

# The UK and Social Security Coordination after Brexit: Reinventing the Wheel or Mad Hatter's Tea Party?

SIMON ROBERTS

University of Nottingham, United Kingdom

**SUMMARY:** *On 23 June 2016 the United Kingdom voted in a referendum to leave the European Union. On 17 January 2017, the UK Prime Minister, Theresa May, stated that what she is seeking is "Not partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries. We do not seek to hold on to bits of membership as we leave. No, the United Kingdom is leaving the European Union" (Reuters, 16 January 2017). It is by no means clear what "leaving" the EU will mean for the UK, the EU and the millions of European citizens who have exercised their right to free movement enshrined in the Treaty of Rome "with the legitimate expectation that their EU citizenship rights were irrevocable." (UK Citizens in Europe, "Towards an Alternative White Paper on the European Union (Notification of Withdrawal) Bill", February, 2017). This article considers the implications of the UK's decision to leave the EU for mobile EU citizens' social security and healthcare rights in the UK and UK nationals' corresponding rights in the EU. It examines the rights at stake and possible arrangements to coordinate social security following Brexit. The article concludes that the most effective arrangement would look conspicuously similar to the current coordinating Regulations 883/04 and 987/09. However, in the event of a 'Hard' Brexit new institutional arrangements would have to be found to administer, review, revise, interpret, and provide consistency and legal certainty across at least 30 countries.*

**KEY WORDS:** *European Union, Brexit, Free Movement, Coordination of Social Security*

## Introduction

On 23 June 2016 the United Kingdom (UK) voted in a referendum by a narrow margin of 51.9% to 48.1%, on a turnout of 72.2% of the electorate, to leave the European Union (EU).<sup>1</sup> The Conservative Prime Minister, David Cameron, who had called the referendum and then campaigned to remain in the EU, had stated on 22 February 2016 that *If the British people vote to leave, there is only one way to bring that about, namely to trigger article 50 of the treaties<sup>2</sup> and begin the process of exit, and the British people would rightly expect that to start straight away.*<sup>3</sup>

Instead, the following morning, David Cameron resigned, to be replaced without a General Election, by a new Conservative Prime Minister, Theresa May, who had also campaigned against leaving the EU. More than eight months later, article 50 has still not been triggered by the UK Government – although it is expected that it will have been by the end of March 2017. In her speech on 17 January 2017, setting out her 12 priorities for the forthcoming negotiations, Theresa May stated that what she is seeking is *Not partial membership of the European Union, associate*

<sup>1</sup> Electoral Commission, <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> (retrieved 20.03.2017).

<sup>2</sup> Article 50 of the Treaty on European Union. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on European Union – Protocols – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – Tables of equivalences, Official Journal C 326, 26/10/2012 P. 0001–0390.

<sup>3</sup> Open Europe, <http://openeurope.org.uk/daily-shakeup/cameron-government-would-promptly-trigger-article-50-in-the-event-of-a-leave-vote/> (retrieved 20.03.2017).

*membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries. We do not seek to hold on to bits of membership as we leave. No, the United Kingdom is leaving the European Union.*<sup>4</sup>

Despite this statement and a Government White Paper published in February 2017,<sup>5</sup> it is by no means clear what “leaving” the EU will mean for the UK, the EU and the millions of European citizens who have exercised their right to free movement enshrined in the Treaty of Rome and manifested in their legal status as European Citizens. This article considers the implications of the UK’s decision to leave the EU for mobile EU citizens’ social security and healthcare rights in the UK and UK nationals’ corresponding rights in the EU. The analysis is founded on research carried out by the author over almost two decades in his role as the UK National Expert on several European Commission funded networks on free movement and social security coordination,<sup>6</sup> although errors and the views expressed are, of course, the author’s own.

### **What is social security coordination?**

Every person holding the nationality of an EU member country is an EU citizen.<sup>7</sup> EU

citizenship is a set of rights additional to those of national citizenship. One of those rights is the right to move, work and live in any EU member country. The drafters of the Treaty of Rome recognised that the member countries’ different social security systems and the restrictions on benefit entitlement they presented to migrant workers through nationality, residence, presence and insurance contribution conditions could be a barrier to the right of free movement enshrined in the Treaty.<sup>8</sup>

To remove some of the disadvantages that EU migrant workers faced as a result of national social security rules, the Treaty of Rome laid the foundations for regulations to be introduced to coordinate the member countries’ social security schemes throughout the European Economic Community (EEC) for the benefit of migrant workers.<sup>9</sup> The coordinating regulations have been revised and reformed as the EEC has evolved to become the EU with the current arrangements provided by EU Regulation 883/04<sup>10</sup> and its implementing Regulation 987/09.<sup>11</sup> The regulations use four key principles to adjust social security systems in relation to each other to protect the entitlements of mobile workers and citizens while leaving the national schemes otherwise intact.<sup>12</sup>

<sup>4</sup> Reuters, 16 January 2017, <http://uk.reuters.com/article/britain-eu-may-priorities-idUKL5N1F655Y> (retrieved 20.03.2017).

<sup>5</sup> Department for Exiting the European Union White Paper, *The United Kingdom’s exit from and new partnership with the European Union*, White Paper published 2 February 2017, <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper> (retrieved 20.03.2017).

<sup>6</sup> For the last 17 years Dr Simon Roberts has been (variously) UK National Expert and Member of the Editorial Board on the European Commission’s Observatory on Social Security for Migrant Workers; UK National Expert, a Visiting International Expert and member of the Think Tank and the pool of Analytic Experts on the European Commission’s Training and Reporting on European Social Security (trESS) network; and is now the UK National Expert and a Visiting International Expert on the European Commission’s Network of Experts on Intra-EU Mobility – Free Movement of Workers and Social Security Coordination (FreSsco).

<sup>7</sup> European Commission, *Justice, EU Citizenship and Free Movement*, <http://ec.europa.eu/justice/citizen/> (retrieved 20.03.2017).

<sup>8</sup> Watson P., *Social security law of the European Communities*, Mansell, London 1980; Holloway J., *Social policy harmonisation in the European Community*, Gower, Farnborough 1981.

<sup>9</sup> Cornelissen R., *Achievements of 50 years of European social security coordination*, in: *50 Years of Social Security Coordination*, Publications Office of the European Union, Luxembourg 2010; Roberts S., *A Short History of Social Security Coordination*, in: *50 Years of Social Security Coordination*. Luxembourg, Publications Office of the European Union 2010.

<sup>10</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, Official Journal of the European Union, 30.04.2004.

<sup>11</sup> Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

<sup>12</sup> Pennings F., *Introduction to European social security law*, Fourth Edition, Intersentia, Antwerp 2003.

These are:

- Equal treatment – discrimination on grounds of nationality is prohibited to guarantee that a person residing on the territory of a member state is subject to the same obligations and benefits from the same rights as the citizens of that member state.
- Rules determine which member country is responsible for collecting social insurance, determining entitlement and paying benefits.
- Periods of insurance, residence or employment spent in different EU member countries can be added together to establish an entitlement to benefits.
- Some, mainly long term, benefits can be exported anywhere in the EU.<sup>13</sup>

All EU nationals (and members of their family) who are covered by the social security legislation of an EU member country are eligible to benefit from the EU social security coordinating regulations.<sup>14</sup> This includes employees and self-employed people, people who are unemployed or outside the labour market, pensioners and students. The regulations apply to social security benefits for sickness (cash and in kind i.e. healthcare), maternity and paternity, old-age, pre-retirement, invalidity, survivors, death grants, unemployment, family benefits, accidents at work and occupational illness. The principles apply to all EU and European Economic Area (EEA) member countries and are reciprocal – for example, UK nationals benefit to the same extent as other EU nationals. The coordinating regulations are dynamic and subject to frequent scrutiny by the European Court of Justice (ECJ), and review and revision by the European Commission, European Council and the European Parliament.<sup>15</sup>

The EU regulations do not require that member countries provide unlimited access to their benefits to EU/EEA mobile workers and citizens.<sup>16</sup> Access to benefits depends on the reason for moving to the host country. A person who moves from one member country to another has access to benefits on an equal basis with host country nationals if they meet the definition of a ‘worker’ under EU law. ‘Work seekers’ on the other hand, face more restrictive access to benefits, while EU migrants who are ‘economically inactive’, including people who are unable to work due to disability<sup>17</sup> or sickness, may be denied benefits if they move from one member country to another.<sup>18</sup> The coordination regulations allow an EU migrant worker to claim ‘family benefits’ for dependent children, who are living in another member country, from the country in which they are working. These benefits may be offset against family benefits that are being paid by the country where the child is living.<sup>19</sup>

The EU coordinating regulations also provide access to both medically necessary and planned healthcare in another member country.<sup>20</sup> A person who is exercising their EU Treaty rights (for example, they are employed, self-employed, a student or a family member) is entitled to healthcare in the host member country under the same conditions as a host country national. The European Health Insurance Card (EHIC) provides access to medically *necessary*, state-provided healthcare during a temporary stay in another EU country as well as in Iceland, Lichtenstein, Norway and Switzerland, under the same conditions as people who are covered for healthcare in that country. The EHIC covers all maternity care, including antenatal and postnatal care, provided the re-

<sup>13</sup> European Commission, Employment, Social Affairs & Inclusion, *EU Social Security Coordination*, <http://ec.europa.eu/social/main.jsp?catId=849> (retrieved 20.03.2017).

<sup>14</sup> Ibidem.

<sup>15</sup> Roberts S., *A Short History...*, op. cit.

<sup>16</sup> House of Commons, *Brexit: impact across policy areas*, Library Briefing Paper Number 07213, 26 August 2016, Edited by Vaughne Miller.

<sup>17</sup> Roberts S., *Free Movement and Special Non-Contributory Benefits for Disabled People: Between the Devil and the Deep Blue Sea*, ERA Forum 2016, 17(2), p. 221–232.

<sup>18</sup> House of Commons (2016), *Brexit...*, op. cit.

<sup>19</sup> European Commission, Employment, Social Affairs & Inclusion, *EU Social...*, op. cit.; House of Commons, *Brexit...*, op. cit.

<sup>20</sup> European Commission, Directorate-General for Employment, Social Affairs & Inclusion, *The coordination of healthcare in Europe Rights of insured persons and their family members under Regulations (EC) No 883/2004 and (EC) No 987/2009*, Publications Office of the European Union, Luxembourg 2011.

ason for the woman's visit was not specifically to give birth or receive maternity treatment.<sup>21</sup>

Regulation 883/04 provides for a patient to receive state-provided *planned* healthcare in another member country either at the discretion of the country where the person is insured or when treatment cannot be provided by that country within a medically acceptable time. Costs are reconciled directly between the member countries concerned.<sup>22</sup>

There is a second route to receive planned healthcare in another EU member country under Directive 2011/24/EU. Under the terms of this Directive, EU citizens who choose to receive a healthcare service in another member country can seek reimbursement of the costs, provided the healthcare service received is equivalent to a service that would have been provided to the patient in their 'home' country.<sup>23</sup>

The UK Government's *Review of the Balance of Competences between the United Kingdom and the European Union Single Market: Free Movement of Persons*<sup>24</sup> published in the summer of 2014, concluded that the EU social security coordinating regulations are of significant benefit to UK citizens:

*A key element of EU social security coordination is the rules which allow those who have worked and made contributions in one State to receive, for example, their state pension when retiring to another State. These provisions are of significant benefit to UK citizens, particularly retirees, who are living in other Member States.... The export of pensions to those who have accrued the necessary entitlements is perhaps the clearest example of the necessary role of coordination rules as originally envisaged.*

## Brexit scenarios for free movement

While the Prime Minister, Theresa May, has announced that "Brexit means Brexit"<sup>25</sup> it is still by no means clear, at the time of writing, what this will mean for those people who have exercised their right to free movement, many before the Lisbon Treaty<sup>26</sup> amended the Treaty of the European Union<sup>27</sup> to provide for a right of withdrawal under Article 50, *with the legitimate expectation that their EU citizenship rights were irrevocable.*<sup>28</sup>

The implications of different Brexit scenarios have been examined in a series of reports and articles.<sup>29</sup> Prior to Theresa May's statement

<sup>21</sup> European Commission, Employment, Social Affairs&Inclusion, *European Health Insurance Card*, <http://ec.europa.eu/social/main.jsp?catId=559> (retrieved 20.03.2017).

<sup>22</sup> European Commission, Directorate-General for Employment, Social Affairs and Inclusion, *The coordination of healthcare in Europe Rights of insured persons and their family members under Regulations (EC) No 883/2004 and (EC) No 987/2009*, Publications Office of the European Union, Luxembourg 2011.

<sup>23</sup> Department of Health Cross Border Healthcare and Patient Mobility in Europe: *Information to accompany the implementation of Directive 2011/24/EU – on patients' rights in cross-border healthcare*.

<sup>24</sup> HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union Single Market: Free Movement of Persons* published summer 2014, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/335088/SingleMarketFree\\_MovementPersons.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335088/SingleMarketFree_MovementPersons.pdf) (retrieved 20.03.2017).

<sup>25</sup> Independent, <http://www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-a7130596.html> (retrieved 20.03.2017).

<sup>26</sup> Europa, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01)*, Official Journal of the European Union.

<sup>27</sup> Europa, *Consolidated Version of the Treaty on European Union*, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT> (retrieved 20.03.2017).

<sup>28</sup> UK Citizens in Europe, *Towards an Alternative White Paper on the European Union (Notification of Withdrawal) Bill*, February, 2017.

<sup>29</sup> Wray H., *What would happen to EU nationals living or planning to visit or live in the UK after a UK exit from the EU*, EU Law Analysis, 17 July 2014; HM Government, *Alternatives to membership: possible models for the United Kingdom outside the European Union*, presented to Parliament pursuant to section 7 of the European Union Referendum Act 2015, March, HMSO, London 2016; Dhingra S., Sampson T., *Life after BREXIT: What are the UK's options outside the European Union?*, Centre for Economic Performance, London School of Economics, February 2016; Frimston A., *Preparing for the UK's Brexit Negotiation*, Chatham House 5 August 2016, <https://www.chathamhouse.org/PUBLICATIONS/TWT/PREPARING-UKS-BREXIT-NEGOTIATION#sthash.fBMVYONy.dpuf> (retrieved 20.03.2017); Peel Q., *Britain's new global role after Brexit?*, Chatham House, <https://www.chathamhouse.org/publications/twt/britain-s-new-global-role-after-brexit> (retrieved 20.03.2017); Emerson M., *Which model for Brexit?*, No. 147/October 2016, CEPS Special Report: *Thinking ahead for Europe*, <http://ec.europa.eu/justice/citizen/> (retrieved 20.03.2017); Oxford Economics, *Global Economic Model*, <http://www.oxfordeconomics.com/forecasts-and-models/countries/scenario-analysis-and-modeling/global-economic-model/overview> (retrieved 20.03.2017).

on 17 January 2017 much attention was paid to the arrangements in place between the EU and the EFTA countries, in particular Norway as representative of the EEA, and Switzerland as a model based on a plethora of bilateral agreements, Canada's Comprehensive Economic and Trade Agreement (CETA) and Turkey's customs union, as possible models for a new relationship between the UK and the EU. In March 2016, the UK Government published *Alternatives to membership: possible models for the United Kingdom outside the European Union*,<sup>30</sup> which considered various models in the event of a leave vote, in terms of costs and obligations, influence and sovereignty and suitability for the UK. There was no consideration of the costs for the EU.

These scenarios impact differently on the rights of people who have or would wish to exercise their right to free movement in the EU. The option of leaving the EU but remaining in the EEA is exemplified by Iceland, Liechtenstein and Norway, which are members of the European Free Trade Association (EFTA) and are integrated in the internal market through the EEA Agreement of 1994.<sup>31</sup> The EEA Agreement includes the free movement of people and coordination of social security. Regulation 883/04 applies in relation to the EEA countries, Norway, Iceland and Liechtenstein, since 1 June 2012.<sup>32</sup> These countries must adopt all relevant EU legislation without having a seat on the EU's decision-making bodies. According to the Council of the European Union: *This Agreement functions properly so long as all Contracting Parties incorporate the full body of the relevant EU acquis relating to the internal market into their national law.*<sup>33</sup>

If the UK leaves the EU but remains in the EEA the coordination of social security would be unaffected.

Switzerland is the fourth EFTA country. However, Switzerland is not a member of the EEA. The Swiss-EU relationship is instead based on a series of bilateral agreements – more than 100 in all. Like Iceland, Liechtenstein and Norway, Switzerland pays a contribution to the EU budget but does not have a seat at the EU's policy making bodies. Despite Theresa May's statement that the UK *does "not seek to adopt a model already enjoyed by other countries"* some observers nevertheless consider that the Swiss arrangement may provide a model for the UK's relationship with the EU following Brexit. For example, the Polish Deputy Prime Minister Mateusz Morawiecki, said on 1 February 2017 that Britain will probably retain access to the EU single market after Brexit and continue to pay contributions to the EU budget. Mateusz Morawiecki said that following his discussions with UK ministers and EU officials he thought that *both sides will come to an agreement on such a participation of Britain in the single market that it will not be of course full participation, but far reaching participation. For example like Switzerland.*<sup>34</sup>

However, Dhingra and Sampson<sup>35</sup> think it is unlikely that the EU will want to replicate the Swiss-EU relationship for the UK as the Council of the European Union has stated that *the challenge of the coming years will be to go beyond this complex system, which is creating legal uncertainty and has become unwieldy to manage and has clearly reached its limits.*<sup>36</sup>

Switzerland is included within the pillar on free movement under an Agreement of 21

<sup>30</sup> HM Government (2016), *Alternatives to membership: possible models for the United Kingdom outside the European Union*, presented to Parliament pursuant to section 7 of the European Union Referendum Act 2015, March, HMSO, London 2016.

<sup>31</sup> EFTA, *EEA Agreement*, <http://www.efta.int/eea/eea-agreement> (retrieved 20.03.2017).

<sup>32</sup> Annex VI to the Agreement on the European Economic Area (EEA Agreement), as updated by Decision No 76/2011 of the EEA Joint Committee; European Commission, Employment, Social Affairs & Inclusion, *EU Legislation, Modernised Coordination*, <http://ec.europa.eu/social/main.jsp?catId=867&langId=en> (retrieved 20.03.2017).

<sup>33</sup> Council of the European Union, *Council conclusions on EU relations with EFTA countries*, 3060th General Affairs Council meeting, 14 December, Brussels 2010.

<sup>34</sup> *Poland expects UK will get Swiss-like deal with EU after exit*, Reuters, 1 Feb, 2017.

<sup>35</sup> Dhingra S., Sampson T., *Life after BREXIT...*, op. cit.

<sup>36</sup> Council of the European Union, *Council conclusions on EU relations with EFTA countries*, 3060th General Affairs Council meeting, Brussels, 14 December 2010.

June 1999, which entered into force on 1 June 2002. The current regulations coordinating social security, Regulations 883/04 and 987/09, apply to Switzerland since 1 April 2012.<sup>37</sup> Switzerland was recently reminded of the inviolability of the principle of free movement when, in February 2014, the country voted in a referendum to introduce quotas for EU nationals coming to Switzerland. In response, the EU reminded the Swiss Government that *the free movement of persons is a fundamental pillar of EU policy ... the internal market and its four freedoms are indivisible* and that the introduction of quotas on EU citizens would be a breach of the EU-Switzerland bilateral agreements.<sup>38</sup> If the UK seeks to replicate the Swiss model, as with Iceland, Liechtenstein and Norway, the coordination of social security would be unaffected.

## No Deal

Following her statement on 17 January 2017 that *We do not seek to adopt a model already enjoyed by other countries*, Theresa May went on to say that: *I am equally clear that no deal for Britain is better than a bad deal for Britain*. The “No deal” scenario, where negotiations break down and the UK leaves the EU without any new arrangements in place, would mean that the UK’s relationship with the EU would be subject to World Trade Organisation (WTO)<sup>39</sup> rules which would involve the imposition of tariffs and non-tariff barriers. According to the UK Government’s own analysis *WTO rules... would be the most definitive break with the EU, offering no preferential access to the Single Market, no wider co-operation on crime or terrorism, no obligations for budgetary contributions or free movement of people*.<sup>40</sup> Although, if negotiations do

break down and the UK leaves the EU without a deal, the negotiations with the WTO may not be straightforward, as the EU is itself an important member of the WTO holding, like all members, a veto.<sup>41</sup>

The implications of a ‘Hard Brexit’/WTO scenario for free movement have been identified by the UK Government’s own analysis: *UK nationals would not have the rights that they currently enjoy to live, work and travel in the EU... The UK would no longer be required to maintain free movement for EU and EEA nationals. New rules could require all foreign citizens that wish to move to the UK to apply for and receive a visa. But if we did this, other countries could be expected to impose similar restrictions on UK nationals living in, or travelling to, other Member States. The UK would still need to comply with WTO obligations relating to the temporary migration of professionals. And we might find, in seeking to negotiate trade deals that other countries, such as India and Japan, prioritised access to the UK labour market in FTA negotiations*.<sup>42</sup>

Wray<sup>43</sup> has suggested that, in this scenario, EU citizens who are already exercising their Treaty rights in the UK, would probably be permitted to remain as long as they continue to exercise those rights, with the possibility of being or becoming eligible for permanent residence or indefinite leave to remain under UK legislation. However, EU citizens (and members of their family) who wish to enter the UK following a ‘Hard Brexit’ would be subject to UK immigration law without the modifying influence of EU Treaty rights and the *process of entering the UK would become more complicated and time-consuming, even for a for a short meeting or weekend visit.. (while).. all EU citizens would need to obtain a visa if they wish to come to the UK for*

<sup>37</sup> Annex II to the Agreement between the European Community and its Member States and the Swiss Confederation on the free movement of persons, as updated by Decision No 1/2012 of the Joint Committee established by that agreement; European Commission, Employment, Social Affairs & Inclusion, *EU Legislation, Modernised Coordination*, <http://ec.europa.eu/social/main.jsp?catId=867&langId=en> (retrieved 20.03.2017).

<sup>38</sup> HM Government (2016) *Alternatives to membership: possible models for the United Kingdom outside the European Union*. Presented to Parliament pursuant to section 7 of the European Union Referendum Act 2015, March 2016, London: HMSO.

<sup>39</sup> World Trade Organisation, <https://www.wto.org/> (retrieved 20.03.2017).

<sup>40</sup> HM Government, *Alternatives ...*, op. cit., para 384.

<sup>41</sup> World Trade Organisation, <https://www.wto.org/> (retrieved 20.03.2017).

<sup>42</sup> HM Government, *Alternatives...*, op. cit.

<sup>43</sup> Wray H., *What would happen to EU nationals living or planning to visit or live in the UK after a UK exit from the EU?*, EU Law Analysis, 17 July 2014.

long term purposes such as for work, study or family reunification.<sup>44</sup>

The process to apply for UK residency has been called a bureaucratic “nightmare” requiring the completion of an 85 page form. *EU citizens must now prove they have been living and working in the UK for the past five years, providing documents for every occasion they have left the UK in that period, while those who have not been working must reportedly show they took out comprehensive health insurance – a requirement that was little known until recently.*<sup>45</sup>

In its first report, the ‘House of Commons Exiting the EU Committee’ concluded: *It is clearly in everyone’s interests to resolve the position of EU nationals currently in the UK and of UK nationals in other EU member states as quickly as possible so as to provide certainty and reassurance to the individuals, their families and the businesses and services that rely on them.... This must be an early priority for the negotiations.*<sup>46</sup>

On 1 March 2017, the House of Lords voted by 358 votes to 256, a majority of 102, to amend the European Union (Notification of Withdrawal) Bill to guarantee the rights of EU nationals living in the UK after Brexit. The amendment states that: *Within three months of exercising the power under section 1(1), Ministers of the Crown must bring forward proposals to ensure that citizens of another European Union or European Economic Area country and their family members, who are legally resident in the*

*United Kingdom on the day on which this Act is passed, continue to be treated in the same way with regards to their EU derived-rights and, in the case of residency, their potential to acquire such rights in the future.*<sup>47</sup>

Despite the Prime Minister’s statement on 17 January 2017 that *Fairness demands that we .... guarantee the rights of EU citizens who are already living in Britain, and the rights of UK nationals in other member states, as early as we can*, on 13 March 2017, the UK Government overturned the House of Lords’ amendment in the House of Commons, leaving continuing uncertainty for EU citizens in the UK.<sup>48</sup>

### **Brexit and social security coordination: The rights at stake**

There have been several considerations of the implications of Brexit for mobile workers’ and citizens’ social security entitlements.<sup>49</sup> However, Theresa May’s statement of 17 January 2017 and the subsequent White Paper<sup>50</sup> published in early February focus attention on the ‘Hard Brexit’/WTO scenario. This scenario highlights the range of social security and healthcare rights that would be lost to mobile UK nationals in the EU and EU citizens in, or coming to, Britain.

In this scenario *Brexit could have significant implications both for EU/EEA nationals living in or wishing to move to the UK, and for UK expatria-*

<sup>44</sup> Ibidem.

<sup>45</sup> Bulman M., *EU nationals express ‘utter desperation’ following MPs rejection of Lords amendment*, Independent, 14 March 2017, <http://www.independent.co.uk/news/uk/home-news/brexit-eu-nationals-mps-lords-amendment-article-50-utter-desperation-commons-a7628291.html> (retrieved 20.03.2017).

<sup>46</sup> House of Commons Exiting the European Union Committee, *The process for exiting the European Union and the Government’s negotiating objectives*, First Report of Session 2016–17, Report, together with formal minutes relating to the report, Ordered by the House of Commons to be printed 11 January 2017, para 87.

<sup>47</sup> House of Lords Hansard European Union (Notification of Withdrawal) Bill, 01 March 2017, Volume 779, European Union (Notification of Withdrawal) Bill.

<sup>48</sup> Bulman M., *EU nationals express...*, op. cit.

<sup>49</sup> For example: Peers S., *What happens to British expatriates if the UK leaves the EU?*, EU Law Analysis, 9 May 2014; House of Commons, *Frozen Overseas Pensions*, Library Briefing Paper SN01457, May 2016, author: Djuna Thurley; Machin R., *Social security in the aftermath of the EU referendum*, Legal Action, June 2016; Mazars, *Brexit – Implications for social security*, 15 July 2016; Bräuninger D., *Social security system coordination after Brexit: ‘Free movement provides for more than the right to work in partner countries’*, Deutsche Bank Research Talking point, 28 July, 2016; House of Commons, *Brexit: impact across...*, op. cit.; Guild E., *Brexit and Social Security in the EU*, CEPS Commentary: Thinking ahead for Europe, 17 November 2016, <https://www.ceps.eu/publications/brexit-and-social-security-eu> (retrieved 20.03.2017); House of Commons, *Brexit: what impact on those currently exercising free movement rights?*, Library Briefing Paper Number 7871, 19, January 2017. By Terry McGuinness.

<sup>50</sup> Department for Exiting the European Union White Paper, *The United Kingdom’s exit from and new partnership with the European Union*, White Paper published 2 February 2017, <https://www.gov.uk/government/publications/the-United-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper> (retrieved 20.03.2017).

tes elsewhere in the EU/EEA, and those considering moving abroad<sup>51</sup> If the UK leaves the EU and the EEA it will be able to subject EU and EEA nationals to the same rules that apply to non-EEA nationals. Guild notes that *British social security rules are designed to exclude all foreigners from almost all social benefits for substantial periods of time.*<sup>52</sup> Under these circumstances, entitlement to contributory social security benefits could be controlled through access to employment.<sup>53</sup> However, David Davies, the Secretary of State for Exiting the European Union, stated in Riga on 22 February 2017, that it was *not plausible that British citizens would immediately take jobs in agriculture, social care and hospitality industry once the UK had left the EU and repeated comments made in Estonia*” (the day before) *“that immigration restrictions would be phased in.*<sup>54</sup>

The UK would be able to discriminate directly and indirectly against EU nationals to restrict access to tax-financed non-contributory benefits through a mix of immigration regulations, such as granting newcomers from the EU leave to remain subject to the condition that they have “no recourse to public funds” and benefit entitlement conditions, including nationality, residence and presence conditions.<sup>55</sup>

However, what is often overlooked by pro-Brexit political commentators in the UK is that free movement of workers and citizens and the coordination of social security and healthcare is reciprocal and benefits UK nationals working and living in another EU country in precisely the same ways as it benefits citizens from other EU countries working and living in the UK. Therefore, Brexit will impact on UK nationals living in other EU/EEA co-

untries, as member countries will be able to introduce similar conditions of entitlement to benefits for UK nationals.<sup>56</sup>

In addition to allowing the UK and the EU countries to subject the other’s nationals to social security conditions of entitlement that they currently reserve for third country nationals, the ‘Hard’ Brexit/WTO scenario would include withdrawing from the EU Regulations 883/04 and 987/09 for coordinating the national social security and healthcare schemes for people moving within the EU/EEA.<sup>57</sup> This would have potentially serious implications for the social security and healthcare entitlements of UK-EU mobile workers and citizens because, as Guild (2016) has pointed out: *There is no principle of equal treatment applicable to foreigners in British social security law. Similarly, there is no principle of export of benefits. This is only permitted on the basis of a very limited number of bilateral agreements. There is no principle of aggregation of contributions made in different countries to calculate any benefit entitlement.*<sup>58</sup>

The loss of the principle of aggregation of insurance periods to create entitlement to a pension could mean that UK and other EU nationals who have worked in both the UK and other member countries would be at risk of losing some or all of their pension entitlement.<sup>59</sup> The EU coordinating regulations provide for uprating the value of a pension to prevent loss of value through inflation, which is not provided under UK law.<sup>60</sup> There would also be implications for occupational pension schemes,<sup>61</sup> although these are not considered in this paper. Furthermore, UK migrant workers in an EU/EEA country would not be eligible to receive family benefit for their chil-

<sup>51</sup> House of Commons, *Brexit: impact...*, op. cit.

<sup>52</sup> Guild E., *Brexit...*, op. cit.

<sup>53</sup> House of Commons, *Brexit: impact...*, op. cit.

<sup>54</sup> Davis D., *K not about to ‘shut the door’ on low-skilled EU migrants*, Guardian 22 February 2017.

<sup>55</sup> Roberts S., *Migration and social security: parochialism in the global village*, in: R. Sigg, C. Behrendt (eds.), *Social Security in the Global Village*, International Social Security Series 2002, Vol. 8, Transaction publishers, New Brunswick; Roberts S., *A Short History...*, op. cit.

<sup>56</sup> House of Commons, *Brexit: impact...*, op. cit.

<sup>57</sup> Ibidem.

<sup>58</sup> Guild E., *Brexit...*, op. cit.

<sup>59</sup> House of Commons, *Brexit: impact...*, op. cit.

<sup>60</sup> Guild E., *Brexit...*, op. cit.

<sup>61</sup> House of Commons, *Brexit: impact...*, op. cit.

dren living in the UK and vice versa for EU citizens.<sup>62</sup>

EU citizens who can show that they are either employed or self-employed in the UK, or non-active but 'ordinarily resident', are entitled to receive NHS treatment free at the point of service. While under the 'Hard' Brexit/WTO scenario, EEA nationals present in the UK would probably retain free access to emergency treatment at an Accident and Emergency department, General Practitioner (GP) and nurse consultations in primary care and treatment provided by a GP under certain time limitations, as well as diagnosis and treatment of certain defined contagious diseases, for example, tuberculosis and HIV-AIDS; diagnosis and treatment of sexually transmitted diseases; treatment of a physical or mental condition caused by torture, female genital mutilation, domestic or sexual violence as long, as the patient has not travelled to the UK for the purpose of receiving treatment,<sup>63</sup> they would lose the right to receive free healthcare in the UK in other circumstances. Similarly, the healthcare rights of UK nationals living in the EU may be lost, and the European Health Insurance Card invalidated for UK nationals, including students, tourists and pregnant women temporarily visiting the EU. Guild concludes that *In short, a 'hard' Brexit may result in a bonfire of social security rights for both British and non-British EU citizens.*<sup>64</sup>

Bräuninger<sup>65</sup> suggests that the 'Hard Brexit'/WTO scenario would entail substan-

tial consequences for British pensioners in EEA countries. While, he argues, that deportation is unlikely, as their residence rights acquired before Brexit would remain valid under international law and practice, the loss of the principle of aggregation of insurance periods to create a pension entitlement, loss of annual increases to their state pension and loss of health care coverage in other member countries would be compounded by increased bureaucracy<sup>66</sup> as the UK falls outside the procedures to streamline the calculation and delivery of retirement pensions across the EU, including the Electronic Exchange of Social Security Information (EESSI) IT system.<sup>67</sup>

A House of Commons Library Briefing Paper on the impact of Brexit, considered that the *implications for UK nationals resident overseas would depend on the attitude of their member country of residence, but it is possible that restrictions on entitlement to benefits, along with other restrictions on rights of residence and changes to immigration status, could result in significant numbers of UK nationals who have made their lives in another EU/EEA member country seeking repatriation.*<sup>68</sup>

UK nationals who have retired to another EU member country and find they must return to the UK are likely to need to rely on the NHS to a greater extent than the largely young and healthy workers who have come to the UK from Poland and other member countries who make few demands on Britain's healthcare services while contributing positively to the UK's finances.<sup>69</sup> This point was recently acknowledged-

<sup>62</sup> Bräuninger D., *Social ...*, op. cit.

<sup>63</sup> Department of Health Cross Border Healthcare and Patient Mobility in Europe, *Information to accompany the implementation of Directive 2011/24/EU – on patients' rights in cross-border healthcare*, Gov.UK, NHS entitlements: migrant health guide, <https://www.gov.uk/guidance/nhs-entitlements-migrant-health-guide> (retrieved 20.03.2017).

<sup>64</sup> Guild E., *Brexit...*, op. cit.

<sup>65</sup> Bräuninger D., *Social...*, op. cit.

<sup>66</sup> *Ibidem*.

<sup>67</sup> *EESSI is an IT system that will help social security bodies across the EU exchange information more rapidly and securely – as required by EU regulations on social security coordination*, European Commission, Employment, Social Affairs and Inclusion, *Electronic Exchange of Social Security Information (EESSI)*, [ec.europa.eu/social/main.jsp?catId=869](http://ec.europa.eu/social/main.jsp?catId=869) (retrieved 20.03.2017).

<sup>68</sup> House of Commons, *Brexit: impact...*, op. cit.

<sup>69</sup> Home Office, *The Economic and Fiscal Impact of Migration*, A Cross-Departmental Submission to the House of Lords Committee on Economic Affairs produced in partnership with the Department for Work and Pensions, October 2007, HMSO; ICF GHK in association with Milieu Ltd, *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, European Commission, DG Employment, Social Affairs and Inclusion, 14 October 2013; Dustmann C., Frattini T., *The Fiscal Effects of Immigration to the UK*, The Economic Journal, Royal Economic Society, John Wiley & Sons, Oxford 2014.

ged by David Davies, the Secretary of State for Exiting the European Union, when he said in Riga on 22 February 2017 that migrants had contributed to making the UK's strong economy: *We're a successful economy, largely or partly at least because we have clever people, talented people come to Britain.*<sup>70</sup> Since 2004, many of these talented people, who have contributed to the UK economy, are Polish citizens<sup>71</sup>, who moved to Britain in good faith *with the legitimate expectation that their EU citizenship rights were irrevocable.*<sup>72</sup>

### Protecting rights after Brexit

On 8 February 2017, the House of Commons Select European Scrutiny Committee asked *the Minister to clarify how the Government will seek to secure a new arrangement with the EU or individual Member States on coordination of social security to replace, in whole or in part, the substance of the existing Regulations when the UK ceases to be a Member State. The Minister's answer should indicate how the Government is planning to support both those British nationals resident in the EU who are currently entitled to receive UK social security, and those EU nationals resident here who currently benefit from Regulation 883/2004.*<sup>73</sup>

Options for the UK include negotiating new social security agreements either with the EU as a whole or with individual EU/EEA member states.<sup>74</sup> Although Theresa May has said that *We do not seek to adopt a model already enjoyed by other countries*<sup>75</sup>, a 'bespoke' UK approach to protect the rights of workers and citizens moving between the UK and the EU, whether bilateral or multilateral, is almost certain to be based on the principles and mecha-

nisms that have been developed to protect the social security and healthcare rights of migrant workers since the beginning of the 20th century when the first bilateral social security agreements were negotiated between what are now member countries of the EU.<sup>76</sup>

After the Second World War there was an expansion in international social security agreements to protect migrant workers. Most of these agreements were between European countries. In the 20 years, between 1946 and 1966, following the end of the Second World War, 401 bilateral social security agreements were signed worldwide; 94 per cent of which were between European parties.<sup>77</sup> These post-war agreements were more sophisticated than their earlier antecedents but were based on the same principles: Equal treatment; rules to determine which country is responsible for collecting social insurance, determining entitlement and paying benefits; aggregation of periods of insurance, residence or employment to establish entitlement; and export of benefits.<sup>78</sup>

The UK already has such agreements with around 20 EU and EEA countries which predate the UK's entry to the European Economic Community (EEC) on 1 January 1973. For EU nationals, bilateral agreements between member countries are largely redundant, having been superseded by the coordinating regulations, now Regulations 883/04 and 987/09. The UK also has bilateral social security and healthcare agreements with several non-EEA countries.<sup>79</sup>

However, these earlier bilateral agreements are unlikely to provide a basis for new arrange-

<sup>70</sup> Davis D., *UK not about...*, op. cit.

<sup>71</sup> Roberts S., *Hard working immigrants welcome: Social security for Polish migrants in the UK*, „Polityka Społeczna”, wydanie w jęz. angielskim, Warszawa 2008.

<sup>72</sup> *UK Citizens in Europe: Towards an Alternative White Paper on the European Union (Notification of Withdrawal) Bill*, February, 2017.

<sup>73</sup> House of Commons Select Committee European Scrutiny, *Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 Documents considered by the Committee on 8 February 2017*, <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxix/7111.htm> (retrieved 20.03.2017).

<sup>74</sup> House of Commons, *Brexit: impact...*, op. cit.

<sup>75</sup> Reuters, 16 January 2017, <http://uk.reuters.com/article/britain-eu-may-priorities-idUKL5N1F655Y> (retrieved 20.03.2017).

<sup>76</sup> Roberts S., *A Short History...*, op. cit.

<sup>77</sup> Holloway J., *Social policy harmonisation in the European Community*. Farnborough, Gower 1981.

<sup>78</sup> Ibidem; European Commission, Employment, Social Affairs & Inclusion, *EU Social Security Coordination*, <http://ec.europa.eu/social/main.jsp?catId=849> (retrieved 20.03.2017).

<sup>79</sup> Roberts S., *Migration and social security: parochialism in the global village*, in: Sigg R., Behrendt C. (eds.), *Social Security in the Global Village*, International Social Security Series 2002, Vol. 8, Transaction publishers, New Brunswick.

ments between the UK and the EU as the protection they provide is variable, whereas new agreements with the EU member countries would require consistency. Examination of the UK's current bilateral agreements with third countries and earlier agreements with what are now EU member countries show that while all agreements provide for equal treatment in respect of rights and obligations under the legislation of the contracting parties, in some cases the equal treatment is not complete and who the principle of equal treatment applies to varies from agreement to agreement.<sup>80</sup>

Even agreements that are open to all people moving between the two countries do not always provide for all contingencies. More recent agreements concluded by the UK provide even more limited cover, being confined to arrangements for coordinating contributions.<sup>81</sup> Scope for new agreements between the UK and other countries is limited because of the UK's 'frozen' pension policy under which pensions are not uprated, whereas annual cost-of-living increases to pensioners and widows would be expected by EU and EEA member countries to feature in a new agreement or agreements. In addition to technical challenges political challenges will need to be overcome. Bilateral agreements are reciprocal and stocks and flows of migrants between the countries and perceptions of equity of treatment can make negotiations complex and lengthy.<sup>82</sup>

A significant limitation of bilateral agreements in the context of a future UK-EU/EEA relationship is that they coordinate the social security and healthcare systems of two countries only. Mobile workers whose working life takes them to two or more EU/EEA countries – which is increasingly going to be the case as the single EU labour market continues to develop – will still face gaps in their social security coverage.

To protect the social security and healthcare of people who have worked in the UK and

two or more EU/EEA member countries the UK could negotiate a single agreement with the EU.<sup>83</sup> While this might be expected to simplify the negotiations,<sup>84</sup> it may not necessarily be the case. The replacement of the coordinating Regulation 1408/71 by a simpler regulation to take account of developments in member states' social security systems and the case law of the ECJ was first proposed at the Edinburgh European Council in 1992 and in 1998 the European Commission submitted a proposal to modernise and simplify the regulations.<sup>85</sup>

After long and complex discussions, a new Regulation, 883/04, was adopted by the European Parliament and the Council on 29 April 2004 – although much of the detail was reserved for the new implementing regulation, 987/09, which was not agreed for a further six years when the new modernised regulations finally became effective on 1 May 2010. The route from the Edinburgh European Council in 1992 to the entry into force of the new Regulation 883/04 on 1 May 2010 was difficult partly because the legal base required unanimity in the Council and, since the Treaty of Amsterdam in 1997, co-decision with the European Parliament.<sup>86</sup> A new agreement between the EU and the UK might also be difficult for all parties to agree.

Ironically, a regulation that the UK refused to accept may provide protection for some UK migrant workers. Since 1 January 2011, Regulation 1231/10 extends Regulations 883/04 and 987/09 *to nationals of third countries who are not already covered by those Regulations solely on the ground of their nationality, as well as to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.*<sup>87</sup>

Regulation 1231/10 does not apply to the UK (or Denmark). However, non-EU natio-

<sup>80</sup> Ibidem.

<sup>81</sup> Ibidem.

<sup>82</sup> Tamango E., *Coordination of Social Security Programmes of Developed and Developing Countries*, ISSA, Geneva 1994; Roberts S., *Migration...*, op. cit.; Wray H., *What...*, op. cit.; House of Commons, *Brexit...*, op. cit.

<sup>83</sup> House of Commons, *Brexit...*, op. cit.

<sup>84</sup> Ibidem.

<sup>85</sup> 5133/99 SOC 5 (COM(98) 779 final).

<sup>86</sup> Roberts S., *A Short History...*, op. cit.

<sup>87</sup> Article 1 of Regulation (EU) No 1231/2010.

nals continue to benefit from the previous EU coordination rules in cases concerning the UK and Denmark as Regulation 859/03 (which extended the previous coordinating regulation, 1408/71, to nationals of non-EU countries) continues to apply in Denmark and the UK. Thus, UK nationals, who would become 'third country nationals' in the EU following a 'Hard' Brexit, would benefit from Regulation 1231/10 and thus be covered by all the provisions of Regulation 883/04 and Regulation 987/09 "if they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State." However, Regulation 1231/10 will not generally be of use to UK nationals who move from the UK to work in another EU member country as they would not be in a cross-border situation within the EU.

A new multilateral agreement between the EU and the UK could not exist in a vacuum. It would need supporting infrastructure including fora and mechanisms to discuss and agree revisions to the agreement in light of new developments; ensure the effective administration of the arrangements; and a mechanism to ensure the uniform interpretation of the agreement in all participating countries. Presently the coordinating regulations are the responsibility of the whole EU superstructure. They are reviewed and revised by the European Commission, European Council and the European Parliament, while the European Court of Justice has the task of settling disputes and ensuring their uniform interpretation in all member states.<sup>88</sup>

The 'Administrative Commission for the coordination of social security systems' is tasked with resolving questions of interpretation arising from the provisions of regulations, promoting cooperation between EU countries, and matters of administration. Its mem-

bers include a representative of the government of each EU member country and a representative of the Commission.<sup>89</sup> The 'Advisory Committee for the Coordination of Social Security Systems', at the request of the European Commission or the Administrative Commission or on its own initiative, provides assistance to the European Commission in the preparation of legislative proposals.<sup>90</sup>

The European Court of Justice does not directly rule on individual cases in the field of social security. Its judgments are limited to the interpretation of the relevant Community provisions in the light of a particular case. This interpretation is binding, however, on all parties involved.<sup>91</sup> The history of the coordinating regulations suggests that in such a complex and technical area of law as cross-border social security and healthcare, where important rights are at stake, disputes in the interpretation of any new agreement to coordinate the social security and healthcare of mobile workers between the UK and the 30 countries of the EEA are likely to arise. For example, since 1959, the ECJ has delivered over 600 judgments on the interpretation of the coordination regulations.<sup>92</sup>

## Conclusion

The current arrangements to coordinate social security and healthcare for mobile workers and citizens in the EU (Regulations 883/04 and 987/09) that the UK would be leaving under a 'Hard Brexit'/WTO scenario, are the result of over 100 years of evolution and are the most developed and sophisticated instruments to protect social security and healthcare rights for migrant workers and citizens anywhere in the world.<sup>93</sup> This would suggest that the most effective arrangement to coordinate social security and healthcare between the UK and the EU/EEA after Brexit would look

<sup>88</sup> Pennings F, *Introduction...*, op. cit.

<sup>89</sup> European Commission, Employment, Social Affairs & Inclusion, <http://ec.europa.eu/social/main.jsp?catId=857&intPageId=983&langId=en> (retrieved 20.03.2017).

<sup>90</sup> European Commission, *Register of Commission Expert Groups*, <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=1783> (retrieved 20.03.2017).

<sup>91</sup> European Commission, Employment, Social Affairs & Inclusion, <http://ec.europa.eu/social/main.jsp?catId=857&intPageId=983&langId=en> (retrieved 20.03.2017).

<sup>92</sup> European Commission: Directorate-General for Employment, Social Affairs and Equal Opportunities, <http://ec.europa.eu/social/> (retrieved 20.03.2017).

<sup>93</sup> Cornelissen R., *Achievements...*, op. cit.; Roberts S., *A Short History...*, op. cit.

conspicuously similar to Regulations 883/04 and 987/09.<sup>94</sup>

If no agreement can be found, the loss of coordination of social security and healthcare entitlements following a 'Hard' Brexit may affect a lot of people. The United Nations estimated that in 2015 there were around 2.88 million migrants from other EU countries living in the UK and 1.22 million UK migrants resident in another EU member country.<sup>95</sup> These people have exercised their right to free movement, many before the Lisbon Treaty<sup>96</sup> amended the Treaty of the European Union<sup>97</sup> to provide for a right of withdrawal under Article 50, *with the legitimate expectation that their EU citizenship rights were irrevocable.*<sup>98</sup> The consequences of 'Hard' Brexit would also limit future opportunities for British and European citizens including the horizons for the UK's and Europe's young people.

The UK Government's own analysis of the options in the event of a vote to leave in the referendum concluded that *Whatever alternative to membership the UK seeks following a decision to leave the EU, we will lose influence over EU decisions that will still directly affect us. We need to weigh the benefits of access to the EU and global markets against the obligations and costs incurred in return. It is the assessment of the UK Government that no existing model outside the EU comes close to providing the same balance of advantages and influence that we get from the UK's current special status inside the EU.*<sup>99</sup>

This applies to the coordination of social security and healthcare. The House of Commons 'Select Committee European Scrutiny'

stated on 8 February 2017, with reference to a 'Proposal for a Regulation amending Regulation (EC) No 883/2004', that *If the amended version of Regulation 883/2004 could potentially form the basis for a future bilateral UK-EU agreement on the coordination of social security, the Government should participate fully in the negotiations to ensure the final legislation is aligned with the UK's priorities.*<sup>100</sup> This looks like sensible advice.

However, key political aims of Brexit are to take the UK outside the 'red tape' of European administration and the purview of the European Court of Justice. The institutional framework to legislate, review, revise, provide legal certainty and consistency across what are now 31 countries has been developed and honed over 60 years. A question then is how would any new multinational social security and healthcare agreement between the UK and the 30 member countries of the EU/EEA (and future members) be reviewed and revised, administered and interpreted? Even in the event of a 'Hard' Brexit, decisions would need to be made on how to protect individual's social security entitlements that exist at the point of withdrawal from the EU.<sup>101</sup> Wray points out that the interpretation of free movement rights and associated social security entitlements will continue to be relevant for many years after Brexit, although if the UK leaves the EU it would not have a seat at the policy making tables to influence legislation or jurisprudence.<sup>102</sup> Thus, Brexit will represent a serious loss of influence, sovereignty and agency for the UK in this arena.

#### REFERENCES

- Bräuninger D., *Social security system coordination after Brexit: 'Free movement provides for more than the right to work in partner countries'*, Deutsche Bank Research Talking point, 28 July, 2016.
- Cornelissen R., *Achievements of 50 years of European social security coordination*, in: *50 Years of Social Security Coordination*, Publications Office of the European Union. Luxembourg 2010.
- Council of the European Union, *Council conclusions on EU relations with EFTA countries*, 3060th General Affairs Council meeting, Brussels, 14 December 2010.

<sup>94</sup> House of Commons, *Brexit: impact...*, op. cit.

<sup>95</sup> United Nations, Global Migration Database, *International migrant stock by destination and origin*, Table 16.

<sup>96</sup> Europa, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01)*, Official Journal of the European Union.

<sup>97</sup> Europa, *Consolidated Version of the Treaty on European Union*, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT> (retrieved 20.03.2017).

<sup>98</sup> UK Citizens in Europe, *Towards an Alternative White Paper on the European Union (Notification of Withdrawal) Bill*, February, 2017.

<sup>99</sup> HM Government, *Alternatives...*, op. cit.

<sup>100</sup> House of Commons Select Committee European Scrutiny, *Proposal...*, op. cit.

<sup>101</sup> House of Commons, *Brexit: impact...*, op. cit.

<sup>102</sup> Wray H., *What...*, op. cit.

- Davis D., *UK not about to 'shut the door' on low-skilled EU migrants*, Guardian, 22 February 2017, <https://www.theguardian.com/politics/2017/feb/22/uk-not-about-to-shut-the-door-on-low-skilled-eu-migrants-says-david-davis> (retrieved 20.03.2017).
- Department for Exiting the European Union, *White Paper 'The United Kingdom's exit from and new partnership with the European Union'*, White Paper published 2 February 2017, <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper> (retrieved 20.03.2017).
- Department of Health, *Cross Border Healthcare and Patient Mobility in Europe: Information to accompany the implementation of Directive 2011/24/EU – on patients' rights in cross-border healthcare*, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181168/Cross\\_Border\\_Healthcare\\_and\\_Patient\\_Mobility.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181168/Cross_Border_Healthcare_and_Patient_Mobility.pdf) (retrieved 20.03.2017).
- Department of Health, *Guidance on implementing the overseas visitor hospital charging regulations 2015*, [http://socialwelfare.bl.uk/subject-areas/services-activity/health-services/departmentofhealth/172767Implementing\\_overseas\\_charging\\_regulations\\_2015.pdf](http://socialwelfare.bl.uk/subject-areas/services-activity/health-services/departmentofhealth/172767Implementing_overseas_charging_regulations_2015.pdf) (retrieved 20.03.2017).
- Dhingra S., Sampson T., *Life after BREXIT: What are the UK's options outside the European Union?*, Centre for Economic Performance, London School of Economics, February 2016.
- Dustmann C., Frattini T., *The Fiscal Effects of Immigration to the UK*, The Economic Journal, Royal Economic Society, John Wiley & Sons, Oxford 2014.
- Electoral Commission, <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> (retrieved 20.03.2017).
- Emerson M., *Which model for Brexit?*, CEPS Special Report: *Thinking ahead for Europe*, No. 147, October 2016, <http://ec.europa.eu/justice/citizen/> (retrieved 20.03.2017).
- Europa, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01)*, Official Journal of the European Union.
- European Commission, Employment, Social Affairs & Inclusion, *EU Social Security Coordination*, <http://ec.europa.eu/social/main.jsp?catId=849> (retrieved 20.03.2017).
- European Commission, Employment, Social Affairs & Inclusion, *The coordination of healthcare in Europe Rights of insured persons and their family members under Regulations (EC) No 883/2004 and (EC) No 987/2009*, Publications Office of the European Union, Luxembourg 2011.
- European Commission, Employment, Social Affairs & Inclusion, *European Health Insurance Card*, <http://ec.europa.eu/social/main.jsp?catId=559> (retrieved 20.03.2017).
- European Commission, Employment, Social Affairs & Inclusion, *EU Legislation, Modernised Coordination*, <http://ec.europa.eu/social/main.jsp?catId=867&langId=en> (retrieved 20.03.2017).
- European Commission, Employment, Social Affairs & Inclusion, <http://ec.europa.eu/social/main.jsp?catId=857&intPageId=983&langId=en> (retrieved 20.03.2017).
- European Commission, Employment, Social Affairs & Inclusion, *Electronic Exchange of Social Security Information (EESSI)*, <http://ec.europa.eu/social/main.jsp?catId=869> (retrieved 20.03.2017).
- European Commission, Justice, *EU Citizenship and Free Movement*, <http://ec.europa.eu/justice/citizen/> (retrieved 20.03.2017).
- European Commission, *Register of Commission Expert Groups*, <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail&groupID=1783> (retrieved 20.03.2017).
- European Free Trade Association, <http://www.efta.int/> (retrieved 20.03.2017).
- Frimston A., *Preparing for the UK's Brexit Negotiation*, 5 August 2016, <https://www.chathamhouse.org/PUBLICATIONS/TWT/PREPARING-UKS-BREXIT-NEGOTIATION#sthash.fBMVYONy.dpuf> (retrieved 20.03.2017).
- Gov.UK, *NHS entitlements: migrant health guide*, <https://www.gov.uk/guidance/nhs-entitlements-migrant-health-guide> (retrieved 20.03.2017).
- Guild E., *Brexit and Social Security in the EU*, CEPS Commentary: *Thinking ahead for Europe*, 17 November 2016, <https://www.ceps.eu/publications/brexit-and-social-security-eu> (retrieved 20.03.2017).
- HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union Single Market: Free Movement of Persons*, published summer 2014, HMSO, London 2014.
- HM Government, *Alternatives to membership: possible models for the United Kingdom outside the European Union*, presented to Parliament pursuant to section 7 of the European Union Referendum Act 2015, March, HMSO, London 2016.
- Holloway J., *Social policy harmonisation in the European Community*, Farnborough, Gower 1981.
- Home Office, *The Economic and Fiscal Impact of Migration*, A Cross-Departmental Submission to the House of Lords Committee on Economic Affairs produced in partnership with the Department for Work and Pensions, October, HMSO 2007.
- House of Commons, *Frozen Overseas Pensions*, Library Briefing Paper SN01457, Author: Djuna Thurley, May 2016.
- House of Commons, *Brexit: impact across policy areas*, Library Briefing Paper Number 07213, 26 August 2016, Edited by Vaughne Miller.
- House of Commons, *Brexit: what impact on those currently exercising free movement rights?*, Library Briefing Paper Number 7871, 19 January 2017, By Terry McGuinness.
- House of Commons, Exiting the European Union Committee, *The process for exiting the European Union and the Government's negotiating objectives*, First Report of Session 2016–17, Report, together with formal minutes relating to the report, Ordered by the House of Commons to be printed 11 January 2017.
- House of Commons, Select Committee European Scrutiny *Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004*, Documents considered by the Committee on 8 February 2017, <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxix/7111.htm> (retrieved 20.03.2017).
- House of Lords Hansard, <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-02-25/HL6447/> (retrieved 20.03.2017).
- House of Lords Hansard, *European Union (Notification of Withdrawal) Bill*, 01 March 2017, Volume 779.
- ICF GHK in association with Milieu Ltd., *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, European Commission, DG Employment, Social Affairs and Inclusion, 14 October 2013.
- Independent, *Theresa May says 'Brexit means Brexit' and there will be no attempt to remain inside EU*, author Ashley Cowburn, <http://www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-a7130596.html> (retrieved 20.03.2017).

- Independent, *EU nationals express 'utter desperation' following MPs rejection of Lords amendment*, author May Bulman, 14 March 2017, <http://www.independent.co.uk/news/uk/home-news/brexit-eu-nationals-mps-lords-amendment-article-50-utter-desperation-commons-a7628291.html> (retrieved 20.03.2017).
- Machin R., *Social security in the aftermath of the EU referendum*, Legal Action, June 2016.
- Mazars, *Brexit – Implications for social security*, 15 July 2016.
- Open Europe, <http://openeurope.org.uk/daily-shakeup/cameron-government-would-promptly-trigger-article-50-in-the-event-of-a-leave-vote/> (retrieved 20.03.2017).
- Oxford Economics, *Global Economic Model*: <http://www.oxfordeconomics.com/forecasts-and-models/countries/scenario-analysis-and-modeling/global-economic-model/overview> (retrieved 20.03.2017).
- Peel Q., *Britain's new global role after Brexit*, Chatham House, <https://www.chathamhouse.org/publications/twt/britain-s-new-global-role-after-brexit> (retrieved 20.03.2017).
- Peers S., *What happens to British expatriates if the UK leaves the EU?*, EU Law Analysis, 9 May 2014.
- Penning F., *Introduction to European social security law*, Fourth Edition, Intersentia, Antwerp 2003.
- Reuters, 16 January 2017, <http://uk.reuters.com/article/britain-eu-may-priorities-idUKL5N1F655Y> (retrieved 20.03.2017).
- Reuters, 1 February 2017, *Poland expects UK will get Swiss-like deal with EU after exit*.
- Roberts S., *Migration and social security: parochialism in the global village*, in: Sigg R., Behrendt C. (eds.), *Social Security in the Global Village*, International Social Security Series, Vol. 8, Transaction publishers, New Brunswick 2002.
- Roberts S., *Pracownicy imigranci mile widziani: zabezpieczenie społeczne polskich pracowników w Zjednoczonym Królestwie Wielkiej Brytanii i Irlandii*, *Polityka Społeczna*, Special Edition December, Warsaw.
- Roberts S., *Hard working immigrants welcome: Social security for Polish migrants in the UK (Pracownicy imigranci mile widziani: zabezpieczenie społeczne polskich pracowników w Zjednoczonym Królestwie Wielkiej Brytanii i Irlandii)*, „Polityka Społeczna” 2008, wydanie w jęz. angielskim.
- Roberts S., *A Short History of Social Security Coordination*, in: *50 Years of Social Security Coordination*, Publications Office of the European Union, Luxembourg 2010.
- Roberts S., *Free Movement and Special Non-Contributory Benefits for Disabled People: Between the Devil and the Deep Blue Sea*, ERA Forum 2016, 17(2), p. 221–232.
- Tamango E., *Coordination of Social Security Programmes of Developed and Developing Countries*, ISSA, Geneva 1994.
- UK Citizens in Europe, *Towards an Alternative White Paper on the European Union (Notification of Withdrawal) Bill*, February, 2017.
- United Nations Global Migration Database, *International migrant stock by destination and origin*, <http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml> (retrieved 20.03.2017).
- Watson P., *Social security law of the European Communities*, Mansell, London 1980.
- World Trade Organisation, <https://www.wto.org/> (retrieved 20.03.2017).
- Wray H., *What would happen to EU nationals living or planning to visit or live in the UK after a UK exit from the EU?*, EU Law Analysis, 17 July 2014.

## Zjednoczone Królestwo i zabezpieczenie społeczne po Brexicie. Wymyślanie koła czy demagogia?

SIMON ROBERTS

Uniwersytet Nottingham, Wielka Brytania

**STRESZCZENIE:** Na skutek decyzji podjętej przez społeczeństwo brytyjskie w referendum 23 lipca 2016 r. Wielka Brytania opuści Unię Europejską. Brytyjska premier Theresa May zapowiedziała, że decyzja ta oznacza nie tyle szukanie modelu już istniejącego, co zupełnie nowy sposób współpracy z Unią Europejską. W artykule rozważa się różne możliwości takiej współpracy oraz różne rozwiązania w zakresie zabezpieczenia społecznego w świetle zapowiadanych zmian w swobodzie przepływu osób. Wypracowany przez UE model koordynacji zabezpieczenia społecznego należy do najbardziej złożonych – ale jednocześnie skutecznych – rozwiązań prawnych w nowożytnej historii. „Brexit” może więc oznaczać niezwykle trudny proces poszukiwania rozwiązań w tym obszarze, zakładając, że dotychczasowe mechanizmy zostaną odrzucone w ramach scenariusza tzw. twardego wyjścia Zjednoczonego Królestwa z Unii Europejskiej (ang. hard Brexit).

**SŁOWA KLUCZOWE:** Unia Europejska, Brexit, swobodny przepływ, koordynacja systemów zabezpieczenia społecznego