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The treatment of Scotland's devolved benefits in the EU-UK Trade and Cooperation Agreement

Dr Simon Roberts, Associate Professor of Social and Public Policy, University of Nottingham

This briefing looks at how Scotland's devolved benefits are treated in the EU-UK Trade and Cooperation Agreement. It is the last of three briefings on Brexit and devolved social security.



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Introduction

This briefing looks at how Scotland's devolved benefits are treated in the [EU-UK Trade and Cooperation Agreement](#).ⁱ It is the last of three briefings on Brexit and devolved social security. The briefing outlines key features of social security coordination in the Trade and Cooperation Agreement for future movers. It presents tables to show how the Agreement applies to [Scotland's devolved benefits](#). Two case studies of Personal Independence Payment (PIP) illustrate the coordinating principles of aggregation and export. The briefing highlights the gaps in social security coverage for future movers between Scotland and the European Union (EU).

ⁱ I am grateful to Camilla Kidner at the Scottish Parliament for comments and discussion on an earlier draft.

The EU-UK Trade and Cooperation Agreement

Coordination of social security for people moving between the EU and the UK from 1 January 2021 is included in the Trade and Cooperation Agreement. In contrast, social security for EU citizens in the UK and UK citizens in the EU who exercised their right to free movement before the end of the Transition period on 31 December 2020 is co-ordinated by the [Withdrawal Agreement](#) (see [briefing 2](#)). The Trade and Cooperation Agreement was agreed by EU and UK negotiators on 24 December 2020, a few days before the expiry of the Transition period on 31 December 2020. The Agreement was initially provisionally applicable from 1 January 2021 until 28 February 2021 to allow time for the [European Parliament's](#) scrutiny. The provisional period has been extended to 30 April 2021 because of ongoing discussions over Northern Ireland.

Part Two, Heading Four, Title I of the Trade and Cooperation Agreement 'Social Security Coordination' provides that "Member States and the United Kingdom shall coordinate their social security systems in accordance with the Protocol on Social Security Coordination, in order to secure the social security entitlements of the persons covered therein." (see below).

Under the Agreement, the UK and the EU must ensure that the provisions of the Protocol on Social Security Coordination have the force of law, either directly or through domestic legislation, so that people can invoke the provisions of the Protocol before domestic courts, tribunals and administrative authorities.

The Agreement will expire after 15 years unless renewed. The UK and the EU may terminate the Protocol by written notification at any time. Should this happen, people's entitlements based on periods of work, contributions or residence that have already been completed, paid or occurred will be retained. A **Partnership Council** may set out transitional and consequential arrangements before the Protocol ceases to apply.

Who is covered?

The Protocol on Social Security Coordination applies to persons, including stateless persons and refugees, who enter into a UK-EU cross-border situation from 1 January 2021 and are not covered by the Withdrawal Agreement, as well as to the members of their families and their survivors.

Principles of social security coordination

The principles of EU social security coordination (see [briefing 1](#)) have been transposed to the Protocol. These are:

Applicable legislation. These are rules to determine which country is responsible for collecting contributions, determining eligibility and administering benefits and services.

Equal treatment prohibits discrimination on nationality grounds. It requires people to be given the same rights and obligations as nationals of the country responsible for their

social security.

Aggregation. Previous periods of insurance, work or residence in other EU member countries are added together to establish entitlement to benefit.

Exportability. Territorial boundaries are removed to make some, mainly long-term, cash benefits exportable to other member countries.

Which benefits are included?

The same *categories* of benefits referred to in Coordinating [Regulation \(EC\) No 883/2004](#) and in the Withdrawal Agreement are included in the Protocol with the exception of family benefits. The benefits covered make up the 'material scope' of the Agreement. These are sickness, maternity and paternity, invalidity, old-age, survivors, accidents at work and occupational diseases, death grants, unemployment and pre-retirement benefits.

However, within these categories several benefits are specifically excluded by Article SSC - 3. These are:

- special non-contributory cash benefits listed in Part 1 of Annex SSC-1
- social and medical assistance
- benefits in relation to which a State assumes the liability for damages
- long-term care benefits which are listed in Part 2 of Annex SSC-1
- assisted conception services
- payments to meet expenses for heating in cold weather listed in Part 3 of Annex SSC-1

The UK's Special Non-Contributory Benefits (SNCBs) (see briefing 1) listed in Part 1 of Annex SSC 1 to the Protocol and therefore excluded from co-ordination are:

- State Pension Credit
- Income-based Jobseeker's Allowance
- Disability Living Allowance, mobility component
- Personal Independence Payment, mobility component
- Income-related Employment and Support Allowance
- Best Start Foods payment under The Welfare Foods (Best Start Foods) (Scotland) Regulations 2019
- Best Start Grants (pregnancy and baby grant, early learning grant, school-age grant under The Early Years Assistance (Best Start Grants) (Scotland) Regulations 2018
- Funeral Support Payment under The Funeral Expense Assistance (Scotland) Regulations 2019.

Part 2 of Annex SSC 1 lists the following excluded long-term care benefits:

- Attendance Allowance
- Carer's Allowance
- Disability Living Allowance, care component
- Personal Independence Payment, daily living component
- Carer's Allowance Supplement under The Social Security (Scotland) Act 2018
- allowances to promote mobility and to compensate for transport costs
- Young Carer's Grant under The Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019 (as amended)).

Part 3 of Annex SSC 1 lists Winter Fuel Payment as being excluded from co-ordination under the Protocol.

A **Specialised Committee on Social Security Coordination** may amend the Annexes and Appendices to the Protocol. However, the Committee has yet to be set up.

Scotland's devolved benefits under the Trade and Cooperation Agreement

The tables below show the status of Scotland's devolved and to be devolved benefits in the Withdrawal Agreement and the Trade and Cooperation Agreement. Table 1 shows benefits currently administered by Social Security Scotland, Table 2 shows benefits that are either devolved or due to be devolved but currently administered by the Department for Work and Pensions (DWP). Table 3 shows proposed Social Security Scotland benefits for which draft regulations have been published.

Benefits classed as 'Social security' are fully co-ordinated and all four principles of coordination described above apply. Special Non-contributory Benefits (SNCBs) are partially coordinated. The principles of applicable legislation, equal treatment and aggregation all apply. However, SNCBs cannot be 'exported'. The distinction between social security, SNCBs and social assistance has been defined by case law. It is not for a member country to decide how a benefit is classified for the purpose of co-ordination. While the member country will describe the benefit's characteristics and may give an opinion, classification is a matter for the '[Administrative Commission for the coordination of social security systems](#)' (See briefing 1).

Table 1: Benefits currently administered by Social Security Scotland

Benefit	Included in Withdrawal Agreement	Included in Protocol to Trade and Cooperation Agreement
Carer's Allowance Supplement	YES - Social Security - all 4 principles of coordination apply	NO
Young Carer Grant	YES - Social Security - all 4 principles of coordination apply	NO
Best Start Grant	Classification yet to be agreed within the Administrative Commission. The Scottish and UK Governments' view is that they are either Special Non-Contributory Benefits (SNCB) or social assistance. If SNCB, not exportable. If social assistance not included	NO
Best Start Foods	As above	NO
Funeral Support Payment	As above	NO
Scottish Child Payment	As above	If a family benefit, NO
Child Winter Heating Assistance	May be classified as a cash sickness benefit for the purposes of Regulation 883/2004 and the Withdrawal Agreement. There will be a discussion on this at a forthcoming meeting of the Administrative Commission.	No discussions yet about whether and how may fall in scope of the TCA. Likely to be something for the Specialised Committee to determine when it has been set up.

Table 2: Devolved or due to be devolved but currently administered by DWP

Benefit	Included in Withdrawal Agreement	Included in Protocol to Trade and Cooperation Agreement
Disability Living Allowance - (care component)	YES - Social Security - all 4 principles of coordination apply.	NO
Disability Living Allowance - (mobility component)	YES - SNCB - not exportable.	NO
Personal Independence Payment - (daily living component)	YES - Social Security - all 4 principles of coordination apply.	NO
Personal Independence Payment - (mobility component)	YES - SNCB - not exportable.	NO
Attendance Allowance	YES - Social Security - all 4 principles of coordination apply.	NO
Industrial Injuries Disablement Benefit	YES - Social Security - all 4 principles of coordination apply.	YES
Carer's Allowance	YES - Social Security - all 4 principles of coordination apply.	NO
Severe Disablement Allowance	YES - Social Security - all 4 principles of coordination apply.	YES
Winter Fuel Payment (due to be devolved)	YES - Social Security - all 4 principles of coordination apply.	NO
Cold Weather Payment (due to be devolved)	YES - SNCB - not exportable.	NO

Table 3: Proposed Social Security Scotland benefits

Benefit	Included in Withdrawal Agreement	Included in Protocol to Trade and Cooperation Agreement
Child Disability Payment	YES - Social Security - all 4 principles of coordination apply.	NO
Adult Disability Payment	YES - Social Security - all 4 principles of coordination apply.	NO

The Administrative Commission for the coordination of social security systems has not yet classified Adult Disability Payment (ADP) and Child Disability Payment (CDP). However, given these benefits' similarity to Disability Living Allowance (DLA) and Personal Independence Payment (PIP), the table assumes they will be classified in the same way. The table assumes that given the similarity of ADP and CDP to DLA and PIP they will not be covered by the Trade and Cooperation Agreement.

Case Studies

This section presents two case studies of [Personal Independence Payment \(PIP\)](#) to illustrate the operation of two of the principles of co-ordination (aggregation and export). PIP is designed to provide financial support to meet some of the extra costs of long-term ill health or disability. PIP has two components: the 'mobility component' and the 'daily living component'. Both are listed in Annex SSC1 to the Protocol – the mobility component under Part 1 of the Annex and the daily living component under Part 2 - as excluded from social security coordination by the Trade and Cooperation Agreement.

The principle of exportability

Isla and her daughter Mary live in Edinburgh and are planning to move to Elche in Spain in July 2021. Isla suffers from Rheumatoid Arthritis and Mary, who is 17 years old, provides care for her for at least 20 hours every week. Isla receives Personal Independence Payment (PIP) daily living component while Mary receives the Young Carer Grant. Under the principle of exportability of 'social security' in the Withdrawal Agreement, Isla would have continued to receive her daily living component of PIP and Mary would have continued to receive her Young Carer Grant if they had moved to Spain before the end of the Transition period on 31 December 2020. However, neither PIP nor Young Carer Grant are covered by the Protocol to the Trade and Cooperation Agreement so Isla and Mary will not be able to export their PIP daily living component and Young Carer Grant if they move to Spain. This may affect their decision whether to live in Spain.

The principle of aggregation

The principle of aggregation requires a member country, when assessing entitlement to a benefit, to take account of periods of social insurance, work or residence in other member countries as if they had been completed under its own legislation.

Under the Withdrawal Agreement, the principle of aggregation of periods of social insurance, work or residence continues to apply to both elements of Personal Independence Payment. Genevieve, who struggles with a mental health condition, was born and lived in Ullapool with her mother until 2015 when she moved to live with her father in Bremen. Genevieve decided to return to live with her mother in Ullapool in 2020 but because of Covid delayed moving until March 2021. If Genevieve had moved back to Scotland before the end of the Transition period on 31 December 2020 she would have been covered by the Withdrawal Agreement and could have counted the five years she had lived with her father in Germany towards satisfying the qualifying condition for PIP - that a person must have lived in England, Scotland or Wales for at least two of the previous three years. As she didn't move back to Scotland until after the end of the Transition period she is not covered by the Withdrawal Agreement but falls within the scope of the Trade and Cooperation agreement. However, PIP is not included in the Trade and Cooperation Agreement and Genevieve cannot count the time she lived in Germany to meet the residence requirement but will have to live for at least two years in Scotland before she has any entitlement to PIP.

Discussion

Tables 1, 2 and 3 show that the Social Security Protocol to the Trade and Cooperation Agreement co-ordinates fewer benefits than the Withdrawal Agreement. [The UK-Ireland Convention on Social Security](#) is a reciprocal bilateral agreement to provide social security rights to UK and Irish citizens in Ireland and the UK respectively, and their family members, that they had previously enjoyed under the Common Travel Area arrangements and EU social security co-ordination regulations. The agreement is designed to ensure that the social security rights of UK and Irish nationals and their family members who move between the UK and Ireland after the UK's exit from the EU, including following the end of the Transition period, are protected.

However, Article SSC.4 (Non-discrimination between Member States) of the Trade and Cooperation Agreement Protocol on social security coordination, and the EU's [Q&A on the European Commission website: Can the UK discriminate between EU citizens in the context of short-term travel or social security?](#) rules out any further bilateral social security agreements between the UK and EU member countries:

“ Whilst the EU and the UK are free to determine their respective visa policies, the UK must treat all nationals of EU Member States equally; it cannot decide to grant a visa waiver for short-term travel to citizens of certain Member States, whilst excluding others. This principle of non-discrimination between EU citizens is also applicable in other areas of the agreement which are directly relevant to citizens, such as in relation to temporary stays for business purposes, **Social Security Coordination**, or participation in Union Programmes.”

The restricted number of social security benefits co-ordinated by the Trade and Cooperation Agreement may restrict people's life choices, in particular those with disabilities. A consideration for Scotland's Parliament is the potential impact of gaps in social security entitlements for people moving to Scotland in the future when considering residence criteria attached Scotland's devolved benefits.

Next Event

After the May elections, the Scottish Parliament Information Centre will host a webinar on the issues raised in these briefings.

The other briefings in this series were:

- [What is Social Security Co-ordination and why does it matter for Scotland?](#) (December 2020)
- [The treatment of Scotland's devolved benefits in the Withdrawal Agreement](#) (February 2021)

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