POLICY NOTE

The Cross-border Health Care (EU Exit) (Scotland) (Amendment) Regulations 2020

SSI 2020/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 the mandatory affirmative procedure under paragraph 1(6) of Schedule 7 of the European Union (Withdrawal) Act 2018.

Purpose of the instrument

2. This Instrument will ensure that the Scottish statute book will function correctly after the EU Exit Implementation Period ('IP') completion day and will make savings provisions to protect, so far as possible, certain patients participating in European Cross-border Healthcare and who are in a transitional situation on IP completion day.

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 (EC) No. 883/2004 and (EC) No. 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 (the "2019 SSI") provided a mechanism for ensuring there was no interruption to healthcare

arrangements for people accessing healthcare through the Directive after EU exit day in those Member States that agreed to maintain the reciprocal arrangements in place with the UK for a transitional period until 31 December 2020 in the event that the UK left the EU without a deal. Cross-border healthcare requires basic reciprocity to operate.

8. The 2019 SSI was originally due to take effect on 29 March 2019, but in light of the European Union (Withdrawal Agreement) Act 2020, that was postponed until the end of the transition period (IP completion day - 31 December 2020). In view of the IP, the UK Government did not require to enter into bilateral reciprocal arrangements with Member States that were willing to do so. Current EU reciprocal arrangements remain extant until the end of the IP, when reciprocal healthcare arrangements set out in the Withdrawal Agreement for existing participants in the EEA and UK will come into force. Negotiations between the UK and EU on wider reciprocal healthcare arrangements after the IP are ongoing.

Explanation of the law being amended by the regulations

9. This Instrument will amend the deficiency fixes in the Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019. It will remove provisions which are redundant in light of the Implementation Period (IP), update references to "exit day", and make appropriate transitional provision following the IP for Scottish patients seeking treatment or reimbursement under the terms of the European Cross-border Healthcare Directive.

10. The Instrument is required to protect Scottish patients accessing healthcare in the EEA under the Cross-border Healthcare Directive who are in a transitional situation at the end of the IP (31 December 2020 at 11.00 p.m. UK time), allowing them to continue to receive arranged treatment and to claim reimbursement for treatment received during a transitional period. Without this Instrument there will be no legal basis to do this beyond the end of the IP.

Regulation 3 amends regulation 3 of the 2019 Regulations (which makes a savings provision in regulation 4 of those Regulations to substitute a reference to "IP completion day" for "exit day" (which is the date the modifications made by the 2019 Regulations will take effect)).

Regulation 4 amends regulation 4(6) of the 2019 Regulations, which inserts a new section 75BC into the National Health Service (Scotland) Act 1978 and the arrangements for reimbursing health care costs to people ordinarily resident in Scotland who receive treatment in EEA states, which cease to operate on IP completion day. Reimbursement will however continue to be available where the treatment was provided, or an application for its authorisation was made, before IP completion day.

Regulation 5 amends the National Health Service (Cross-Border Health Care) (Scotland) Regulations 2013, to make provision to allow certain pensioners residing in the EEA, who previously would have had access to cross-border healthcare services, to access NHS healthcare at no cost when they are in Scotland on or after IP completion day where those services were provided before the cut-off day (i.e. 1 year after IP completion day).

Reasons for and effect of the proposed change or changes on retained EU law

11. The SSI retires current cross-border healthcare rights under the Cross Border Directive legislation, except for patients in a transitional position on IP completion day. Maintaining effective access to cross-border healthcare abroad is inoperable without reciprocity and the UK will be unable to participate in existing European cross-border healthcare arrangements as a non-member of the EU. The UK Government and other devolved administrations are introducing similar regulations.

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

12. 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) Regulations 2020 do no more than is appropriate. This is the case because they do not extend citizens' rights or entitlements, but protect the existing rights and entitlements of Scottish patients in a transitional situation on implementation period completion day."

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

13. 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 the Cross-border Health Care (EU Exit) (Scotland) (Amendment) Regulations 2020 and I have concluded they are a reasonable course of action. We need to ensure that Scottish patients in a transitional situation on IP completion day are protected so that there is no sudden loss of cross-border healthcare provision or reimbursement to their detriment."

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

14. 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) Regulations 2020 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

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) Regulations 2020 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

16. This heading is not applicable as regard to the Cross-border Health Care (EU Exit) (Scotland) (Amendment) Regulations 2020.

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)

17. This heading is not applicable as regard to the Cross-border Health Care (EU Exit) (Scotland) (Amendment) Regulations 2020.

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

18. The SSI is of medium significance as it is predominantly concerned with technical detail. However, it does include provisions that may warrant subject committee scrutiny. Ministers' policy choice is limited as are the implications. The Instrument is necessary to enable the Scottish statute book to operate on IP completion day.

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

19. 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

20. In accordance with paragraph 4(a) of schedule 2 to the European Union (Withdrawal) Act 2018, we have consulted the Secretary of State as we plan to amend the amendments made by The Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 before they take effect on IP completion day.

21. There has been no other 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. The Cabinet Secretary for Health and Sport confirms that 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
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