Act implements the provision of the EU Directives 80/987[125] and 2002/74/EC[126] which deal with the protection arrangements for employees who are employed by companies who undergo insolvency in another EU Member State. The EU directives allow certain flexibilities for Member States in defining the arrangements for employee protection including provisions on time limits and limiting the payments available to employees. Member States are free to define arrangements which are more favourable to employees.

According to a report by the Comptroller and Auditor General in 2014 €23.6 million was paid under the Insolvency Payments Scheme, administered by the then Department of Social Protection. In that year the Department estimated that 90% of the payments were not recoverable through the liquidation process. On average around 10,000 employees per year benefitted form the scheme between 2007 and 2014.[127]

Understandably, the costs of the Payment Insolvency Scheme are significantly higher during times of economic turmoil, when there are higher numbers of company insolvencies. Figure 2 demonstrates that the overall costs of the scheme more than doubled during the period from 2009 to 2014.

[123] Department of Enterprise, Trade and Employment, "Guide to Insolvency Payments," 2010, http://www.ockt.ie/wp-content/uploads/downloads/2012/05/OCKT-Dept-Enterprise-Guide-to-Insolvency-Payments.pdf.
[124] Government of Ireland, "Protection of Employees (Employers' Insolvency) Act, 1984," Pub. L. No. Number 21 of 1984, accessed February 6, 2019, http://www.irishstatutebook.ie/eli/1984/act/21/enacted/en/print.html?printonload=true; Law Reform Commission, "Administrative Consolidation - Protection of Employees (Employers' Insolvency) Act 1984," Pub. L. No. Number 21 of 1984 (2015), http://revisedacts.lawreform.ie/eli/1984/act/21/revised/en/pdf?annotations=true.
[125] Council of the European Communities, "Council Directive 80/987/EEC on the Approximation of the Laws of the Member States Relating to the Protection of Employees in the Event of the Insolvency of Their Employer," Pub. L. No. 80/987/EEC (1980), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31980L0987:EN:HTML.
[126] European Parliament and the Council of the European Union, "Directive 2002/74/EC Amending Council Directive 80/987/EEC on the Approximation of the Laws of the Member States Relating to the Protection of Employees in the Event of the Insolvency of Their Employer" (2002), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:270:0010:0013:en:PDF.
[127] Comptroller and Auditor General, "Management of Redundancy and Insolvency Scheme Debts," 2014, https://www.audit.gov.ie/en/Find-Report/Publications/2015/Chapter-18-Management-of-Redundancy-and-Insolvency-Scheme-Debts.pdf.

Figure 2: Total cost of payments under the Insolvency Payments Scheme from 2006 to 2017.



Source: Comptroller and Auditor General Reports

According to analysis by the Department of Employment Affairs and Social Protection in the five years preceding the summer of 2018, 530 employees from 50 UK based companies received payment from the Insolvency Payments Scheme.[128] However, as the number of employees is relatively small, annual beneficiaries can vary substantially depending on which companies become insolvent in any given year. Consequently, while the scheme has been availed of by relatively few employees of UK based organisations in recent years, there is the potential for increased costs to the State in the context of the economic challenges presented by Brexit.

Scope of the Insolvency Payments Scheme

The scope of the Insolvency Payments Scheme is current subject to review, as the Scheme does not currently cover those employed in organisations that are subject to *informal* solvency, as opposed to *formal* insolvency. In the case *In re Davis Joinery Ltd [2013] IEHC 353*, the High Court identified the difficulties that employees can face when their employer ceases trading but without becoming officially insolvent. In that case, the Court made an order officially winding up the company, which allowed the employee in question to access the Scheme; however, the judge commented that "*unless the issue is successfully litigated by an adversely affected employee… the obvious unfairness inherent in the Act… will only be redressed by legislative change*".[129] A 2017 Court of Appeal decision[130] found that the State has not adequately implemented EU legislation by failing to provide a procedure to protect employees' entitlements in the event of an *informal*

[128] Confirmed in communication with the Redundancy and Insolvency Unit in the Department of Employment Affairs and Social Protection, Monday 5 February 2019.
[129] William Fry, "Difficulties in Accessing Employer's Insolvency Fund in the Case of Informal Insolvency," September 24, 2013, https://www.williamfry.com/newsandinsights/news-article/2013/09/24/difficulties_in_accessing_employers_insolvency_fund_in_the_case_of_informal_insolvency_.
[130] Glegola -v- Minister for Social Protection & ors : Judgments & Determinations : Courts Service of Ireland (The Court of Appeal February 24, 2017).

insolvency of their employer.[131] The Government appealed this decision to the Supreme Court, and in December 2018 the Supreme Court[132] agreed that the State had failed to correctly transpose obligations under EU law.[133] In his judgment, Judge O'Donnell concluded that, "*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*".[134]

In May 2018, the Minister for Employment Affairs and Social Protection (PQ 2018/249) stated that,: "*the Department is continuing to review the position to establish what, if anything, can be done to progress payments to individuals in situations where employers cease trading without engaging in a formal winding-up process and owe moneys to their employees*".[135]

The question of informal insolvency situations has been highlighted as one that will impact upon the situation of UK based companies. A recent academic analysis, by Umfreville et al., of the situation in relation to post-Brexit insolvency proceedings of companies in five countries (including Ireland), states that "the position [in Ireland] in relation to collective proceedings falling short of a winding up seems to be less clear".[136]

Legislative changes

The overall purpose of the amendments in Part 12 of the General Scheme 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 General Scheme proposes several changes to the Protection of Employees (Employers' Insolvency) Act 1984.

- **Head 1** extends the definitions set out in the EU Directives so that they cover the UK. The first part extends the definition of "competent authority" to an employer in a state of insolvency under UK law. The second part deals with the "relevant officer" which is the body administering the insolvency, and means the employees in Ireland can submit applications under the Insolvency Payment Scheme, where the liquidator (or other competent body) is in the UK.
- **Head 2** amends the section of the Act which deals with the definition of when an employer shall be taken to be insolvent, in order to extend this to organisations who are deemed to be insolvent in the UK.
- **Head 3** amends section 4(1), which deals with the date on which an employer is regarded as having become insolvent, to include the date an employer is made insolvent in he UK.
- **Head 4** amends section 7(3)(b) of the Act which makes provision for dealing with a situation whereby an employer has failed to make pension contributions, and allows for the amounts to be certified by an actuary (or someone performing a similar task) in the UK.

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[131] Caoimhe Heery, "Insights - Court of Appeal Rules That State Must Pay Damages in Informal Insolvency Case," *Ronan Daly Jermyn* (blog), September 27, 2019, https://www.rdj.ie/insights/court-of-appeal-rules-that-state-must-pay-damages-in-informal-insolvency-case.
[132] Glegola -v- Minister for Social Protection (The Supreme Court December 20, 2018).
[133] Ann O'Loughlin, "Supreme Court Upholds Damages Award of €16,000 to Woman over Redundancy Law Failure by State," December 20, 2018, https://www.business-support.ie/supreme-court-upholds-damages-award-of-e16000-to-woman-over-redundancy-law-failure-by-state-2/.
[134] Glegola -v- Minister for Social Protection.
[135] Houses of the Oireachtas, "Insolvency Payments Scheme Payments, Parliamentary Question No. 249," § Dáil Éireann Debate (2018), https://www.oireachtas.ie/en/debates/question/2018-05-17/249?highlight%5B0%5D=insolvency.
[136] Chris 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, https://doi.org/10.1002/iir.1325.

- **Head 5** provides for the exchange of information with a 'relevant officer' of an employer who is insolvent in the UK. The General Scheme notes that this will be done in line with GDPR.
- **Head 6** deals with commencement of the Act on a date determined by the Minster for Employment Affairs and Social Protection.

Overall then the proposed changes to the 1984 Act are intended to facilitate the smooth continuation of existing laws on the protection of employees of a company that becomes insolvent in the UK.

Implications

The draft *Withdrawal Agreement* between the EU and the UK provides for the continuation of arrangements to deal with cross border insolvency, including the protection of employees. In the event of a no-deal Brexit, the UK will enact draft regulations to provide for pan-European insolvency. In this case the situation of employees will depend on the particular context in each Member State. In Ireland, part 12 of the *General Scheme of the Miscellaneous Provision (Withdrawal of the UK from the European Union on 29 March 2019) Bill 2019*, proposes legislative changes to the 1984 Act which should provide for the smooth transitioning of employee protection should a company become insolvent under the laws of the UK.

Overall then, the purpose of these provisions is to maintain the *status quo*, and to prevent uncertainties in the regulation of cross-broader insolvency. However, there are many potential complexities and questions which are likely to arise in a post-Brexit situation. Leading Irish academic commentator Professor Irene Lynch Fannon, has raised several questions about the future of employee protection in situations of company insolvency.[137] Professor Fannon's questions include:

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?
3. Where pensions are based in the UK, or where pension funds are undermined in the lead up to an insolvency,[138] how will the pension rights of employees be protected?

In addressing these questions, legislators must be cognisant of two overarching imperatives - the need to protect the rights of employees, and the need to protect the tax payer against carrying an unreasonable burden for the costs of UK based insolvencies. Furthermore, commentators have suggested that there will be significant economic costs of Brexit and therefore Brexit will create the

[137] Researcher consultation, on Monday 11 February 2018, with Professor Irene Lynch Fannon, BCL(NUI), BCL (Oxon.), Doctor of Juridical Science (UVa.), Solicitor. University College Cork, email: i.lynchfannon@ucc.ie, Professor Lynch Fannon is a member of the Company Law Reform Group: http://www.clrg.org/.

[138] A recent high profile United Kingdom case involved the sale of the department store BHS. A report by the UK Pension Regulator described how the pension fund had been undermined in the lead up to the sale, and how the sale was intended to avoid liabilities under the pension scheme. For further information see an article by Sarah Butler in The Guardian Newsletter on 27 June 2019: https://www.theguardian.com/business/2017/jun/27/sir-philip-green-main-bhs-sale-pension-regulator-report, and the report by the United Kingdom Pension Regulator: https://www.thepensionsregulator.gov.uk/en/media-hub/press-releases/tpr-publishes-report-on-bhs-case.

potential for increased levels of company insolvency, as is generally the case during periods of economic down turn.

Part 13: Changes to the *Interpretation Act 1995*

Policy context and implications

This Part is intended to deal with situations that will arise if the UK leaves the EU **subject to an agreed transition period** (as opposed to a 'no-deal' exit).

The effect of the changes proposed in this Part is to deem the United Kingdom, for the duration of the transition period, to be a 'Member State' as that term is defined in the *Interpretation Act 2005*. As a result, references in legislation to 'Member States' will be deemed to include the United Kingdom during that period**, unless the legislation expressly states otherwise**.

The proposed provision is to be subject to a commencement order, allowing effect to be given to it as and when the Taoiseach considers that circumstances require.

Part 14: Amendments to the *Extradition Act 1965* to apply the provisions of the 1957 Council of Europe Convention on Extradition

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."[139] The departure of the UK from the European Union means that it will cease to be part of the European Arrest Warrant ('EAW', discussed below) system which currently governs the extradition of individuals between EU member states. Part 14 of the General Scheme seeks to address this potential vacuum in the event of a no-deal Brexit scenario by making amendments to the *Extradition Act 1965*[140] to allow extradition between Ireland and the UK.

The *Extradition Act 1965* gave effect in Irish law to the European Convention on Extradition 1957. As noted in the Explanatory Note accompanying Head 1 of Part 14, the Government proposes to revert to the use of that 1957 Convention to facilitate extradition between Ireland and the UK by way of Statutory Instrument.

What is the European Arrest Warrant?

The European Arrest Warrant 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."[141]

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[139] Remy Farrell and Anthony Hanrahan, *The European Arrest Warrant in Ireland* (Clarus Press, 2011) at page 3.
[140] Available here: http://www.irishstatutebook.ie/eli/1965/act/17/enacted/en/html
[141] Briscoe, R. 'Brextradition', Law Society Gazette Jan/Feb 2017, at 36

The European Arrest Warrant allows judicial authorities in Member States to send warrants to each other for the purpose of execution. The procedure for a European Arrest Warrant 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 a European Arrest Warrant.
- This request will be sent to the Central Authority (in Ireland, this would be the Department of Justice and Equality) who will then apply to court to have the warrant endorsed for execution. In Ireland it is the High Court which must provide this endorsement.
- Where the person named in the warrant is found, they will be arrested and brought before the High Court.[142]

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.[143] The most recent Annual Report[144] addresses the issue of Brexit specifically, saying:

> The departure of the UK is particularly significant for Ireland on a wide range of issues. However, in the context of combating crime and terrorism, the necessity to maintain a functioning system of extradition between the two States has been identified as a key priority. As all Annual Reports on the EAW to date have shown, the UK remains the state with which Ireland has the greatest interaction. In that context, the Minister has requested the Department of Justice and Equality to examine the implications of Brexit for extradition between the two States and to consider the options available to address the various possible outcomes to the Brexit negotiations."

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]

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 European Arrest Warrant is fundamentally based on **mutual recognition of judicial decisions**, the procedure under the European Convention on Extradition 1957 is a **diplomatic process**, with the request being made through diplomatic channels.

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

[143] 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.

[144] Report on the operation of the European arrest warrant act 2003 (as amended) for the year 2017 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: http://opac.oireachtas.ie/AWData/Library3/JUQdoclaid071218_111900.pdf

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

[146] Ibid.

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 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."

Legislative changes

Part 14 of the General Scheme is a short Part consisting of three Heads, outlined below.

Head 1 proposes an amendment to section 14 of the *Extradition Act 1965*. That section, as substituted by the *Extradition (European Union Conventions) Act 2001*, generally prohibits the extradition of Irish citizens:

> "Extradition shall not be granted where a person claimed is a citizen of Ireland, unless the relevant extradition provisions or this Act otherwise provide."

Head 1 proposes to amend this section in order to allow for the extradition of Irish citizens on a reciprocal basis.

Head 2 of the General Scheme proposes to insert a new Section 23B into the Act of 1965. This new section would deal with 'Electronic transmission of documents'. Given that the 1965 Act is so dated, it does not currently make provision for the transmission of supporting documentation related to an extradition request electronically. The Act has previously been amended in 2001[148] to

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[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

[148] Extradition (European Union Conventions) Act 2001. Available here: http://www.irishstatutebook.ie/eli/2001/act/49/section/18/enacted/en/html

allow the transmission of documents via facsimile (i.e. fax machine). This amendment largely mirrors that one.

Finally, **Head 3** provides for Commencement matters, stating generally that this Part will come into operation by order of the Minister for Justice and Equality. Different provisions may come into operation on different days.

In addition to the legislative changes proposed by the General Scheme, a Statutory Instrument will be required. Section 8 of the *Extradition Act 1965* allows the Government, by order, to create extradition agreements with other countries.

Implications

If enacted, the implications of this change will stem largely from the **procedural differences** between the current system of extradition (i.e. European Arrest Warrant) and those under Part II of the *Extradition Act 1965*. In December 2018 barrister Anthony Hanrahan, co-author of the book *The European Arrest Warrant in Ireland,* was reported as telling a conference in Dublin that Ireland should be relatively unaffected as long as it can put in place a bilateral agreement.[149]

However others have 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.[150] The House of Lords European Union Committee, in a December 2016 Report[151] stated that based on evidence it received, "the 1957 Council of Europe Convention on Extradition cannot adequately substitute for the European Arrest Warrant."[152] That Committee referred to evidence given by the Law Society of Scotland[153] which drew its attention to three main differences between the European Arrest Warrant and the 19587 Convention:

- The EAW can be described as a transaction between judicial authorities where the role of the Executive is removed. By contrast, applications under the 1957 Convention would need to be made by diplomatic channels, with Secretary of State approval required at a number of points in the process.
- The EAW framework imposes strict time limits at each stage of the process. The 1957 convention does not impose the same time limits.
- Article 6 of the 1957 Convention provides that States **can refuse an extradition request for one of their own nationals.** The EAW framework abolished the own nationals exception based on the concept of EU Citizenship.[154]

These concerns were reiterated in a report from the European Citizen Action Service:

> "[Reverting to the European Convention on Extradition] would create significant changes to the previous process between the UK and EU Member States because this convention

[149] Conor Gallagher Crime Correspondent, 'Ireland Able to Agree Extradition Deal with UK, Conference Hears', The Irish Times, accessed 7 February 2019, https://www.irishtimes.com/news/crime-and-law/ireland-able-to-agree-extradition-deal-with-uk-conference-hears-1.3718920.
[150] Briscoe, R. 'Brextradition', Law Society Gazette Jan/Feb 2017, at 39.
[151] https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf
[152] Ibid at para 141 (page 38)
[153] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-future-ukeu-security-and-policing-cooperation/written/43327.html
[154] House of Lords European Union Committee (2016) 'Brexit: future UK – EU security and police cooperation'. Available here: https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf

> does not provide for specific time limits, reverts to the use of diplomatic channels and does not rely on the principle of mutual recognition."[155]

As noted by Farrell and Hanrahan, the European Arrest Warrant system was largely implemented in an attempt to address those two issues of complexity of procedure and delay.[156] Ultimately it cannot be known at this point the extent to which procedural differences will impact the effective operation of extradition.

Part 15: Amendments to the *Immigration Acts 1999 and 2003*

Policy context

Part 15 of the General Scheme contains provisions drafted in light of a decision of the High Court in *S.G. (Albania) v Minister for Justice and Equality*.[157] The amendments are technical in nature but are necessary to bring clarity to important aspects of immigration law. In particular, it is necessary to clarify the duty of the Minister to consider the international law principle of non-refoulement in making deportation orders. In the *S.G.* case, the High Court (Humphreys J) had to consider the legal consequences of the repeal of the *Refugee Act 1996* on the effect of section 3 of the *Immigration Act 1999*. The decision involves complex legal issues of statutory interpretation.

Useful Definitions

The principle of **non-refoulement** provides that:

'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' (Article 33 of the Convention and Protocol Relating to the Status of Refugees)

'**International protection**' is the term used to describe protection granted by a State to a refugee or a person eligible for subsidiary protection. It is important to note however that a 'hierarchy' of protection exists, with asylum at the top of the hierarchy, followed by subsidiary protection. This means that if a person is eligible for asylum, this is the form of protection that must be granted. It is also why, as part of the international protection determination process, eligibility for asylum must always be considered first.

A **refugee** is any person who:
'.....owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail him or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.' (Article 1A(2) of the Convention and Protocol Relating to the Status of Refugees)

An '**asylum seeker**' is a person seeking to be recognised as a refugee or seeking recognition as a person eligible for subsidiary protection.

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[155] European Citizen Action Service (2017) 'Brexit & the European Arrest Warrant: How will change affect the interests of citizens?', at page 10. Available here: http://ecas.org/wp-content/uploads/2017/11/Brexit-and-the-EAW.pdf

[156] Remy Farrell and Anthony Hanrahan, *The European Arrest Warrant in Ireland* (Clarus Press, 2011) at page 5.

[157] [2018] IEHC 184.

The Statutory Framework

Section 3 of the *Immigration Act 1999* ("the 1999 Act") empowers the Minister to deport foreign nationals. However, the section expressly limits this power by reference to s.5 of the *Refugee Act 1996* (the 1996 Act),[158] which enshrines the international law principle of non-refoulement. Non-refoulement, or the principle against refoulement, refers to fundamental precept of international law that a State not return (refoule) a refugee to another country where, on account of his or her race, religion, nationality, membership of a particular social group or political opinion, that person's life or freedom would be jeopardised by doing so. The Minister must therefore consider any refoulement concerns raised by the applicant before making a deportation order. While the 1996 Act has been repealed, and replaced by a new legal regime established in the *International Protection Act 2015* (the 2015 Act), the reference to s.5 of the *Refugee Act 1996* **remains** in s.3 of the 1999 Act.

The decision in S.G. (Albania) v Minister for Justice and Equality

The continuing reference to the 1996 Act in the 1999 Act gave rise to significant difficulty in the *S.G.* case in circumstances where the applicant's deportation order was considered by the Department in December 2016 but was not formally issued until January 2017. In the intervening period, on December 31st 2016, the 2015 Act had come into force, repealing the 1996 Act.

Section 50(1) of the 2015 Act sets out the principle of non-refoulement in relation to the new regime. It is important to note that the protection against refoulement in s.50 of the 2015 Act is somewhat broader than that contained in the 1996 Act.[159] It restates the refoulement protection provided in the 1996 Act but adds a further subsection, directing that the Minister not refoule a person where "there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."
The question then arose as to whether the refoulement issue in S.G.'s case should have been considered under s.5 of the 1996 Act or s.50 of the 2015 Act, or neither, but perhaps implied under s.2 of the *European Convention of Human Rights Act 2003*.[160]
The Court considered a number of submissions made by counsel for both sides as to how to read s.3 of the 1999 Act in light of the altered statutory landscape. The Court concluded that the reference to section 5 of the 1996 Act must now be taken to refer to s.50 of the *International Protection Act 2015*. The Court reached this conclusion on the basis of s.26(2)(f) of the *Interpretation Act 2005*, which provides:

> "Where an enactment ("former enactment") is repealed and re-enacted, with or without modification, by another enactment … a reference in any other enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read as a

[158] Section 5(1) of the 1996 Act provides that "A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion."
[159] Section 50(1) of the 2015 Act provides "A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister—
(a) the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or
(b) there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."
[160] Section 2 of the *ECHR Act 2003* requires the courts to, insofar as is possible, interpret domestic legislation in such a way as to render it compatible with the Convention.

> reference to the provisions of the new enactment relating to the same subject-matter as that of the former enactment…."

Summarising the effect of the judgment for the immigration system in general, the Court said:[161]

> "The take-home point for the ongoing operation of the immigration system is that s.5 of the 1996 Act has been fully repealed and that pursuant to s.26 of the 2005 Act, references in any legislation to s.5 (in particular the reference in s.3 of the 1999 Act) should now be construed as references to s.50 of the 2015 Act, which provides a protection against *refoulement* for all persons being deported, whether such deportation is ordered under s.3 of the 1999 Act or s 51 of the 2015 Act."

The applicant, having regard to the error on the face of the deportation order (referring to the 1996 Act rather than the 2015 Act), was granted an order quashing the deportation order.

Legislative changes

Head 1 of Part 15 of the General Scheme now moves to legislate for the decision in *S.G*. by **incorporating the refoulement considerations directly into the relevant immigration legislation**. That is, s.3 of the *Immigration Act 1999* will be amended to remove the reference to s.5 of the 1996 Act and include directly within that legislation for the principle of non-refoulement. This will clarify the complex interaction of various statutory provisions that had to be teased out by the High Court in the *S.G.* case. The amendment proposes to use the text of the refoulement protection provided in the *International Protection Act 2015*, which is slightly broader than the protection previously provided under the *Refugee Act 1996*.

It should also be noted that the Head also proposes to clarify that the prohibition on refoulement applies to persons the subject of a proposed deportation order under s.3 after the commencement of the *International Protection Act 2015* but before the commencement of this legislation. This seeks to capture any persons that might "fall through the cracks", as it were, of the overlapping legislation, and the overlapping commencement of such legislation.

The Head will also insert an identical provision into the *Immigration Act 2003*. The 2003 Act provides for the removal of persons from the State who have been unlawfully in the State for less than 3 months. A textbook on the subject has noted that this effectively provides a means by which the State can expel persons who are refused leave to land.[162] Removal from the State under s.5 of the 2003 Act is also subject to the principle of non-refoulement, and the Act expressly conditions the Minister's power to deport to s.5 of the *Refugee Act 1996*. For the same reasons discussed in relation to the 1999 Act, the principle of non-refoulement will now be set out directly in the 2003 Act, removing reference to the now repealed 1996 Act.

Head 2

Head 2 simply provides for the commencement of the Part. It proposes that the Minister for Justice and Equality be empowered to commence the provision by order at such time as he sees fit.

[161] [2018] IEHC 184 at [67].
[162] Stanley, *Immigration and Citizenship Law* (Round Hall, 2017) p. 283.

Part 16: Amendments to the *Data Protection Act 2018*

Policy context

Part 16 of the General Scheme proposes amendments to the *Data Protection Act 2018* relating to personal data concerning immigration, asylum and naturalisation. These amendments are intended to facilitate the continued sharing of such data with UK authorities in the event that the UK leaves the European Union without an withdrawal agreement providing for such exchanges.

Legislative changes

- Head 1 of Part 16 proposes new sections 55A, 55B, 55C and Schedule 4 of the 2018 Act. The net effect of these will be to create an Irish statutory version of the EU's Global Data Protection Regulation (GDPR) that applies only to processing of personal data for the purposes of immigration, asylum and naturalisation.
- Head 2 of Part 16 proposes amendments to section 60 of the 2018 Act. If enacted, this will allow restriction of data subjects' rights in respect of processing for immigration, asylum and naturalisation. Section 60 currently gives the Minister for Justice and Equality power to make regulations to bring in restrictions for those purposes; the effect of the proposed amendment is to place such a restriction on a statutory footing without need for Ministerial regulations other than a commencement order.

Implications

Part 16 will create an Irish statutory version of the EU's Global Data Protection Regulation (GDPR) that applies only to processing of personal data for the purposes of immigration, asylum and naturalisation.

Part 17: Exchange of immigration data with the UK

Policy context

Keeping the CTA with the UK is one of the key Brexit priorities of the Government.[163] It means that This means that Irish and British citizens can travel freely within the whole of the British Isles without the need to present a passport at any border.
The CTA relies on **significant cooperation between the immigration authorities in Ireland and the UK. In particular, this involves the transfer of large volumes of personal data.** Following the UK's exit from the European Union, this will become problematic as a result of the provisions of the General Data Protection Regulation (GDPR).

Article 44 of the GDPR provides:

> "Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with…"

[163] Department of Justice, *Immigration in Ireland Annual Review* (2017) p. 7.

Following the UK's exit from the EU on March 29th, it will become a "third country" within the meaning of Article 44 of the GDPR. Ireland would therefore have to justify transfers of data to the UK by reference to Articles 44 – 50 of the GDPR. The GDPR provides a number of ways in which Member States can lawfully transfer data to third countries, falling into three categories:[164]

1. Adequacy decision
2. Appropriate safeguards
3. Specific derogation

It has been observed that these categories may be described as a hierarchy, with an adequacy decision constituting the most desirable solution and specific derogations the least.[165]

1. Adequacy decision

An adequacy decision refers to a decision taken by the European Commission that a third country provides an **adequate level of protection to personal data**. Where such a decision is issued, no specific authorisation is required to transfer data to that third country. While the GDPR directs that the Commission simply be satisfied that the third country offers an "adequate level of protection",[166] the relevant Recitals suggest that the third country must provide data protection roughly equivalent to that provided within the EU.[167]

2. Appropriate safeguards

In the absence of an adequacy decision, there other mechanisms that can be relied on to legally transfer data to a third country. These mechanisms must provide:[168]

- "Appropriate safeguards";
- "Enforceable data subject rights; and
- "Effective legal remedies for data subjects".

Article 46 GDPR and the relevant Recitals indicate that the above conditions can be satisfied by an agreement between public authorities with corresponding duties and functions, one within the EU Member State and the other in the third country. Recital 108 provides that public authorities may insert "provisions into administrative arrangements, such as a memorandum of understanding, **providing for enforceable and effective rights for data subjects."**

3. Specific derogations

At the lower end of the hierarchy, the GDPR provides a **number of specific circumstances in which Member States can derogate** from the Regulation and share data with a third country in

[164] This categorisation is borrowed from Kelleher & Murray, *EU Data Protection Law* (Bloomsbury, 2018) p. 117.
[165] Ibid.
[166] Article 45 GDPR.
[167] Recital 104 to the GDPR provides that "…The third country should offer guarantees ensuring an adequate level of protection essentially equivalent to that ensured within the Union, in particular where personal data are processed in one or several specific sectors. In particular, the third country should ensure effective independent data protection supervision and should provide for cooperation mechanisms with the Member States' data protection authorities, and the data subjects should be provided with effective and enforceable rights and effective administrative and judicial redress."
[168] Article 46(1) GDPR.

the absence of an adequacy decision or appropriate safeguards. These specific circumstances include:[169]

- Where the data subject has explicitly consented to the proposed transfer;
- Where the transfer is necessary for important reasons of public interest;
- Where the transfer is necessary for the establishment, exercise or defence of legal claims;
- Where the transfer is necessary to protect the vital interests of the data subject or other persons where the data subject is physically or legally incapable of giving consent.

Legislative changes

At the time of writing, prior to the publication, it is unclear as to what approach the legislation intends to adopt in ensuring that the State can continue to share and receive immigration data with the UK, without breaching the GDPR.

It would not be possible to secure an adequacy decision from the Commission in respect of the UK in advance of March 29th, as the UK shall remain a Member State until that date, and adequacy decisions are only available in respect of third countries.

The General Scheme indicates an intention to derogate entirely from the requirements in Articles 44-50 in respect of immigration data. However, it is understood that the Department intends to substantially revise this Head. It is therefore not possible to comment on the exact approach that will be adopted in the Bill at this time.

[169] The full list is contained in Article 49 GDPR.

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