

Draft Regulations laid before the Scottish Parliament under paragraph 1(6) of schedule 7 of the European Union (Withdrawal) Act 2018, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2019 No.

**EXITING THE EUROPEAN UNION
NATIONAL HEALTH SERVICE**

**The Cross-border Health Care (EU Exit)
(Scotland) (Amendment etc.) Regulations 2019**

Made - - - - 2019

Coming into force in accordance with regulation 2

The Scottish Ministers make the following Regulations in exercise of the powers conferred by paragraph 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018⁽¹⁾ and all other powers enabling them to do so.

In accordance with paragraph 1(6) of schedule 7 of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Introduction

Citation

1. These Regulations may be cited as the Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.

Commencement

2. These Regulations come into force on exit day.

Savings in relation to regulation 4

- 3.—(1) The modifications made by regulation 4 do not apply to a case if—
- (a) it is a case in which either of the following events occurred before exit day—
 - (i) the cost of eligible services was incurred, or
 - (ii) authorisation under section 75C of the NHS Act was applied for, and

(1) 2018 c.16.

- (b) section 75BA of the NHS Act does not apply to the case.
- (2) In this regulation—
“eligible services” has the meaning given by section 75B(2) of the NHS Act (despite its repeal),
“the NHS Act” means the National Health Service (Scotland) Act 1978(2).

Modifications

Modification of the National Health Service (Scotland) Act 1978

- 4.—(1) The National Health Service (Scotland) Act 1978 is modified as follows.
- (2) In section 75A (remission and repayment of charges and payment of travelling expenses), in subsection (1)(b)(ii), for “75B” substitute “75BA”.
- (3) Section 75B (reimbursement of the cost of services provided in another EEA State) is repealed.
- (4) In section 75BA (reimbursement of the cost of services provided in another EEA State on or after 25 October 2013)—
- (a) in subsection (1), after “and (14)” insert “and section 75BC”,
 - (b) in subsection (3), omit “other than the United Kingdom”,
 - (c) for subsection (15) substitute—

“(15) In this section and section 75BB—
“authorised provider” in relation to services provided in an EEA State means a person who is lawfully providing services,
“services” includes any goods, including drugs, medicines and appliances which are used or supplied in connection with the provision of a service, but does not include accommodation other than hospital accommodation.”.
- (5) In section 75BB (prior authorisation for the purposes of section 75BA), in subsection (9), omit “and section 75C”.
- (6) After section 75BB insert—

“Restriction on reimbursement after EU withdrawal

- 75BC.**—(1) The duty to reimburse in section 75BA(2) applies in respect of a service provided to a person on or after exit day only if one of the following conditions is met.
- (2) Condition 1 is that the service began to be provided to the person before exit day.
 - (3) Condition 2 is that—
 - (a) the application for authorisation under section 75BB in relation to the provision of the service to the person was made before exit day, and
 - (b) the service began to be provided to the person before—
 - (i) the end of the period specified in the authorisation as the period for which authorisation is granted, or
 - (ii) if no such period is specified in the authorisation, the end of the period of 1 year beginning with exit day.

(2) [1978 c.29](#). Amendments to the National Health Service (Scotland) Act 1978 relevant for the purposes of these Regulations are made by [S.S.I. 2010/283](#), [S.S.I. 2013/177](#) and [S.S.I. 2013/292](#).

- (4) Condition 3 is that the service began to be provided to the person at a time when a cross-border arrangement with the EEA State in which the service was provided was in effect.
- (5) Condition 4 is that—
- (a) the application for authorisation under section 75BB in relation to the provision of the service to the person was made at a time when a cross-border arrangement with the EEA State in which the service was provided was in effect, and
 - (b) the service began to be provided to the person before—
 - (i) the end of the period specified in the authorisation as the period for which authorisation is granted, or
 - (ii) if no such period is specified in the authorisation, the end of the period of 1 year beginning with the day that the cross-border arrangement in question ceased to have effect.
- (6) For the purposes of this section—
- (a) “exit day” has the meaning given by section 20 of the European Union (Withdrawal) Act 2018,
 - (b) a cross-border arrangement with an EEA State is in effect during the period that the list maintained under regulation 16(4) of the National Health Service (Cross-Border Healthcare and Miscellaneous Amendments etc.) (EU Exit) Regulations 2019⁽³⁾ says that a cross-border arrangement with that State is to be treated as having effect.”.
- (7) Section 75C (which provides the prior authorisation rules for section 75B) is repealed.
- (8) In section 75D (deduction of NHS charges)—
- (a) in subsection (1), omit “75B(1) or”,
 - (b) in subsection (2), omit “75B and 75C or”,
 - (c) for subsection (3) substitute—
 - “(3) In this section—
 - “eligible person” means a person who is ordinarily resident in Scotland,
 - “NHS charge” means any charge payable in accordance with sections 69 to 74 or regulations made under those sections,
 - “services” has the meaning given in section 75BA(15).”.

Modification of the National Health Service (Cross-Border Health Care) (Scotland) Regulations 2013

5.—(1) The National Health Service (Cross-Border Health Care) (Scotland) Regulations 2013⁽⁴⁾ is modified as follows.

- (2) In regulation 2 (interpretation)—
- (a) before the definition of “the Directive” insert—
 - ““cross-border arrangement with an EEA State” means an arrangement that—
 - (a) has been made between the United Kingdom and an EEA State, and
 - (b) is included in the list maintained under regulation 16(4) of the National Health Service (Cross-Border Healthcare and Miscellaneous Amendments etc.) (EU Exit) Regulations 2019,”
 - (b) after the definition of “medicinal product” insert—

(3) S.I. 2019/XX.

(4) S.S.I. 2013/292, amended by S.S.I. 2015/91.

““Member State” means a State that is a member of the European Union or the European Economic Area,”

- (c) omit—
- (i) the definition of “resident patient”, and
 - (ii) the definition of “visiting patient”.
- (3) In regulation 4 (national contact point: information about treatment in Scotland)—
- (a) in paragraph (1)(e) omit “other”,
 - (b) in paragraph (2), for “visiting patient” substitute “relevant person”,
 - (c) after paragraph (3) insert—
 - “(4) In paragraph (2), “relevant person” means a person to whom health care may be, or has been, provided in Scotland as a consequence of an exercise of the person’s rights in relation to access to health care under—
 - (a) the Directive, or
 - (b) a cross-border arrangement with an EEA State.”.
- (4) In regulation 5 (national contact point: information about treatment in another member state) —
- (a) for “resident patients”, in both places it occurs, substitute “persons ordinarily resident in Scotland”,
 - (b) in paragraph (a), for “another” substitute “a”.
- (5) In regulation 6(1) (national contact point: cross border co-operation)—
- (a) after “Directive”, where it first occurs, insert “or any cross-border arrangement with an EEA State”,
 - (b) in paragraph (a) omit “other”.
- (6) In regulation 9 (information on rights and entitlements)—
- (a) after “Directive” insert “or any equivalent provision contained in, or having effect by virtue of, a cross-border arrangement with an EEA State”,
 - (b) after “that Article” insert “or (as the case may be) the equivalent provision”,
 - (c) for “resident patients” substitute “persons ordinarily resident in Scotland”.
- (7) In regulation 10 (exemption from NHS charges for certain persons who reside in another member state)—
- (a) in paragraph (2)—
 - (i) for “if P is” substitute “if, when the cross-border healthcare service began to be provided, P was”,
 - (ii) in sub-paragraph (a) omit “other than the United Kingdom”,
 - (iii) at the end of sub-paragraph (a) (after the semi-colon) insert “and”,
 - (iv) in sub-paragraph (b) before “for whom” insert “a person”,
 - (b) in paragraph (3), for sub-paragraph (a) substitute—
 - “(a) it is not a service of the kind that falls within section 75BA(6) of the NHS Act, and”,
 - (c) after paragraph (3) insert—
 - “(3A) But a cross-border healthcare service is not within paragraph (3) insofar as it is provided after the cut-off day.

- (3B) For the purpose of paragraph (3A)—
- (a) the cut-off day is—
 - (i) in a case where the service is provided as a consequence of an exercise of P’s rights under the Directive, the day falling 1 year after exit day,
 - (ii) in a case where the service is provided as a consequence of an exercise of P’s rights under a cross-border arrangement with an EEA State, the day falling 1 year after the day that arrangement ceased to have effect,
 - (b) a cross-border arrangement with an EEA State ceases to have effect when the list maintained under regulation 16(4) of the National Health Service (Cross-Border Healthcare and Miscellaneous Amendments etc.) (EU Exit) Regulations 2019 says that the arrangement ceases to have effect.”,
- (d) in paragraph (4)—
- (i) after sub-paragraph (a) insert—
 - “(aa) “cross-border healthcare service” means healthcare that is provided to a person in Scotland as a consequence of an exercise of the person’s rights in relation to access to healthcare under—
 - (i) the Directive, or
 - (ii) a cross-border arrangement with an EEA State,”,
 - (ii) after sub-paragraph (b) insert—
 - “(c) references to Regulation (EC) No 883/2004, in relation to a case in which the service in question began to be provided on or after exit day, is to that Regulation as it applied (if it applied at all) on the day the service began to be provided by virtue of schedule 5 of the Social Security Coordination (Reciprocal Healthcare) (Amendment etc.) (EU Exit) Regulations 2019(5),
 - (d) “exit day” has the meaning given by section 20 of the European Union (Withdrawal) Act 2018.”,
- (e) after paragraph (4) insert—
- “(5) The modifications made to the preceding paragraphs of this regulation by regulation 5(7) of the Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 do not apply in relation to any service that began to be provided before exit day (which is the day that those modifications came into force).”.
- (8) After regulation 10 insert—

“Exemption from NHS charges for certain pensioners after EU withdrawal

10A.—(1) A person to whom paragraph (3) applies is exempt from any charge provided for by regulations under section 98 of the NHS Act in respect of a relevant service.

(2) A service is relevant, for the purpose of paragraph (1), insofar as it is provided during the period of 1 year beginning with exit day.

(3) This paragraph applies to—

- (a) a person who, immediately before exit day—
 - (i) was resident in a Member State, and
 - (ii) was in receipt of—

- (aa) a state pension under Part 1 of the Pensions Act 2014⁽⁶⁾ or Part 1 of the Pensions Act (Northern Ireland) 2015⁽⁷⁾, or
- (bb) a retirement pension under the Social Security Contributions and Benefits Act 1992⁽⁸⁾ or the Social Security Contributions and Benefits (Northern Ireland) Act 1992⁽⁹⁾, and
- (b) a person who, immediately before exit day, was a member of the family of a person described by sub-paragraph (a).
- (4) In this regulation—
 - “exit day” has the meaning given by section 20 of the European Union (Withdrawal) Act 2018,
 - “member of the family” has the meaning it had for the purposes of Regulation (EC) No 883/2004 immediately before exit day.”
- (9) In regulation 11 (NHS charges)—
 - (a) in paragraph (1)—
 - (i) omit “visiting” in both places it occurs,
 - (ii) for “resident patient” substitute “British citizen who is ordinarily resident in Scotland”,
 - (b) after paragraph (1) insert—
 - “(1A) But paragraph (1) does not apply to a cross-border healthcare service insofar as it is provided after the cut-off day.
 - (1B) For the purpose of paragraph (1A)—
 - (a) the cut-off day is—
 - (i) in a case where the service is provided as a consequence of an exercise of the patient’s rights under the Directive, the day falling 1 year after exit day,
 - (ii) in a case where the service is provided as a consequence of an exercise of the patient’s rights under a cross-border arrangement with an EEA State, the day falling 1 year after the day that arrangement ceased to have effect,
 - (b) “exit day” has the meaning given by section 20 of the European Union (Withdrawal) Act 2018,
 - (c) a cross-border arrangement with an EEA State ceases to have effect when the list maintained under regulation 16(4) of the National Health Service (Cross-Border Healthcare and Miscellaneous Amendments etc.) (EU Exit) Regulations 2019 says that the arrangement ceases to have effect.”
 - (c) in paragraph (2)(a)—
 - (i) omit “visiting”,
 - (ii) after “Directive” insert “or a cross-border arrangement with an EEA State”.

(6) 2014 c.19.
 (7) 2015 c.5.
 (8) 1992 c.4.
 (9) 1992 c.7.

St Andrew's House,
Edinburgh
Date

Name
A member of the Scottish Government

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made in exercise of the powers conferred by paragraph 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively in the field of cross-border health care arising from the withdrawal of the UK from the European Union.

Regulation 4 amends the National Health Service (Scotland) Act 1978 (“the 1978 Act”) so that the arrangements for reimbursing health care costs to people ordinarily resident in Scotland who receive treatment in EEA States cease to operate on the day that the UK leaves the European Union (“exit day”), subject to two caveats. The first caveat is that reimbursement will continue to be available where the treatment was provided, or an application for its authorisation made, before exit day. The second caveat is that reimbursement will continue to be available in respect of treatment in an EEA State if that State has entered into a reciprocal arrangement with the UK.

One of the effects of regulation 4 is to remove the mechanism for reimbursing health care costs provided by section 75B of the 1978 Act. Regulation 3 preserves the law as it was before regulation 4 comes into force for live cases to which section 75B applies.

Regulation 5 amends the National Health Service (Cross-Border Health Care) (Scotland) Regulations 2013, to make provision about cross-border arrangements with EEA States.