

POLICY NOTE

THE CROSS-BORDER HEALTH CARE (EU EXIT) (SCOTLAND) (AMENDMENT ETC.) REGULATIONS 2019

SSI 2019/XXX

1. The above instrument was 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. The instrument is subject to mandatory affirmative procedure under paragraph 1(6) of Schedule 7 of the European Union (Withdrawal) Act 2018.

Purpose of the instrument

2. The instrument is necessary to remedy deficiencies in retained EU law relating to cross-border healthcare, which would arise from the withdrawal of the United Kingdom from the European Union in the event of no deal.

The purpose of the SSI is to ensure that there will continue to be a functioning statute book in Scotland on exit day and an effective mechanism to maintain cross-border healthcare arrangements in appropriate circumstances if the UK leaves the EU without a deal.

Policy Objectives

3. Directive 2011/24/EU of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare (the Directive) came into force on 24 April 2011 with a transposition deadline of 25 October 2013. It clarified patients' rights to obtain qualifying healthcare in another European Economic Area (EEA) Member State and to receive reimbursement from their home healthcare system.

4. Reimbursement can be capped at the cost of state-provided treatment in a patient's home healthcare system. Eligible patients can receive reimbursement for qualifying private or state-provided treatments. The obligation to reimburse is limited to treatment which is the same as, or equivalent, to a treatment that would be made available to the person in their home healthcare system - the NHS in Scotland. The Directive also provides a broader discretion whereby patients must seek prior authorisation from their state healthcare provider before travelling for specialist treatment under the Directive.

5. The Directive rights are separate from reciprocal healthcare arrangements under the social security co-ordination regulations (Regulations /883/2004 and 987/2009). Reimbursement rights under the Directive relate to the fundamental EU principle of the freedom to provide and avail of services, whereas the rights under the social security co-ordination regulations relate to the free movement of people. Payments for reciprocal healthcare under social security co-ordination regulations flow between member states, whereas reimbursements under the Directive route are made to the individual by their local healthcare provider - in Scotland their local NHS Board.

6. Given that healthcare provision is devolved and that there are different healthcare systems in the countries that make up the UK, in 2013 the Scottish Government transposed the

Directive into domestic regulations. [The National Health Service \(Cross-border Health Care\) \(Scotland\) Regulations 2013](#) implemented the majority of the Directive's provisions in Scotland. Those implementing regulations made amendments to the [National Health Service \(Scotland\) Act 1978](#).

7. The Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 provide a mechanism for ensuring there is no interruption to healthcare arrangements for people accessing healthcare through the Directive after exit day in those Member States that agree to maintain the current arrangements in place with the UK for a transitional period until 31 December 2020. The arrangements will not apply to Member States who do not agree to maintain the current reciprocal arrangements with the UK.

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

8. The Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 remedy deficiencies in the domestic legislation that implements the Directive in Scotland, which would arise from the UK's withdrawal from the EU without a deal by:

- modifying sections 75A, 75BA and 75BB, 75C and 75D of the National Health Service (Scotland) Act 1978, and by inserting section 75BC into the Act; and
- modifying regulations 2, 4, 5, 6, 9, 10 and 11 of the National Health Service (Cross-border Health Care) (Scotland) Regulations 2013 and by inserting regulation 10A into the Regulations.

9. The SSI makes transitional provision for patients who are in the process of obtaining cross-border healthcare on exit day, and enables the continuation of cross-border healthcare arrangements with those countries with whom the UK has established continued reciprocity, maintaining the additional choice provided by the Directive for countries where there is already reciprocity through the continuation of EHIC or S2 type schemes. It facilitates access to cross-border healthcare in "listed" countries for people resident in Scotland. It also makes provision for UK state pensioners residing in the EEA on the day the UK leaves the EU to access NHS healthcare in Scotland.

10. As reciprocal healthcare arrangements are applied on a UK-wide basis, the Secretary of State for Health will maintain a list of countries that reach agreement to maintain the current reciprocal arrangements with the UK. However, the SSI extinguishes access to cross-border healthcare in countries where there is no reciprocity, as maintaining effective access to cross-border healthcare abroad requires basic reciprocity.

11. The SSI protects, so far as possible, key groups of patients in a transitional situation on exit day, irrespective of any reciprocity in place. For example:

- those individuals who obtained prior authorisation for planned treatment before exit day, but have not yet obtained the treatment; and
- those who accessed healthcare abroad prior to exit day, but have not yet completed the treatment or sought reimbursement.

12. This time-limited measure aims to prevent, so far as is possible without reciprocity, a sudden loss of overseas healthcare rights for residents in Scotland.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

13. The Cabinet Secretary for Health and Sport, Jeane Freeman MSP, has made the following statement “In my view the Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 do no more than is appropriate. This is the case because they do not extend citizens’ rights or entitlements, but ensure that Scottish residents continue to have access to cross-border healthcare in those countries with whom the UK has established continued reciprocity in the event of ‘no deal’ when the UK leaves the EU”.

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

14. The Cabinet Secretary for Health and Sport, Jeane Freeman MSP, has made the following statement “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. We need to protect Scottish residents’ rights to be able to continue to access cross-border healthcare in the EEA and the rights of citizens from other EEA countries to be able to access cross-border healthcare in Scotland. We also need to ensure that key groups of patients in a transitional situation on exit day are protected, irrespective of any reciprocity that is in place, so that there is no sudden loss of cross-border healthcare provision”.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

15. The Cabinet Secretary for Health and Sport, Jeane Freeman MSP, has made the following statement “In my view the Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

16. The Cabinet Secretary for Health and Sport, Jeane Freeman MSP has made the following statement “In my view Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

17. This heading is not applicable as regard to the Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

18. This heading is not applicable as regard to the Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.

An indication of how the regulations should be categorised in relation to the significance of the change proposed

19. The SSI is of medium significance as it is predominantly concerned with technical detail. However, it does include some more significant provisions that may warrant subject committee scrutiny. Ministers policy choice is limited as are the implications. However, the SSI is necessary to enable the Scottish statute book to operate on exit day in a no deal situation.

Statement setting out the Scottish Ministers' reasons for their choice of procedure

20. The SSI is subject to mandatory affirmative procedure under paragraph 1(6) of Schedule 7 of the European Union (Withdrawal) Act 2018. Therefore, the sifting procedure in the SSI protocol is not relevant to this SSI.

Further information

Consultation

21. There has been no consultation on this SSI, which is necessary to allow existing European cross-border healthcare arrangements to continue if the UK leaves the EU without a deal, as far as that can be achieved. At this time, Cross-border healthcare has a modest uptake in Scotland.

Impact Assessments and Financial Effects

22. Impact Assessments have not been prepared to accompany this SSI as it will have no financial effect on the Scottish Government, local government, business (the legislation does not apply to small business), charities, voluntary bodies or the public sector. The effect on Scottish NHS Boards will also be negligible or nil.

**Scottish Government
Directorate for Healthcare Quality and Improvement
March 2019**