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## **Inevitably Diminished: Rights of Frontier Workers in Northern Ireland after Brexit**

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### **Keywords**

Brexit – Frontier Workers – EU/UK Withdrawal Agreement – Northern Ireland – Free Movement of Persons – Social Security Coordination

### **Abstract**

Brexit has exposed a fundamental weakness in the EU's free movement legal architecture: a failure to map out the complexities that arise from different configurations of frontier work. Frontier work is far from uncommon in the EU; almost a third of Article 45 TFEU workers commute across a border for work. However, EU legislation on free movement is generally written with only those who both work *and* reside in a Member State other than the one they hold the nationality of in mind, with frontier work considered as an afterthought. The problems that arise from this approach have been thrown into sharp relief by Brexit. The only location in the UK that experiences significant amount of frontier work is its land border with the EU on the island of Ireland. Brexit jeopardised the rights of frontier workers on the island of Ireland, triggering the need for specific protections. This led to a rush-job of identifying and attempting to fill gaps in frontier workers' rights in EU law in the specific context of the island of Ireland.

This article argues that there are a number of frontier-work-sized gaps in the 'Citizens Rights' chapter of the Withdrawal Agreement concluded between the UK and the EU. It also weighs up the capacity of three different sources to plug those gaps – the Common Travel Area, the Trade and Cooperation Agreement, and the Protocol on Ireland/Northern Ireland. What emerges is a picture of a legislature at best ignoring, or at worst, not fully cognizant of, the differences between different configurations of frontier work, or fully appreciative of the significance of those differences. Part 2 of the Withdrawal Agreement addresses some formations of frontier work well, but many other types are simply not considered or covered. Even those who successfully apply for and hold a 'frontier worker' status after Brexit are at risk of losing that status and not being able to regain it – amounting to a 'diminution' of frontier worker's rights potentially contrary to Article 2 of the Protocol on Ireland/Northern Ireland. These problems do not only indicate the shortcomings of drafting under the time-pressure of Brexit, but also flag up an overdue lesson for the EU: it is time to get to grips with the taxonomy of frontier workers and to properly consider and protect their rights in different circumstances, so they cannot continue to slip between the cracks of EU free movement law.

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## Introduction

It has long been accepted that ‘frontier work’ – working in one EU Member State and living in a different EU Member State – is one of the ways in which EU nationals can be ‘working’ under Article 45 TFEU as a matter of EU law. However, because of the nature of frontier work, in that it by-and-large only takes place close to the national borders between the Member States, the number of frontier workers has always remained relatively small. According to recent EU Commission estimates, there are 2 million frontier workers in the EU,<sup>1</sup> out of a total of 6.27 million broader ‘EU migrant workers’ under Article 45 TFEU.<sup>2</sup> Some borders between EU Member States are more porous than others when it comes to frontier work; the Commission reports that in 2019 the largest flows of frontier workers were those residing in Poland and commuting to Germany to work (122 000) people, between France and Luxembourg (93 000); and Hungary and Austria (56 000).<sup>3</sup> Regardless, the attention paid to this sub-set of workers in EU legislation that generally addresses EU nationals who work where they *reside* has been very limited.

Brexit has changed this: if attention is not paid to frontier work, workers living in the Republic and working in Northern Ireland or working in the Republic and living in Northern Ireland, would have fallen between the cracks of any general Brexit settlement. The Irish/Northern Irish border is the UK’s only land border with the EU, and cross-border work between Ireland and Northern Ireland is a relatively common occurrence. Estimates of between 18,000 and 29,000 people crossing the invisible border on the island of Ireland for work purposes were Northern Ireland’s Department for the Economy in 2018, as context for the drive to ensure that such cross-border work would remain possible even as the UK left the EU.<sup>4</sup>

Frontier workers are thus for the first time explicitly addressed in detail in a Treaty co-produced by the EU, and the Withdrawal Agreement (WA) in its Part 2 on Citizens’ Rights both defines what frontier workers are, and what rights they retain after Brexit. However, this is not enough to mitigate the effects of Brexit. This article explores what amounts to an irrevocable ‘loss of status’ and protection that these frontier workers are experiencing, even with all the law that is applicable to them *because* of Brexit and all the further provisions —such as the arrangements under the Common Travel Area (CTA)—that remain applicable to many of them.

The article commences with an overview of what a ‘frontier worker’ is under EU law, and then considers how Part 2 of the WA addresses the specific rights they had under EU law and that are meant to be maintained. The following section will then examine how the UK has implemented the WA, as this has significant consequences for how many cross-border workers will actually be ‘frontier workers’ in Northern Ireland. After highlighting the shortcomings of the WA (as implemented), a final section of the article considers to what extent other international law compensates for these shortcomings, by assessing arrangements under the CTA, the Trade & Cooperation Agreement (TCA), and the Protocol of Ireland/Northern Ireland (the Protocol). The only possible conclusion to draw from the analysis is that a subset of frontier workers in Northern Ireland may continue to have the same level of protection when it comes to rights to work, rights to residency, and rights to employment-related benefits as they did when both Ireland and the UK

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<sup>1</sup> Eurostat, ‘[People on the Move: Statistics on Mobility in Europe](#)’ (2020), Chapter 2.3.

<sup>2</sup> EU Commission, ‘[Eurostat statistics explained: EU citizens living in another Member State - statistical overview](#)’ (2021), *Key Messages*.

<sup>3</sup> Eurostat (n 2 above).

<sup>4</sup> Department for the Economy, ‘[Background Evidence on the Movement of People across the Northern Ireland – Ireland Border](#)’ (March 2018) Section 2.9.

were in the EU – but all the other possible frontier workers are at risk of losing status and rights. Their best hope is that Article 2 of the Protocol means that those rights *have* to be preserved, regardless of what the WA and its implementing law generally say. The shortcomings of the WA and the Protocol when it comes to frontier workers reflect a perhaps well-meaning but ultimately inept attempt to redress in a short space of time decades of neglect when it comes to addressing frontier work seriously in EU legislation. While the effects are felt most immediately in the context of Northern Ireland, these experiences could be a useful prompt – in light of the frontier work hotspots elsewhere in the EU – to stop skating over the complexity of frontier workers’ lives.

### Frontier Workers in EU Law

The words ‘frontier worker’ do not appear in the EU Treaties and never have, but as early as 1968, EU secondary legislation has confirmed that the EU concept of ‘worker’ encompasses ‘permanent, seasonal and frontier workers’.<sup>5</sup> CJEU case law has further established that frontier workers can operate in two different ways: they can stay living in their home Member State while taking up employment in a host Member State<sup>6</sup>, which is the ‘standard’ way of doing frontier work, but they can also stay working in their home Member State and move their residence to a host Member State as ‘reverse’ frontier workers.<sup>7</sup> Because of free movement of EU nationals, there is even a third ‘route’ to frontier work, which involves living in a host Member State – and working in a *separate* host Member State; these frontier workers will be referred to as ‘dual’ frontier workers in this article.

In the context of the island of Ireland, this establishes the following six types of frontier workers as holding EU rights prior to Brexit:

- UK nationals living in the UK and working in the Ireland (‘standard’ frontier worker)
- Irish nationals living in Ireland and working in the UK (‘standard’ frontier worker)
- UK nationals living in Ireland and working in the UK (‘reverse’ frontier worker)
- Irish nationals living in the UK and working in the Ireland (‘reverse’ frontier worker)
- EU nationals (non-Irish) living in Ireland and working in the UK (‘dual’ frontier worker)
- EU nationals (non-Irish) living in the UK and working in Ireland (‘dual’ frontier worker)

The pre-Brexit rights of all these frontier workers are found in Article 45 TFEU, and in the accompanying Regulation 492/2011 (the Workers Regulation), which sets out in detail what specific rights ‘workers’ hold in their state of employment. These include a broad range of equal treatment rights, in particular with regards to social and taxation advantages.<sup>8</sup>

Almost as important to frontier workers is Regulation 883/2004 (the Social Security Coordination Regulation), which makes clear as a matter of coordinated law between all the EU Member States *which* state is responsible for paying for social security for a given EU national. In the case of a

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<sup>5</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (1968) OJ L257/2, preamble. This is reinforced by Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (1971) OJ L149/2, which declares itself to be addressing ‘all the basic provisions for implementing [Article 45 TFEU] for the benefit of workers, including frontier workers...’ in the preamble and defines ‘frontier worker’ in Article 1(iii)(b). The first mention of ‘frontier work’ in CJEU case law is Case 13/64 *Van Dijk* ECLI:EU:C:1965:19.

<sup>6</sup> See, as an early example, Case C-57/96 *Meints* ECLI:EU:C:1997:564.

<sup>7</sup> Case C-212/05 *Hartmann* ECLI:EU:C:2007:437; Case C-286/05 *Hendrix* ECLI:EU:C:2007:494.

<sup>8</sup> Regulation (EU) 492/2011 on freedom of movement for workers within the Union (2011) OJ L 141/1, Article 7.

frontier worker, the majority of responsibility will fall on their state of employment, as it does for other EU workers – but exportability rules built into the Social Security Coordination Regulation acknowledge that some workers, or their families, do not *live* in the state of work, and they should be entitled to claim those benefits notwithstanding that they will not meet residence conditions that might normally attach to those benefits.<sup>9</sup> The Regulation also contains a few specific references to frontier work, regarding the entitlement of family members to sickness benefits in kind in the states of residence and of work, for example.<sup>10</sup> Moreover, the CJEU has interpreted the coordination rules permitting Member States to restrict special non-contributory benefits to the state of residence, as also requiring an exception for frontier workers, where the condition of residence would lead to ‘an unacceptable degree of unfairness’.<sup>11</sup>

However, the Social Security Coordination Regulation actually defines what a ‘frontier worker’ is, and in doing so, extends access to medical care in the frontier worker’s state of work only to very specific types of frontier workers. Article 1(f) of the Regulation reads:

‘frontier worker’ means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State **to which he/she returns as a rule daily or at least once a week.** (*emphasis added*)

This addresses very regular frontier work only and excludes those who work in another Member State *less regularly* - nor does it address those working in several Member States or providing short-term services in another Member State. Seasonal frontier work also appears precluded, despite preambles to earlier versions of the Workers Regulation making clear that the EU legislature *intended* for it to be covered. This definition may mean that the legislation was drafted to avoid too many workers being taken out of the realm of general Article 45 worker status, and/or it could be an attempt to narrow down the scope for inter-Member State disputes about competence. In any case, as the specific term of frontier worker is only invoked in the main text of the Regulation primarily to address sickness and maternity/paternity benefits of the frontier worker and their family members, it is not clear whether or to what extent this restrictive definition influences other areas of social security.<sup>12</sup>

Finally, further rights of some frontier workers are found in Directive 2004/38 (the Citizens Directive).<sup>13</sup> However, as the Directive is essentially about rights of *residence* outside the state of nationality, it does not obviously capture ‘standard’ frontier workers who live in the state of nationality and commute to another State for work.<sup>14</sup> In contrast, ‘reverse’ frontier workers, who move their state of residence but keep working in the state of nationality, and ‘dual’ frontier workers who are not nationals of either the state of residence or work, do fall within its scope and benefit from its provisions. This creates something of a paradox – that frontier workers engaging in

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<sup>9</sup> Regulation 883/2004/EC on the coordination of social security systems (2004) OJ L 166/1, Article 7.

<sup>10</sup> Regulation 883/2004, Articles 17-18.

<sup>11</sup> Case C-287/05 *Hendrix* EU:C:2007:494, interpreting the rules in Regulation 1408/71, reproduced in the successor Regulation 883/2004.

<sup>12</sup> Regulation 883/2004, Articles 17 and 28.

<sup>13</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (‘CD’)

<sup>14</sup> See, very explicitly, Article 3(1) CD: ‘This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.’

cross-border economic activity, so exercising the ultimate market ideal, have fewer rights to, e.g., non-EU family reunification, than cross-border residents whose economic activity is purely internal to the state of nationality.

The fact that 'standard' frontier work does not trigger protection from the Directive might in practice not cause many residence problems for those with EU-national family members residing in the worker's state of nationality, because they hold their own residency rights as self-sufficient EU nationals. However, this significantly reduces their entitlement to equal treatment: while it is in theory possible to be self-sufficient and still need temporary support, in practice, Member States often take the view that a claim for benefits negates a claim of self-sufficiency, and refuse such claims without much, if any, consideration.<sup>15</sup> As family members of workers, however, they would have been so entitled. This is not a purely academic point; with in-work poverty on the rise in the UK, it is entirely normal for families on low and middle incomes to rely on supplementary benefits.<sup>16</sup>

However, the lack of work-based protection from the Directive in a 'standard' frontier worker's state of residence and nationality bites even harder where they have non-EU family members who wish to reside with them. While in principle, the 'scope' of EU law includes anything that involves cross-border movement – which frontier work does *for work* – the reality is that most secondary legislation on free movement of persons assumes that they also change residence.

Even case law like *Surinder Singh* only affects those EU nationals *returning* to their 'home' State after having worked and resided in a 'host State'.<sup>17</sup> The one possible analogy to 'standard' frontier workers in the CJEU's case law is in *Carpenter*, where a service provider's non-EU spouse was found to have residency rights in the service provider's home state (the UK), because to deny those would make it significantly harder for him to provide services in other EU Member States, and would thus pose a restriction to that right.<sup>18</sup> However, such an analogy to *Carpenter* has never been attempted by a frontier worker residing in their state of nationality, either before the CJEU or (to the authors' knowledge) domestic courts, and so it is difficult to say whether such a 'standard' frontier worker 'right to be joined by family in the home State' exists as a matter of EU law.

'Reverse' frontier workers have a step up on 'standard' frontier workers in terms of Directive coverage. They themselves have rights of residence in the host Member State, by virtue of the Directive, while commuting back to their 'home' state for work. They will be resident as self-sufficient EU nationals, but they *are* entitled to rights of family reunification. This is particularly crucial for those frontier workers residing in a MS different to their state of nationality with family members who are not themselves EU nationals, who in the absence of the Citizens Directive would struggle to join their EU frontier worker family member in the EU.<sup>19</sup>

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<sup>15</sup> See, inter alia, Charlotte O'Brien, 'Civis capitalist sum: Class as the new guiding principle of EU free movement rights' (2016) 53(4) *Common Market Law Review* 937; Victoria Hooton, 'A tale of two citizens: the *Brey-Dano* proportionality gap in UK courts and tribunals' (2021) 23(2) *European Journal of Social Security* 144.

<sup>16</sup> See Clare McNeil et al, '[No Longer 'Managing': The Rise of Working Poverty and Fixing Britain's Broken Social Settlement](#)' (IPPR, May 2021).

<sup>17</sup> Case C-370/90 *Surinder Singh* ECLI:EU:C:1992:296.

<sup>18</sup> Case C-60/00 *Carpenter* ECLI:EU:C:2002:434.

<sup>19</sup> Contrast the open-ended 'right to join' reiterated by Case C-127/08 *Metock and Others* ECLI:EU:C:2008:449's, based on Article 3(1) CD, with highly conditional immigration law in the Member States.

However, as discussed above, the self-sufficient EU national ‘reverse’ frontier worker must prove that they have sufficient resource to live in that Member State to not burden it.<sup>20</sup> Full-time employed frontier workers will not struggle to meet either of those conditions, but those engaged in seasonal or part-time work might find that there are months where they cannot demonstrate having sufficient resources. And, as with the family members of ‘standard’ frontier workers, they will struggle to claim subsistence benefits in the state of residence, many of which count as ‘social assistance’ and so cannot be claimed and exported from the state of work.<sup>21</sup>

‘Dual’ frontier workers, meanwhile, are covered by the full range of rights in the Directive and treated purely as EU migrant workers, the most privileged category of EU citizen ‘free movers’. Their entitlement to equal treatment is unconditional, and the EU’s generous definition of ‘work’ means that even part-time work, providing it is more than ‘marginal and ancillary’, will qualify an EU national for those worker benefits.<sup>22</sup> These same generous rights are extended to frontier workers with regards to their *work* activity, and the entitlement of their family members to, for example, housing and education. Coverage in the Directive also enables ‘reverse’ and ‘dual’ frontier workers to attain permanent residence in a host Member State, granting them greater protection in the event of unemployment or inability to work, or if they are faced with deportation.<sup>23</sup>

Even ‘dual’ frontier workers may face difficulties invoking the protections of the Citizens Rights Directive, however, if their work is at all irregular. Nothing in the CJEU’s case law or EU secondary law specifies how *regular* ‘work’ has to be – it merely notes that it cannot be ‘marginal or ancillary’. The Citizens Directive’s rules on retention of ‘worker’ status in the case of involuntary unemployment<sup>24</sup> require registration with an employment agency like the UK’s Jobcentre, and ‘actively’ looking for work to remain a ‘worker’ with all the associated rights. Someone habitually engaged in frontier work in a very seasonal sector, like agriculture, may not be doing this, in which case they will lose their ‘worker’ status and all associated entitlement to benefits after 6 months.

These may sound like they are ‘niche’ gaps in coverage, simply not caught by legislation intended to function in 28 different jurisdictions. However, especially in the context of the island of Ireland, they are crucial gaps that are likely to affect many frontier workers who are simply not *aware* of the ways they are expected to jump or bridge these gaps themselves – and consequently are not aware of these ‘self-sufficiency’ or ‘registering as unemployed’ requirements. This is because most frontier workers on the island of Ireland will also be covered by the arrangements of the Common Travel Area (CTA), whereby neither British nor Irish nationals face any restrictions on their right to reside and work in each other’s countries. Given this absence of restrictions, and the consequent lack of checks on status, why would a seasonal British frontier worker register with an employment office in Ireland when they do not live there? And why would an Irish family resident in Northern Ireland bother with registering for residency rights under EU law, when their rights to reside are not restricted by domestic law anyway?

The ease of movement and reciprocal rights established under the banner of the Common Travel Area were in practice heavily underpinned by EU law from the 1970s onwards – but most Irish and UK beneficiaries of those rights will have been able to live in relative ignorance of the role EU law

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<sup>20</sup> Article 7(3) CD. They also require comprehensive sickness insurance (CSI); see on this Case C-247/20 *VI v Commissioner of HMRC* ECLI:EU:C:2022:177, rejecting the UK’s overly restrictive approach to the concept of CSI, as discussed in Sylvia de Mars, ‘A Little Less Liable? Enforcing Post-Brexit EU Law in the UK’ (forthcoming).

<sup>21</sup> Regulation 883/2004, Article 3(5).

<sup>22</sup> Case 53/81 *Levin* ECLI:EU:C:1982:105.

<sup>23</sup> See Articles 16 and 28 CD.

<sup>24</sup> Article 7(3)(b)-(c) CD.

played.<sup>25</sup> However, with the UK leaving the EU, the role of EU law and the gaps created by its absence became clear – and so the UK and the EU negotiated to preserve the rights of all those benefitting from EU law for the duration of their lives in either an EU Member State or in the UK. In principle, the WA as concluded *should* consequently preserve all rights of EU national workers who work in the UK, or UK nationals who work in Ireland.

## **Frontier Workers in the Withdrawal Agreement**

### *General Rights*

Despite the fact that the most frontier workers affected by Brexit will be working and living on opposite sides of the land border on the island of Ireland, their rights are set out in the body of the WA and not specifically addressed by the Protocol. Unlike most EU law on free movement of workers, however, which alludes to frontier workers primarily in non-binding preambles and limited provisions where they were due exceptional treatment, Part 2 of the WA – which details EU citizens' rights maintained by the WA – centres them immediately.

Article 9(b) of the WA defines 'frontier workers':

'frontier workers' means Union citizens or United Kingdom nationals who pursue an economic activity in accordance with Article 45 or 49 TFEU in one or more States in which they do not reside;

The definition given by the WA is an appropriately broad one, encompassing both work and self-employment, with the key distinguishing factor between 'work' and 'frontier work' being 'residence' in another state. This should include 'standard', 'reverse' and 'dual' frontier workers travelling in both directions between Northern Ireland and Ireland. However, it seems clear within the space of a couple of provisions, that any intention to capture workers and families falling within all six headline permutations of frontier worker was either quickly (but quietly) abandoned, or simply undermined through drafting inconsistency and poor understanding of the complexities of frontier work.

Article 10 lists those falling in the personal scope of the Citizens Rights part of the Agreement:

- (a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;
- (b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
- (c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;
- (d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so

Again, (c) and (d) appear to recreate the breadth of definition of Article 9. However, on then outlining the family members who will have rights, Article 10 WA adds:

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<sup>25</sup> Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, '[Discussion Paper on the Common Travel Area](#)' (IHREC and NIHRC, October 2018) ('Discussion Paper')

(e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:

- (i) they *resided in the host State* in accordance with Union law before the end of the transition period and continue to reside there thereafter;
- (ii) they were directly related to a person referred to in points (a) to (d) and resided outside *the host State* before the end of the transition period...
- (iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period...

(f) family members *who resided in the host State...* before the end of the transition period and continue to reside there thereafter.

While the wording of ‘family members of the persons referred to in points (a) to (d)’ gives the impression that persons in (a) to (d) will have similar family reunification rights, the reliance in (e) and (f) upon the ‘host state’ excludes the family members of ‘*standard*’ frontier workers. This is because at Article 9(c), the WA defines ‘host state’ as:

- For EU nationals: the UK if they lived there in accordance with EU law prior to Brexit (and continue to live there afterwards);
- For UK nationals: the Member State they lived in in accordance with EU law prior to Brexit (and continue to live there now).<sup>26</sup>

Frontier workers explicitly do not *live* in the state they work in. Instead, they either live in their state of nationality and work elsewhere, or work in their state of nationality and live elsewhere – or they simply work and reside in two different Member States, neither of which are their states of nationality. Family members of ‘*standard*’ frontier workers thus will never ‘reside in the host State’ for EU law purposes, as a ‘*standard*’ frontier worker will also not ‘reside in the host State’ – they will reside in their state of nationality.

Article 10(3) WA consequently does not seem to apply to those frontier workers’ families any more than EU law did – but it *can* cover ‘reverse’ or ‘dual’ EU frontier workers and their families who are resident in the UK but work in a different Member State, or ‘reverse’ or ‘dual’ non-Irish EU and UK national frontier workers and their families who are resident in Ireland but work in the UK. Given the specific context of frontier work on the island of Ireland, however, the fact that ‘*standard*’ frontier workers’ families are not expressly included in these definitions means that bulk of frontier workers *on* the island of Ireland will not see their family’s residency rights addressed by the WA. This is of little concern for Irish and British nationals, who hold residency rights under the Common Travel Area’s arrangements, as we will see below – but might be of significant consequence for non-British and non-Irish family members of both UK and EU national ‘*standard*’ frontier workers, who seem to fall outside of the scope of the WA just as they did EU law, bar an application for *Carpenter*-style EU law rights that has never been attempted.

While this replicates the paradox already in existence in EU law - of ‘*standard*’ frontier workers having fewer family reunification rights than ‘reverse’ frontier workers - it is arguable that the consequences are more severe, because routes to engage coverage of the Citizens Directive are no longer available, making their exclusion final.

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<sup>26</sup> Article 9(c) WA.

In terms of residency rights for ‘reverse’ frontier workers and their families, or ‘dual’ frontier workers and their families, the WA in Articles 13-15 in effect copies over the relevant provisions of the Citizens’ Directive, and so maintains the rights of exit and entry, rights of initial residence, and rights of permanent residence held by these frontier workers and their families prior to Brexit. Article 16 ensures that they can *attain* permanent residence even after Brexit. However, the WA version of ‘permanent residence’ is distinct from that in the Citizens’ Directive: Article 15(3) makes clear that it can be lost after an absence from the host State of more than 5 consecutive years. The Citizens’ Directive also makes provision for ‘quicker’ permanent residence for ‘onward’ frontier workers, who live and work in an EU Member State and after 3 years, proceed to work in a *different* Member State;<sup>27</sup> this has not made its way into the WA, simply because UK nationals do not have ‘onward’ free movement rights under the WA, and any EU national starting to work in the UK after Brexit will likewise not be doing so as a matter of EU law.

Article 18 sets out the rules applicable to what in the UK has become the EU Settlement Scheme, permitting the UK and Member States to adopt a residency registration process that results in Part 2 rights being conferred to EU nationals by their ‘host State’. Again, this provision can only be relevant for ‘reverse’ UK or ‘dual’ EU national (including Irish) frontier workers and their families who are resident in the UK and work in the EU. As was the case under Citizenship Directive, frontier workers and their families resident in Northern Ireland could register for this new residency status (‘Settled Status’) as self-sufficient under Article 18(1)(k)(ii) WA. Article 23 of the WA copies over the Citizenship Directive’s Article 24, granting equal treatment with ‘host State’ nationals, in full – including its limitations on student maintenance grants and its extension of equal treatment to resident family members of EU nationals residing in the host State. This complements Article 12 WA, which references Article 18 TFEU’s prohibition of discrimination based on nationality and applies it to both the host State and the State of Work. Article 22, meanwhile, confirms that family members of EU nationals resident in the host State are entitled to take up work or become self-employed there as well.

A big change in terms of rights of ‘reverse’ and ‘dual’ frontier worker families resident in Northern Ireland but working elsewhere in the EU is found in Article 20, which makes clear that while decisions to deport such frontier workers and their families on the basis of conduct that took place before the end of transition were to be taken in line with Citizenship Directive, decisions on deportation as of 2022 are taken on the basis of national legislation.<sup>28</sup> This is a visible loss of protections, as national legislation does not offer the protections granted by the Citizenship Directive and the CJEU’s case law to those who hold long-term residency in the UK.<sup>29</sup>

Chapter 2 of Part 2 discusses the specific rights of workers and self-employed persons. Article 24 WA here copies over the relevant rights set out in Regulation 492/2011, and adds a specific proviso for frontier workers.<sup>30</sup> Article 24(3) WA creates an interesting new provision, not only allowing the retention of that worker status for frontier workers regardless of where they are resident, but also

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<sup>27</sup> Article 17(1)(c) CD.

<sup>28</sup> Article 20(2) WA. The UK deports on grounds known as ‘conductive deportation’, where they can be deported from the UK if that deportation is ‘conductive to the public good’ (Immigration Act 1971, s3(5)).

<sup>29</sup> See Article 28 CD, which only permits deportation of permanently resident EU nationals on ‘serious grounds’ and only permits deportation of EU nationals resident in the host state for longer than 10 years on ‘imperative grounds’. ‘Imperative’ grounds of public security include dealing in narcotics as part of organised crime (Case C-145/09 *Tsakouridis* ECLI:EU:C:2010:708) and terrorism (Case C-300/11 ZZ ECLI:EU:C:2013:363), as opposed to lesser criminal activity – which can be grounds for a ‘conductive deportation’.

<sup>30</sup> Article 24(3) WA.

giving former frontier workers the right to enter and exit their State of former work in the way that other persons covered by the WA are entitled to enter the 'host State'. This is a useful supplement to the Citizenship Directive's content on retained worker status, compensating for the fact that EU nationals can always travel back and forth between Member States, but EU nationals would not have those rights regarding the UK after Brexit.

The rights contents of Part 2 is gatekept by Article 26 WA, which enables the state of work to require a frontier worker to apply for a document certifying they are frontier workers. This is a wholly new development, in that prior EU documentation as set out in the Citizenship Directive was concerned only with *residency*, and the UK opted to not require EU nationals to apply for residency status documentation for the duration of its membership. As we will see, the UK has set up a Frontier Worker Permit scheme in line with Article 26 WA, meaning that accessing frontier worker rights under the WA requires formal registration.

Title IV of Part II contains other provisions that are of relevance to frontier workers. Article 37 WA obliges the Member States and the UK to 'disseminate information concerning the rights and obligations of persons covered' by Part 2, which is of relevance when we consider the UK approach taken to 'informing' Irish nationals about the post-Brexit registration schemes. Article 38(1) enables the UK and the Member States (as either host State or State of Work) to uphold 'more favourable provisions' than the baseline required by Part II; and Article 38(2) specifies that the Article 12 non-discrimination commitment and Article 23's equal treatment commitment operate 'without prejudice' to the Common Travel Area and more favourable treatment stemming from its operation. This latter article echoes the Common Travel Area exemption that was contained in Protocol 20 of the EU Treaties when the UK was a Member State, and so represents more continuity for relevant frontier workers.

Finally, Article 39 makes clear that those covered by Part II shall enjoy its rights for their lifetime, unless they cease to meet the conditions set out in Part II. This provision, too, looks promising – until we consider just what 'ceasing to meet the conditions' amounts to, and how easy it is to *lose* frontier worker status under the WA.

### *Social Security Coordination*

Title III of Part 2 addresses social security coordination under the WA. Article 30(1) makes clear that it covers any EU national (and their family) subject to UK social security legislation, as well as any UK national (and their family) subject to an EU Member State's social security legislation at the end of the transition period. Article 30(2) makes clear that those covered will *remain* covered as long as they continue *without interruption* to fall within the scope of Article 30(1), and Article 30(3) adds to this that Title III will also apply to those who are not in the specific residency or 'subject to legislation' situation but otherwise fall within the scope of Part 2, as long as they continue to have a right to reside in a relevant host State, or continue to hold the right to work in their state of work. These provisions, taken together, mean that all configurations of frontier workers involving the UK will be covered by Title III of the WA.

Title III's substantive contents is composed of references to Regulation 883/2004 and its implementing regulation, 987/2009. Article 31 WA makes explicit that definitions of terms in Regulation 883/2004 will apply across the Title, meaning that it effectively copies over and applies the Regulation in full – including the restriction on the family members of frontier workers accessing sickness benefits in the state of work.

One further provision of interest to all workers, including frontier workers, is Article 36, which makes clear that Title III of Part 2 is ‘living’ legislation, rather than ‘static’ in the way that earlier Titles of Part 2 are. What this means is that where Regulation 883/2004 and its implementing regulation are amended or replaced at any point in the future, these *new* social security coordinating Regulations will apply to all EU and UK nationals covered by the current ones. Where there are significant changes to the benefits granted, this is a matter of discussion in the Joint Committee – but in any event, the contents of Title III ensures that those covered by it will be entitled to the same social security *access* as they were when the UK was an EU Member State.

### *Summary*

Frontier workers were expressly considered in the WA, which is in principle a positive, but there are distinct gaps in that consideration. Residency rights for families of frontier workers who are living in the state of that frontier worker’s nationality remain left unaddressed, and indeed, the concept of ‘residence’ as applicable to frontier workers has been left ambiguous by the WA. This would be less concerning if the only other explicit EU legislative provision on frontier work prior to Brexit did not define the concept of ‘residency’ in the frontier worker context as requiring almost *daily* commuting back to that state of residence, which consequently excludes a wide range of semi-irregular and irregular frontier work from the definition.

Other ‘losses’ visible in the WA include the rights to residency protections, which under the Citizenship Directive grow stronger the longer someone resides in their ‘host State’ – something of specific relevance to ‘dual’ frontier workers and ‘reverse’ frontier workers; and the ability to engage in ‘onward’ frontier worker is lost to UK nationals, as is the ability to attain accelerated permanent residency as an ‘onward’ frontier worker.

However, most of the rights set out in the variety of regulations and directives addressing free movement of workers are preserved by the WA – and so insofar as frontier workers *can* be treated like other workers, they will retain those rights. Importantly, they can also themselves enforce those rights: the WA’s contents is directly effective where it meets the EU law conditions for direct effect, as the rights set out in Part 2 do;<sup>31</sup> this means that those covered by Part 2 can go to UK courts and seek redress by relying on the WA’s content itself if the UK fails to respect the rights it is meant to preserve under Part 2.<sup>32</sup> Frontier workers are thus fairly well-protected by the terms of Part 2 of the WA, provided they registered as frontier workers before the end of the UK’s transition period.

### **Frontier Workers under UK Law Implementing the WA**

Much of how the WA protects frontier workers on the island of Ireland after Brexit depends on how the UK (given that these are not generally devolved powers) has implemented the WA. The previous section highlighted that there are two specific types of rights envisioned by the UK and the EU as persisting after Brexit under the WA:

- General *residency* rights, which in the UK are granted by the EU Settlement Scheme (EUSS) – and are relevant for ‘reverse’ and ‘dual’ frontier workers and their families, as well as non-EU family members of ‘standard’ frontier workers, provided they joined their EU national frontier worker in the UK under EU law;

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<sup>31</sup> For a detailed discussion of potential shortcomings of this direct effect, see Stijn Smismans, ‘EU citizens’ rights post Brexit: why direct effect beyond the EU is not enough’ (2018) 14(3) European Constitutional Law Review 443; the point made in this article is simply that it is not a *de jure* diminution from the enforcement rights existing under EU law.

<sup>32</sup> Article 4(1) WA.

- Frontier worker rights, which in the UK are granted by the Frontier Worker Permit Scheme (FWP Scheme).

The EUSS was established and started accepting applications *prior* to Brexit, and so will be considered separately from the UK's implementation of the WA, as found in the EU (WA) Act 2020 (the 2020 Act) and the secondary legislation adopted under it.

#### *The EUSS – Residency Rights in Northern Ireland*

The EU Settlement Scheme (EUSS) is the UK implementation of Article 18 WA, which sets out the conditions under which both the EU Member States and the UK can set up 'residency registration' schemes for relevant beneficiaries of Part 2 of the WA. In the case of the UK, the Settlement Scheme enables EU nationals who were resident in the UK on 31 December 2020 to register as such right-holders. The details of how the EUSS works is set out Appendix EU to the Immigration Rules.<sup>33</sup>

As the EUSS is about *residence in the UK*, then for our purposes, it is only of relevance to frontier workers and their families that are resident in Northern Ireland (and so the frontier worker is employed in Ireland). What is of particular interest is that Appendix EU creates two specific categories of applicants under the EUSS in light of Northern Ireland. First, there is the 'relevant person of Northern Ireland':

a person who:

(a) is:

- (i) a British citizen; or
- (ii) an Irish citizen; or
- (iii) a British citizen and an Irish citizen; and

(b) was born in Northern Ireland and, at the time of the person's birth, at least one of their parents was:

- (i) a British citizen; or
- (ii) an Irish citizen; or
- (iii) a British citizen and an Irish citizen; or
- (iv) otherwise entitled to reside in Northern Ireland without any restriction on their period of residence<sup>34</sup>

This sub-set of those born in Northern Ireland are treated as EEA citizens, and so their family members can 'join' them under the EUSS scheme. The category of 'relevant person of Northern Ireland' thus addresses a shortcoming of both the Citizens Directive and the WA: these particular residents of Northern Ireland *can* sponsor family members to join them in their state of nationality; it is thus a rare prohibition of "reverse' discrimination', so allowing own state nationals (in Northern Ireland) similar family reunification rights to EEA migrants.

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<sup>33</sup> The Immigration Rules are treated as secondary legislation and are where all applicable 'law' on the details of immigration-related decisions are kept for all visa and status categories.

<sup>34</sup> Appendix EU, Annex 1.

A further category of applicants created by Appendix EU is the ‘specified relevant person of Northern Ireland’, which can only be held by those who meet the conditions of ‘relevant person of Northern Ireland’ but do not hold exclusively Irish citizenship. These ‘specified’ applicants have been given additional rights under the EUSS on 1 July 2021 to sponsor non-EU dependent relatives for EUSS residency rights even when they themselves were not in the UK at the time of Brexit for compelling reasons. There are thus a range of ‘EU-law-based’ immigration options available to family members of certain British and/or Irish nationals from Northern Ireland that compensate for what the Citizens Directive and the WA exclude because of limits to the scope of EU law – which was very good news for frontier workers and their families if they *were aware* of this prior to the final application deadline to the EUSS scheme, which was 1 July 2021. There was, in other words, a window of time in which a British and/or Irish frontier worker could sponsor their family for residency rights *in their home State of Northern Ireland* – but that window has now expired.

Appendix EU further discusses family members of frontier workers generally, and notes that they count as EEA citizens eligible for EUSS registration where the frontier worker holds a Frontier Worker Permit under UK law. This is curious, however, because any EU national frontier worker holding a Frontier Worker Permit in UK law cannot themselves be resident in the UK (or they would simply be a worker). It is difficult to see what the purpose of this definition is: it seems to enable families of frontier workers to hold residency rights in the UK, but only if they do not live with the frontier workers themselves – or the frontier worker would not be a frontier worker. If nobody examines this contradiction too closely, however, it gives yet another group of family members of frontier workers residency rights in the UK after Brexit.

What we see in the EUSS is consequently an implementation of the WA’s core requirements for Citizens’ Rights, but also additional rights for those born in Northern Ireland to British and/or Irish parents. Without needing to, it treats them as EEA nationals, so as to maximise the benefits they gain from the WA *without* needing them to leave their home State at all.

#### *The EU (WA) Act 2020 – Other Rights involving Frontier Workers*

The WA is implemented in the UK by the EU (WA) Act 2020. As with previously directly applicable EU law, the primary mechanism for giving effect to the WA’s content is via a ‘reference’ clause, set out in Article 5 of the Act. It makes, ‘without further enactment’, the contents of the WA a part of UK domestic law, to be ‘enforced, allowed and followed accordingly’.

Likewise, the 2020 Act reintroduces the ‘implied supremacy’ clause that was at the heart of the ECA 1972, by making clear that ‘every enactment (including an enactment contained in this Act) is to be read and has effect subject to’ the contents of the WA. This addresses the content of Part 2 of the WA, but there are specific sections in the 2020 Act that deal explicitly with Citizens’ Rights.

The majority of the 2020 Act gives powers to Ministers to enact secondary legislation to give effect to the WA and its obligations. Key here is s8, which enables ministers to set up a system to register for the ‘frontier worker status’ document alluded to in Article 26 WA in secondary legislation. Section 13 permits the passing of statutory instruments that implement Title III of Part 2 of the WA, addressing social security coordination; and there is also s14, which enables the passing of statutory instruments to implement Article 12 WA on non-discrimination, Article 23 WA on equal treatment, and Articles 24 and 25 WA with regards to the rights of workers, the self-employed and frontier workers. Section 8 has been acted on, but much as the UK did not transpose Article 24 of the Citizenship Directive in the Immigration (EEA) Regulations 2016 when it was still a Member State, it has not passed any secondary legislation to address equal treatment rights for any EU workers as

section 14 permits. Perhaps more surprisingly, section 13 has also not produced any statutory instruments at the time of writing.

### *The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020*

The Frontier Workers Regulations 2020 bring the WA's specific provisions concerning frontier workers into UK domestic law. They do so in significant detail. The first job the regulations do is that of definition. Regulation 2 makes clear that the Frontier Workers Regulations apply to EEA nationals who are *not* also British nationals. Regulation 3 adds to this that the definition of a frontier worker for the purpose of the Regulations is an EEA national who is *not* primarily resident in the UK. Certain categories of frontier workers are thus explicitly *not* addressed by these regulations: UK nationals living in Ireland and working in the UK (eg, 'reverse' frontier workers).<sup>35</sup> However, Regulation 3 gives a 'not primarily resident' extremely broad scope: anyone who returns to their country of residence at least twice in every twelve-month period is deemed to not be 'primarily resident' in the UK. For those who want to benefit from falling within the frontier worker regulations, this is a generous definition, which will catch many more workers than that in Regulation 883/2004, which requires them to return to their state of residence 'at least once a week', and thereby excludes most irregular frontier workers from coverage. This approach does create some potential complexity, however, in that it also captures a lot of people who consider themselves *resident* in the UK; there is definite overlap in the personal scope of the FW regulations and the EUSS.

The definition is further expanded upon in Regulations 3 and 4 which address employment status. Frontier workers can be workers, self-employed, or 'retained' workers – with Regulation 4 here making clear that self-employed 'frontier workers' can also 'retain' status on account of involuntary unemployment or voluntary vocational training linked to their previous work. The pre-Brexit Immigration (EEA) Regulations 2016 made no such provision – in fact, they made no mention of frontier workers at all. However, that is because they were primarily about the creation of residence rights; retaining worker status being of importance in order to retain a *right to reside*. In a post-Brexit UK, it is however necessary for frontier workers to demonstrate that they retain that status in order to retain a *right to work* – a factor that was not in question while the UK was an EU member.

This retained right is not indefinite. When the activity ceased because of involuntary unemployment, frontier worker status can only be 'retained' for a period longer than 6 months *if* the EEA national can prove that they are continuing to seek employment. This has potential implications for those who have historically engaged in very casual or seasonal frontier work, as highlighted above. And it is worth noting that the UK government has a track record of introducing strict<sup>36</sup> – and unlawful<sup>37</sup> – rules and guidance when it comes to checking the employment prospects of EU national former workers.

Having defined them, the next job the regulations do is provide frontier works with a right to be admitted to work *qua* frontier worker; Regulation 5 establishes that frontier workers are not subject to immigration control in the UK, and Regulation 6 provides that to be admitted when they provide

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<sup>35</sup> This latter category of frontier workers, however, falls within the scope of relevant Irish legislation on frontier work after Brexit.

<sup>36</sup> See Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford: Hart, 2017), Chapter 6; Charlotte O'Brien, 'The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37(1) *Journal of Social Welfare and Family Law* 111.

<sup>37</sup> *KH v Bury MBC and SSWP* [2020] UKUT 50 (AAC).

an identity document as well as a valid 'Frontier Worker Permit'. Regulation 6(2) excepts Irish nationals from holding such a permit, however.

This right of entry is subject to exceptions; frontier workers can be refused the right of entry into the UK on grounds of public policy, public security, public health,<sup>38</sup> on grounds conducive to the public good, (where the conduct in question took place after the end of the transition period)<sup>39</sup> or on grounds of the misuse of frontier workers' rights,<sup>40</sup> or if the immigration officer doubts they actually (still) are a frontier worker.<sup>41</sup> However, there is no cross-reference to the relevant EU law, which is potentially confusing for those who hold rights under the Citizens Directive (as preserved by the WA). Regulation 20(3) makes clear that decisions on these grounds must be proportionate and 20(4) adds that decisions cannot be taken 'systematically' in relation to misuse of frontier worker rights. Frontier workers' appeals will operate under a first level administrative and a second level judicial redress system that is identical to the one the UK operated to comply with the Citizens Directive.<sup>42</sup>

Where they are denied entry, they are subject to regular UK Immigration Law as set out in the 1971 Immigration Act in that they will be 'removed' to their country of nationality.<sup>43</sup> Likewise, when a frontier worker's right of entry is later revoked, they will be issued with a notice to leave the UK under the 1971 Immigration Act;<sup>44</sup> and frontier workers can be removed if they cease to be frontier workers, or if there are removal grounds (under the same categories of grounds as for refusing admission).<sup>45</sup> Removals will be processed under normal UK immigration law, as opposed to under EU law.<sup>46</sup>

Having covered definition and admission, the Regulations then outline the duration of frontier worker rights. Frontier worker permits are valid for *two* years in the case of an application from a 'retained' frontier worker, and *five* years for other frontier workers.<sup>47</sup> However, frontier workers can apply for their permit to be renewed if they meet the original conditions of eligibility.<sup>48</sup> The duration of the permit is somewhat irrelevant, in that it will not lead to a 'permanent frontier worker' status, the way that five years of continued residence under the EUSS *does* lead to eligibility to apply<sup>49</sup> for indefinite leave to remain. Frontier workers have to therefore continuously *stay* frontier workers, as defined, and have to continually reapply for status as long as they remain frontier workers.

In short, the Frontier Workers Regulations are a detailed and faithful implementation of the WA's content on frontier workers, but they exclude from their consideration the scenario of the British national 'reverse' frontier worker, who (despite being a subject of EU law prior to Brexit) now is likely to be subject purely to UK social security legislation while resident in Ireland. Certain other dimensions of the Frontier Worker Regulations highlight the limitations of the WA as a 'snapshot'

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<sup>38</sup> The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020, reg 18 ('Frontier Workers Regulations 2020')

<sup>39</sup> Ibid, reg 19.

<sup>40</sup> Ibid, reg 20.

<sup>41</sup> Ibid, reg 12.

<sup>42</sup> Under reg 24 which amends the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020

<sup>43</sup> See Schedule 2 of the Immigration Act 1971, para 8.

<sup>44</sup> Frontier Workers Regulation, reg 14.

<sup>45</sup> Ibid, reg 15.

<sup>46</sup> Ibid, reg 16. In this case, the Immigration Act 1971 and the Immigration and Asylum Act 1999.

<sup>47</sup> Ibid, reg 10.

<sup>48</sup> Ibid, reg 11.

<sup>49</sup> Note that the Independent Monitoring Authority for the Citizens' Rights Agreements is pursuing a [judicial review](#) on whether a second application should be required, arguing that instead the transition to indefinite leave should be automatic.

settlement, in that limitations on retaining what has become a ‘one-off’ status under the WA means that in future, those regularly engaging in cross-border work in Northern Ireland but with significant interruptions in *when* that work takes place will fall outside the scope of Part 2 of the WA.

### *Guidance on WA Rights*

One curious aspect of the UK’s implementation of EU law, as a Member State, was that a significant amount of directly applicable EU legislation (eg, that not requiring implementation) was only ever found in guidance to administrators and decision-makers. As just an example, the Social Security Coordination Regulation receives passing mentions in UK primary and secondary legislation, but takes a prominent place in guidance to decision-makers on benefit applications – each of which tends to contain a bespoke ‘European’ section where the effects of Regulation on applications from EU nationals are laid out in great detail.<sup>50</sup> This is not contrary to EU law, but it is concerning from the perspective of legal certainty for EU citizens – in that UK law only ever told *half* the story of the entitlements EU nationals held in the UK.

Ironically, in leaving the EU, the UK’s approach seems to have flipped, to make the legislation more detailed and the guidance sketchy. All official guidance on the WA is significantly lacking in at least one key respect: both the EUSS and the FWP Scheme guidance reflect public-facing UK government websites prior to Brexit, and stress that Irish citizens ‘do not need to apply’ for either status to work and live in the UK, but can do so if they want to.<sup>51</sup> The EUSS Guidance adds to this that non-Irish and non-British family members do need to apply under the EUSS, but their Irish national family member does not need to. There is no further comment in the caseworker guidance on why Irish nationals might *wish* to apply for an EUSS status if they are resident in the UK; there is only a generic comment that ‘Irish citizens enjoy a right of residence in the UK that is not reliant on the UK’s membership of the EU’.<sup>52</sup>

This is of course correct, but ignores that the WA also contains detailed rules on equal treatment, social security coordination, retention of status, and appeal rights to decisions concerning residency. It also arguably *is* problematic from the perspective of Article 37 WA and its obligations to ‘disseminate information on rights’ held under the WA – in that it is unclear whether most Irish nationals understood what rights they *could* have held if they had applied for a status under the WA. In the absence of registering a status *under* the WA, it is not obvious that those rights will be available to Irish nationals.

### *Summary*

The above summary of how the UK has implemented the WA should present a picture of broad coverage, and in some cases coverage that goes beyond the WA’s express requirements (eg, on family reunification rights for ‘relevant persons of Northern Ireland’, and on the definition of ‘frontier worker’ and their residence requirements) – but they nonetheless do not address all six of the various configurations of frontier work that might take place on across the Northern Ireland border, and in any event, are supplemented by public guidance that strongly suggests that Irish nationals do not *need* to register for any status under the WA.

Because it is hard to explicitly legislate for the absence of a status, it is also easy to overlook the biggest shortcoming of the ‘frontier worker’ rights preserved by the WA, and as implemented by the

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<sup>50</sup> For example, HRMC, ‘[Child Benefit Technical Manual](#)’ (29 March 2022), CBTM10000.

<sup>51</sup> Home Office, ‘[EU Settlement Scheme: EU, other EEA, Swiss Citizens and family members](#)’ (version 17, 13 April 2022), 21; and Home Office, ‘[Frontier worker permit scheme guidance](#)’ (version 2, 1 April 2021), 9.

<sup>52</sup> EU Settlement Scheme Guidance, *ibid*, 20.

UK: once someone loses the ‘frontier worker status’ that the WA enables them to obtain, they cannot get it back as a matter of WA law. Those who fail to register in the first instance, (and do not have a sufficiently good reason for a later application), or those who cease to be frontier workers (whether in full, or simply do not engage in it regularly enough to be captured by the *definition* of frontier worker or retained frontier worker), consequently fall outside of the scope of the WA and so former ‘dual’ frontier workers (who are neither British nor Irish nationals) consequently lose their rights to work in their state of Work, and lose their WA-based social security coordination rights as well. As we will see, these ‘gaps’ in the WA remain are not fully addressed by the CTA and the TCA concluded between the EU and the UK. The Protocol on Ireland/Northern Ireland might nonetheless offer a route to retention of ‘frontier worker’ rights as they existed in EU law.

### **Frontier Worker Rights Beyond Part 2 of the WA**

There are three possible other ‘international law’ sources of rights for frontier workers employed or resident in Northern Ireland. These are, in no particular order, the Common Travel Area’s arrangements – and particularly its Convention on Social Security; the Trade & Cooperation Agreement’s Protocol on Social Security; and Article 2 of the Protocol on Ireland/Northern Ireland.

#### *The CTA*

The constant refrain in the lead-up to Brexit was that there were no reasons to be concerned about the rights of those living on the island of Ireland, because the Common Travel Area would continue existing, and would address all the same points.<sup>53</sup> This was, of course, only ever true for British and Irish nationals, not for all other EU nationals or third country nationals – and a detailed study showed that while there is substantial overlap between EU law rights and the rights that the UK government associates with the Common Travel Area, those former rights were enforceable as a matter of EU law, where the latter are bilateral commitments to uphold reciprocal rules on issues like the right to work and residency rights, as well as access to education and health services.<sup>54</sup> They are not, in short, directly effective.

The exception to ‘reciprocal domestic law’ is in the realm of social security, where the UK and the EU concluded a Treaty in February 2019 to ensure that ‘the reciprocal rights enjoyed by British and Irish citizens under the Common Travel Area arrangements are protected following the withdrawal of the United Kingdom from the European Union.’<sup>55</sup> The indefinitely applicable<sup>56</sup> Social Security Convention cross-references EU social security coordination rules, and in its basic setup effectively copies Regulation 883/2004, including its definition of frontier workers. Consequently, the CTA’s Social Security Convention works as a ‘back-up’ for Irish and UK national frontier workers who either did not qualify for a frontier worker permit in December 2020 – because, perhaps, their frontier work started after that – or who failed to register for a frontier worker permit. It entitles them to identical social security benefit access as that system, with the exception of healthcare access in their state of Work if they do not meet the definition of ‘frontier worker’ under the Convention. Social security coordination thus appears well-addressed by the CTA’s Convention, but it, too, is not enforceable as

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<sup>53</sup> See Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, [‘Continuing EU Citizenship “Rights, Opportunities and Benefits” in Northern Ireland after Brexit’](#) (March 2020), Section 5.5; Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press 2018) Chapter 5.

<sup>54</sup> See Discussion Paper (n 25 above).

<sup>55</sup> Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (2021) CP 379, Treaty Series No. 6

<sup>56</sup> Article 66 of the Convention.

a matter of domestic law; and, as above, does not benefit any non-Irish or non-British frontier workers and their families.

#### *The TCA's Protocol on Social Security*

EU nationals who are not Irish or British citizens and who wish to start any kind of work in the UK after the transition period have to apply for a UK visa. The details of UK immigration law are beyond the scope of this paper, but most 'work visas' available do not enable sporadic, flexible, or low-paying work and come with minimum earning requirements. Even visas available for more low-paying 'frontier' work, such as seasonal agricultural work, are valid for only 6 months and have conditionalities attached.<sup>57</sup> Non-Irish EU nationals working in Ireland who wish to start living in the UK after Brexit are simply out of luck altogether: visas do not exist to enable longer-term 'residency' in the UK in the absence of work or pre-existing family members there. Frontier work on the island of Ireland will consequently prove much more difficult, if not impossible, for non-Irish EU nationals who fall outside of the scope of the WA. However, should they find themselves successful in obtaining a relevant UK work visa, some of their rights are addressed by the TCA's Protocol on Social Security (PSS).<sup>58</sup>

It is important to stress here is that the PSS addresses social security coordination for British and Irish nationals *as well as* other EU nationals. Article 489 of the TCA makes clear that the Protocol on Social Security (PSS) applies to all those 'legally residing' in a Member State or the UK, which covers those British and Irish nationals engaging in frontier work who are not within the scope of the WA and/or failed to register under the WA, as well as any non-Irish EU nationals holding relevant visas for the UK.

The PSS, like the CTA Convention, by and large copies out the Social Security Coordination Regulation—but it has different provisions on enforcement from the CTA's Convention. The PSS requires all parties to ensure that the contents of the PSS can be enforced domestically before courts, tribunals and administrative bodies.<sup>59</sup> In essence, this makes the PSS 'directly effective' as the WA is, and as EU law was, in the UK; and makes it significantly more effective in terms of enforcement than the CTA convention, which cannot itself be relied upon directly before domestic UK courts. Given that the PSS explicitly covers UK and Irish nationals as well as all other 'legal residents' of the UK and Ireland, this makes it the most likely focus of redress claims for all those who are not covered by the WA.

However, the PSS's advantage in enforceability comes with a different downside to the Convention: the PSS in principle will last 15 years – and then has to be renewed by agreement between the EU and the UK.<sup>60</sup> In the absence of renewal, all rights and benefits accrued prior to the Protocol's end of application date would be retained by relevant frontier workers, but further benefits would not be coordinated in the way indicated. At that time, the Convention would once more become the only available 'back-up' for those British and Irish nationals not eligible, or not registered, for a frontier worker permit under the WA.

#### *The Protocol on Ireland/Northern Ireland*

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<sup>57</sup> See, for example, the post-Brexit UK Government 'Check if you need a UK Visa' answer for a [German national](#). Note that these visas grant residency rights in the UK, but as they enable travel to and from the UK as well as residency there, nothing appears to preclude residency in a different country for a visa holder.

<sup>58</sup> It is implemented in UK law by s26 of the European Union (Future Relationship) Act 2020.

<sup>59</sup> Article SSC.67 PSS.

<sup>60</sup> Article SSC.70 PSS.

One other possible route to rights for those not expressly covered by Part 2 of the WA is the existence of the Protocol on Ireland/Northern Ireland (Protocol), and its Article 2(1):

The United Kingdom shall ensure that **no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union**, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.  
(emphasis added)

There has been significant debate as to the scope of this ‘no diminution’ commitment.<sup>61</sup> In terms of concrete rights protected, evidence to the Lords Committee on the Protocol has suggested that there are no clear limitations to the GFA concept of ‘rights, safeguards and equality of opportunity’ — the GFA only sets out a non-exhaustive list of examples of rights confirmed for ‘everyone in the community’.<sup>62</sup> The concept of the ‘community’ across the GFA is used to describe those in Northern Ireland, and McCrudden argues persuasively that in the context of Brexit, it should also capture all those in Ireland.<sup>63</sup> As such, these rights appear confirmed for all (regardless of nationality) engaged in frontier work on the island of Ireland.

For the current purposes, however, there are several rights listed in the relevant part of the GFA that can be clearly linked to the lives of frontier workers. First, there is the right to ‘freely choose one’s place of residence’. Even taken very literally, that right implies that there should be no restrictions on the ability of someone in the UK deciding to go live in Ireland and work in the UK as a ‘reverse’ frontier worker, nor should there be any restrictions on an Irish national moving to the UK but remaining working in Ireland. Secondly, there is the ‘right to equal opportunity in all social and economic activity’. This right does not specifically prevent discrimination on the basis of nationality as EU law does, but instead encompasses a broader work-related equal treatment obligation. Here, again, if there are restrictions on the ability for someone from Ireland to go work in the UK, or someone from the UK to go work in Ireland, we find a potential violation of the relevant dimension of the GFA. Likewise, if there are different benefits available to the same worker when they are a frontier worker as opposed to when they are a ‘standard’ worker, this would pose a possible problem in terms of ‘equal opportunity’ of economic activity.

Of course, Article 2 of the Protocol only applies to a *diminution* of rights that is a result of Brexit, and not general change in rights or the overall availability of rights within the UK. This requires a careful consideration of the different types of frontier workers that exist on the island of Ireland; the rights they held before Brexit in connection to GFA-protected rights; how their rights operate post-Brexit; and whether this represents a diminution.

As has been shown, the highest level of ‘protection’ of rights for all post-Brexit frontier workers in Northern Ireland is that granted by the WA. However, even those protections come with one

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<sup>61</sup> See Colin Murray and Clare Rice, ‘Beyond Trade: implementing the Ireland/Northern Ireland Protocol’s human rights and equalities provisions’ (2021) 72(1) NILQ 1, and the ongoing series of reports published by the Northern Ireland Human Rights Commission, exploring the scope of Article 2: Tamara Harvey, [‘Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol’](#) (NIHRC, March 2022); Alison Harvey, [‘Human Trafficking and Article 2 of the Ireland/Northern Ireland Protocol’](#) (NIHRC, March 2022).

<sup>62</sup> Protocol on Ireland/Northern Ireland Sub-Committee, [‘Corrected oral evidence: Article 2 of the protocol’](#) (parliament.uk, 15 September 2021), statement by Éilís Haughey, 8.

<sup>63</sup> Christopher McCrudden, ‘Human Rights and Equality’ in Christopher McCrudden (ed), *The Law and Practice of the Ireland/Northern Ireland Protocol* (CUP 2022) 145.

extremely significant depletion from the former regime applicable to frontier workers: a frontier worker covered by the WA has to be a frontier worker in December 2020 and *cannot stop being a frontier worker and keep their rights*. When they fall outside of the definition of frontier worker or retained frontier worker, they simply cease to be covered by the WA altogether. A further depletion comes in the field of protections against deportation, which after Brexit—for frontier workers, like all workers—is purely based on UK ‘public good’ considerations; the fact that EU national workers have enhanced protection against deportation after 5 and 10 years of residence there ceases to exist for anyone covered by the WA.

To ameliorate the harsh consequences of loss of status, the UK’s implementation of the WA offers a generous definition of ‘frontier work’ that enables those who only sporadically return to their country of residence to fit within the scheme – but that still excludes any frontier workers who do not engage in frontier work continuously and with great regularity. It would not have done so prior to Brexit, as anyone resident in the UK or Ireland in line with EU law would have been able to start and stop frontier work *whenever they wished to*. Given the connections between frontier work and the GFA right to reside in a place of one’s choice and right of equal opportunity in economic activity, the mere fact that ‘frontier worker status’ now has an included expiration date for those who stop their frontier work amounts to a diminution of rights held prior to Brexit under Article 2 of the Protocol. Likewise, the ability to be deported is now taken solely on the basis of a consideration of whether the ‘reverse’ or ‘dual’ frontier worker’s presence in the UK ‘is not conducive to the public good’ – a test the Home Office describes as ‘intentionally broad in nature’, with no consideration as to the length of their residence in the Host state, nor any enhanced protections because of that residence.<sup>64</sup>

These diminutions will not be alleviated for many frontier workers even when we consider the CTA and the PSS as ‘alternatives’ or ‘supplements’ to the WA. Irish and British nationals who are not covered by the Frontier Worker Regulations can, of course, start and stop frontier work as they see fit – but where ‘standard’ frontier workers are covered by the CTA arrangements, the ability to enforce the social security coordinating rules applicable under the CTA are diminished in comparison to enforcing the WA. The PSS is more enforceable than the WA – but it may not remain in force forever. There consequently may be *some* Irish and British frontier workers who fall outside of the scope of the WA, are covered by the CTA, but nonetheless find that their rights have been diminished because they are trying to enforce the GFA ‘equality of opportunity in economic activity’ right they have but find that they cannot as a matter of domestic law.

For EU nationals outside the scope of the WA, the situation is far worse, in that they will find ‘stopping’ and ‘restarting’ frontier work significantly more difficult than UK and Irish nationals. UK immigration law will make something that is automatic for those covered by the CTA much harder for other EU nationals who are living in Ireland and wish to work in the UK.

In sum, even the ‘best covered’ frontier worker imaginable, who is a UK or Irish national, resident in Ireland and working in the UK, will lose the added protection of the WA if they take an extended ‘break’ from frontier work, and will not see that compensated for by the CTA or the PSS. This seems a clear Article 2 Protocol issue – but one that has as of yet not been addressed by the UK or the EU.

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<sup>64</sup> See rule EU15(2) in Appendix EU, and Home Office, [‘EU Settlement Scheme: suitability requirements’](#) (version 8, 29 June 2022).

## Conclusion

Both Theresa May and Boris Johnson stressed their desire to push 'Brexit' through as quickly as possible, and it is unsurprising that this urgency contributed to imperfect legislation. Likewise, the ability of Treaties to cater for all specific configurations of its subjects' rights is limited, and so it is perhaps unfair to expect Part 2 of the WA to have dealt with each subset of its beneficiaries more effectively. Regardless of whether this was realistically avoidable, however, we end up with a variety of conflicting impulses in the WA that neither domestic legislation nor other international law can *really* compensate for.

The aim of Part 2 of the WA was to preserve all possible rights. The immediate problem, of course, was that not all rights *could* be preserved outside of the very specific legal strictures of the EU. We saw challenges to this, in terms of retention of citizenship status for UK nationals, and in terms of lobbying for 'onward' movement rights for UK nationals resident in the EU – but they all failed when faced with the limits of EU law, as set out in the EU Treaties. Frontier workers face the most obvious of the consequences of Brexit in the same way: the 'frontier' has changed, and while any such work already existing is protected, any started fresh or interrupted falls outside of what the WA is intended to protect. Anything less than such a severance, after all, would not have been deemed to be 'Brexit'.

However, those brutal shortcomings of EU law could, and should, have been softened in the specific context of the island of Ireland by domestic law or the UK-EU arrangements on the Common Travel Area given the prominence of discussion of an "all-Island" economy in the context of the Brexit negotiations. Domestic law has made serious attempts, by enabling residency rights for frontier worker families who could have been left in the cold by a narrow implementation of the WA; and by ensuring that frontier work that did not fit a daily '9-to-5' definition would be protected under its registration scheme. But those attempts do not capture all those crossing the invisible border to work, and while the CTA *today* offers rights to those British and Irish nationals crossing each other's borders, those rights are not protected in domestic law, and impossible to enforce if anything *were* to be found lacking in them.

The Protocol on Social Security attached to the TCA is not an attempt to compensate for Brexit so much as a baseline for future cross-border work, where relevant EU and UK nationals qualify for the visas to engage in it. It was thus never going to address the rights that frontier workers stood to lose in Brexit in a complete manner. And that leaves Article 2 of the Protocol on Ireland/Northern Ireland, which *was* drafted to deal with the specific context of the island of Ireland. The fact that 'frontier worker', whether as defined in the WA or in domestic UK law, is now a status that can be *lost* is a diminution of rights directly attributable to Brexit – and especially for those who failed to register for the FWP Scheme, or whose work never quite qualified for it to begin with, it may be worth making that argument.

The WA's shortcomings when it comes to frontier workers – the gaps, the overlooked categories, the drafting inconsistencies, the overlaps, and the potential for all-out loss of status – are symptomatic of legislating under pressure and at speed on an area with which the drafters were not fully acquainted. This, in turn, highlights that until now frontier workers have been subject to (benign) legislative neglect – there simply wasn't a detailed body of law, evidence or experience of the lived complexity at issue from which the WA drafters could draw. The rest of the EU – with even more cross-border commuting – still keeps frontier work at legislative arm's length, but should view the Brexit-inflicted island of Ireland experience as a prompt to reconsider that approach.