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# The treatment of Scotland's devolved benefits in the Withdrawal Agreement

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This briefing looks at how Scottish devolved benefits will be treated by the [Withdrawal Agreement](#). This is the second of three briefings on the impact of Brexit on devolved social security.



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# Introduction

This briefing looks at how Scotland's devolved benefits are treated in the [EU-UK Withdrawal Agreement](#) ('the Withdrawal Agreement').<sup>i</sup> It is the second of three briefings on Brexit and devolved social security. The briefing outlines key features of social security co-ordination in the Withdrawal Agreement. It presents tables to show how the principles of EU social security co-ordination apply to [Scotland's devolved benefits](#). Case studies of [Young Carer Grant](#) and [Best Start Grant](#) illustrate the operation of these principles. The briefing highlights the importance for legislators of how Scotland's benefits are classified by the [Administrative Commission for the co-ordination of social security systems](#).

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

# The Withdrawal Agreement

Social security for EU citizens in the UK and UK citizens in the EU who had exercised their right to free movement before the end of the Transition period on 31 December 2020 is co-ordinated by Part Two, Title III of the Withdrawal Agreement.

Specifically, the Withdrawal Agreement covers:

- EU citizens and UK nationals within the scope of Co-ordinating [Regulation \(EC\) No 883/2004](#) who at the end of the Transition period had been subject to the social security legislation of an EU27 Member State for UK nationals, or UK legislation for EU27 citizens, and their family members and survivors
- EU27 and UK nationals within the scope of the Withdrawal Agreement by virtue of residence, and their family members and survivors
- Stateless persons, refugees, and nationals of third countries who fulfil the conditions of [Regulation \(EC\) No 859/2003](#).<sup>ii</sup>

Parallel agreements co-ordinate social security for people who are in analogous situations moving between the UK and [EFTA](#) countries (Iceland, Liechtenstein and Norway) and the UK and Switzerland.

The same benefits referred to in Co-ordinating Regulation (EC) No 883/2004 are included in the Withdrawal Agreement. The benefits covered make up the 'material scope' of the co-ordination rules. These are sickness (including healthcare), maternity and paternity, invalidity, survivors, accidents at work and occupational diseases, death grants, unemployment, pre-retirement, and family benefits.

The principles of EU social security co-ordination have also been transposed to the Withdrawal Agreement:

*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.

Benefits are classified into three categories for the purpose of EU social security co-ordination. This classification also applies to the Withdrawal Agreement. Which category a particular benefit falls into determines which of the co-ordination principles and mechanisms apply to that benefit:

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ii This Regulation co-ordinates the social security benefits of 'third-country nationals', who legally reside within the EU, when they move between two or more member countries in order to stay, live or work.

*Social security* benefits are fully co-ordinated i.e. all four main principles of co-ordination described above, apply.

*Special Non-Contributory Benefits (SNCBs)* are 'partially coordinated'. The principles of applicable legislation, equal treatment and aggregation apply. However, SNCBs are not exportable.

*Social assistance* is not included within co-ordination or Part Two, Title III of the Withdrawal Agreement.

As described in the first briefing, 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 co-ordination of social security systems'.

The Co-ordinating Regulations will continue to evolve including in response to Judgments of the [Court of Justice of the European Union](#) (CJEU) and future changes to Member States' social security systems. Under the Withdrawal Agreement, the UK must apply future reforms and revisions of the Regulations (with some exceptions to changes to the material scope and exportable benefits) without being able to contribute. The Withdrawal Agreement provides for the UK to have a limited presence with observer status in the Administrative Commission and to be present in an advisory role when the items on the agenda are relevant to the UK. The UK can take part in the Electronic Exchange of Social Security Information (EESSI) and bear the related costs. Under the Agreement the UK and EU must inform a Joint Committee of relevant changes to UK legislation and to the Co-ordinating Regulations. To ensure consistent application, the Agreement provides for a UK court or tribunal to request the CJEU to give a preliminary ruling on a question in a case that commences within eight years of the end of the Transition period. The [preliminary ruling](#) will be binding on the court that submits the request.

# Scotland's devolved benefits under the Withdrawal Agreement

The tables below show the classification of Scotland's devolved and to be devolved benefits and the consequent application of the four key principles of EU social security co-ordination in the Withdrawal 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 DWP. Table 3 shows proposed Social Security Scotland benefits for which draft regulations have been published.<sup>iii</sup>

**Table 1: Benefits currently administered by Social Security Scotland**

Benefit	Classification under Co-ordination	Applicable legislation	Equal Treatment	Aggregation	Export
Carer's Allowance Supplement	Social Security	Yes	Yes	Yes	Yes
Young Carer Grant	Social Security	Yes	Yes	Yes	Yes
Best Start Grant	Yet to be agreed in the Administrative Commission. Scottish and UK Governments' view is they are either Special Non-Contributory Benefits (SNCB) or Social Assistance.	If SNCB Country of residence	If SNCB Yes	If SNCB Yes	If SNCB No
Best Start Foods	As above	If SNCB Country of residence	If SNCB Yes	If SNCB Yes	If SNCB No
Funeral Support Payment	As above	If SNCB Country of residence	If SNCB Yes	If SNCB Yes	If SNCB No
Scottish Child Payment	As above	If SNCB Country of residence	If SNCB Yes	If SNCB Yes	If SNCB No
Child Winter Heating Allowance	Social security	Yes	Yes	Yes	Yes

<sup>iii</sup> The Administrative Commission for the co-ordination of social security systems has not yet classified ADP and CDP. However, given these benefits' similarity to DLA and PIP, the table assumes they will be classified in the same way.

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

Benefit	Classification under Co-ordination	Applicable legislation	Equal Treatment	Aggregation	Export
Disability Living Allowance	Care component is social security	Yes	Yes	Yes	Yes
	Mobility component is SNCB	Country of residence	Yes	Yes	No
Personal Independence Payment	Living component is Social Security	Yes	Yes	Yes	Yes
	Mobility component is SNCB	Country of residence	Yes	Yes	No
Attendance Allowance	Social Security	Yes	Yes	Yes	Yes
Industrial Injuries Disablement Benefit	Social Security	Yes	Yes	Yes	Yes
Carer's Allowance	Social Security	Yes	Yes	Yes	Yes
Severe Disablement Allowance	Social Security	Yes	Yes	Yes	Yes
Cold Weather Payment. Due to be devolved.	SNCB	Place of residence	Yes	Yes	No
Winter Fuel Payment. Due to be devolved	Social Security	Yes	Yes	Yes	Yes

**Table 3: Proposed Social Security Scotland benefits**

Benefit	Classification under Co-ordination	Applicable legislation	Equal Treatment	Aggregation	Export
Child Disability Payment	Care component is Social Security	Yes	Yes	Yes	Yes
	Mobility component is a Special Non-Contributory Benefit	Country of residence	Yes	Yes	No
Adult Disability Payment	Care component is Social Security	Yes	Yes	Yes	Yes
	Mobility component is a Special Non-Contributory Benefit	Country of residence	Yes	Yes	No

# Case Studies

This section presents case studies of Young Carer Grant and Best Start Grant to illustrate the operation of the principles of co-ordination in Scotland's devolved benefits

## The principle of export

The Young Carer Grant is an annual payment to young carers who are not entitled to Carer's Allowance. As a [cash sickness benefit that is classified as 'social security' under the EU Co-ordinating Regulation 883/2004](#), Young Carer Grant is therefore also classified as 'social security' under the Withdrawal Agreement. This means, as shown in Table 1, that all four principles of co-ordination apply and that the Young Carer Grant can be exported to and claimed from another EU/ [EEA](#) member country as well as Switzerland.

### Example

Mary and her mother have lived in Malaga since July 2020. Mary's mother suffers from macular degeneration and Mary, who is 17 years old, provides care for her for at least 20 hours every week. Mary's mother receives her UK Personal Independence Payment (PIP) daily living component in Spain under the principle of exportability provided by the EU Social Security Co-ordinating Regulations (see Table 2). Before moving to Spain, Mary and her mother had lived their whole lives in Scotland. Mary claimed the Young Carer Grant in Scotland before she and her mother moved to Malaga. Under the principle of export provided by the Co-ordinating Regulations, she was able to take her benefit with her to Spain. Under the principle of exportability of 'social security' in the Withdrawal Agreement, Mary will continue to receive her Young Carer Grant in Spain while her mother will continue to receive her daily living component of PIP.

## The principles of applicable legislation, equal treatment and aggregation of periods

The classification of Best Start Grant is yet to be decided by the Administrative Commission. [The Scottish and UK Governments' view is that it is either a Special Non-Contributory Benefits \(SNCB\) or social assistance](#). If Best Start Grant is determined by the Administrative Commission to be social assistance it will fall outside the provisions of social security co-ordination in the Withdrawal Agreement. This example assumes that the Administrative Commission determines the benefit to be a SNCB, which means it will come within the scope of the Withdrawal Agreement.<sup>iv</sup> SNCBs are 'partially coordinated' and the principle of export does not apply. However, the other principles of Co-ordination - applicable legislation, equal treatment and aggregation – do apply.

### Example

Dolores, who is Spanish, has lived in Dundee for the last four years. She works locally and

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<sup>iv</sup> This does not imply an opinion by the author on the correct classification of Best Start Grant, which is a matter for the Administrative Commission.



receives Working Tax Credit (WTC). She has [‘worker’](#) status under EU law. Dolores has a two year old daughter and has applied for the Early Learning Payment element of Best Start Grant. Under the principle of applicable legislation, the ‘competent state’ to provide a Special Non-Contributory Benefit is the place of residence. This means that Dolores must meet Scotland’s conditions of entitlement for Best Start Grant. The Co-ordinating Regulation principles of equal treatment and aggregation of periods are designed to ensure that these conditions do not affect Dolores more than they would a Scottish national. The principle of equal treatment prevents EU member countries treating EU nationals from other member countries less favourably than their own nationals. While 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. As Dolores has [‘worker’](#) status under EU law she is exempt from the [Habitual Residence Test](#) but needs to satisfy the requirement to be ‘ordinarily resident’ in Scotland to be eligible for a Best Start Grant. If Dolores did not have ‘worker status’ and been in receipt of WTC, or another qualifying benefit, she would have been able to qualify for the Best Start Grant if she was aged under 18 (or 18 or 19 and dependent on someone else). If this had been the case and she had applied for the Best Start Grant before the end of the Transition period she would have needed to show that she was both ordinarily resident in Scotland and ‘Habitually Resident’ in the EEA. In selecting this test Scotland’s legislators had applied the principles of Co-ordination to Best Start Grant:

“ We have chosen to apply the condition of habitual residence to the EEA rather than e.g. the CTA or Scotland, as a way of simplifying the process and to broaden the evidence base that an applicant is able to draw on to establish eligibility. This is consistent with practice across the EEA where periods of residence in one member state can often be taken into account to establish eligibility for social security in another.”

Scottish Government, 2018<sup>1</sup>

Under the Withdrawal Agreement, the principles of applicable legislation, equal treatment and aggregation of periods of social insurance, work or residence continue to apply to Dolores’ claim for a Best Start Grant.

# Discussion

An important consideration for Scotland's Parliament when legislating for new social security benefits is the potential impact of the EU-UK Withdrawal Agreement and specifically how that new benefit is likely to be classified in EU Co-ordination law by the Administrative Commission. The Administrative Commission classifies new benefits with reference to its characteristics and EU law. As noted above, the Withdrawal Agreement provides for the UK to have a limited presence with observer status in the Administrative Commission and to be present in an advisory role when the items on the agenda are relevant to the UK. This will mean that the UK's opportunity to influence the categorization of its own new benefits will be limited. Scotland's policy makers will feed into the development of the UK's position on devolved benefits to be presented at the Administrative Commission:

“ We will continue to engage with the relevant EU institutions, but that will be done through the UK's representation at joint UK-EU committees. Such matters are decided at a UK level, so Scotland's opinion on them cannot differ from that of the UK.”

Scottish Parliament, 2020<sup>2</sup>

When designing new benefits and revising existing ones, Scotland's policy makers and legislators will need to anticipate whether the Administrative Commission will classify a new benefit as 'social security (exportable)', or as an SNCB (not exportable) or as 'social assistance' (not covered by the co-ordination of social security provided by the Withdrawal Agreement). The Withdrawal Agreement has primacy and UK courts are empowered to disapply any national legislation that is not compatible with the Agreement.

# Next Briefing

The next briefing will examine how Scotland's devolved benefits will be treated in [EU-UK Trade and Co-operation Agreement](#) for future movers.

# Bibliography

- 1 Scottish Government. (2018). Best Start Grant: Scottish Government response to the consultation. Retrieved from <https://www.gov.scot/publications/early-years-assistance-scottish-government-response-consultation-best-start-grant/pages/6/> [accessed 25 January 2021]
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