Draft Regulations laid before the Scottish Parliament under section 2(2) of the European Communities Act 1972 for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2010 No.

NATIONAL HEALTH SERVICE

The National Health Service (Reimbursement of the Cost of EEA Treatment) (Scotland) Regulations 2010

Made - - - -	*2010*
Coming into force - -	*2010*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(**a**) and all other powers enabling them to do so.

Citation, commencement and extent

1.—(1) These Regulations may be cited as the National Health Service (Reimbursement of the Cost of EEA Treatment) (Scotland) Regulations 2010 and come into force on the day after the day which they are made.

(2) These Regulations extend to Scotland only.

Amendment of the National Health Service (Scotland) Act 1978

2. The National Health Service (Scotland) Act 1978(**b**) is amended in accordance with regulations 3 to 5.

Reimbursement of the cost of treatment in another EEA state

3.—(1) Section 2C(7)(**c**) is repealed.

(2) After section 2C insert—

"**2CA. Functions of Health Boards outside Scotland**

(1) Where it is the function of a Health Board to provide or to secure the provision of a service, the Health Board may secure the provision of that service outside Scotland.

(**a**) 1972 c.68. By virtue of the amendment to section 1(2) of the European Communities Act 1972 by section 1 of the European Economic Area Act 1993 (c.51), regulations may be made under section 2(2) of the European Communities Act to implement obligations of the United Kingdom created or arising by or under the EEA Agreement. Section 2(2) was amended by the Scotland Act 1998 (c.46), Schedule 8, paragraph 15(3); the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1) and by the European Union (Amendment) Act 2008 (c.7), Schedule, Part 1. The functions conferred upon Ministers of the Crown under section 2(2), in so far as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998.

(**b**) 1978 c.29.

(**c**) Section 2C was inserted by the Primary Medical Services (Scotland) Act 2004 (asp 1), section 1(2).

(2) For the purposes of securing the provision of any service referred to in subsection (1), a Health Board may make such arrangements for the provision of the service as they think fit (and may in particular make contractual arrangements with any person).

(3) Anything done by a Health Board in pursuance of subsection (1) or (2) is to be regarded as done in exercise of functions of the Scottish Ministers conferred on the Health Board by an order under section 2(1)(a).".

(3) After section 75A(**a**) insert—

"**Reimbursement of the cost of services provided in another EEA state**

75B.—(1) A Health Board must reimburse the cost of eligible services incurred by or on behalf of an eligible person on or after 23rd August 2010, but this is subject to the limits applicable under subsections (3) and (4), to subsections (6) and (7) and to any deduction applicable under section 75D.

(2) Eligible services are services provided by an authorised provider in an EEA state other than the UK, which are necessary to treat or diagnose a medical condition of the eligible person and are—

(a) services, not being specified services, that are the same as or equivalent to those that the Health Board in whose area the eligible person resides would make or have made available under this Act in the circumstances of the person's case;

(b) specified services for which the Health Board in whose area the eligible person resides has given authorisation under section 75C; or

(c) services—

(i) which are neither the same as nor equivalent to services that the Health Board would make available under this Act in the circumstances of the person's case; and

(ii) for which the Health Board has given authorisation under section 75C.

(3) In respect of services other than dental services, a Health Board may limit the amount payable by way of reimbursement under subsection (1) to the amount that the same or equivalent services would have cost the Health Board in whose area the eligible person resides if those services had been provided under this Act otherwise than in accordance with this section and section 75C.

(4) In respect of dental services a Health Board may limit the amount payable by way of reimbursement under subsection (1) to the amount that would have been payable in respect of the same or equivalent services if those services had been provided under this Act otherwise than in accordance with this section and section 75C.

(5) Where the same or equivalent services referred to in subsection (4) would have required approval from the Dental Practice Board, the Health Board—

(a) may require the eligible person to submit evidence as to the clinical necessity of the dental services; and

(b) may decline to reimburse the costs of any services which were not clinically necessary.

(6) The duty in subsection (1) does not apply where the cost of the eligible services was incurred in connection with an arrangement which was entered into by or on behalf of the eligible person in the course of business and under which the applicant for reimbursement has gained or might be expected to gain any financial benefit.

(7) This section and section 75C do not apply in circumstances where Articles 20 and 27(3) of Regulation (EC) 883/2004 apply.

(**a**) Section 75A was inserted by the Social Security Act 1988 (c.7), section 14(2).

(8) In this section and sections 75C and 75D—

"authorised provider" in relation to services provided in an EEA state other than the United Kingdom means a person who is lawfully providing services;

"eligible person" means a person who is ordinarily resident in Scotland;

"eligible services" has the meaning given in subsection (2) of this section;

"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; and

"specified services" means those services comprising—

(a) services which would require a stay in hospital accommodation for at least one night;

(b) medical treatment that involves general anaesthesia, epidural anaesthesia or intravenously administered sedation;

(c) dental treatment that involves general anaesthesia or intravenously administered sedation;

(d) services whose provision involves the use of specialised or cost-intensive medical infrastructure or medical equipment.

75C Prior authorisation

(1) An eligible person may apply to the Health Board in whose area that person resides for prior authorisation for the purposes of section 75B.

(2) Prior authorisation must be given if the eligible services are specified services which—

(a) are the same as or equivalent to those that the Health Board in whose area the eligible person resides would make available under this Act in the circumstances of the person's case; and

(b) are not available to the eligible person from the Health Board without undue delay.

(3) Prior authorisation may be given for any other eligible services falling within section 75B(2)(b) or (c).

(4) "Undue delay" means that the services cannot be provided within a period of time which is acceptable on the basis of medical evidence as to the clinical needs of the eligible person, taking into account that person's state of health at the time the decision is made and the probable course of the medical condition to which the services relate.

(5) In assessing whether there is undue delay for the purposes of subsection (2), the Health Board must consider—

(a) the eligible person's medical history;

(b) the extent of any pain, disability, discomfort or other suffering that is attributable to the medical condition to which the services are to relate;

(c) whether any such pain, disability, discomfort or suffering makes it impossible or extremely difficult for the patient to carry out ordinary daily tasks; and

(d) the extent to which the services would be likely to alleviate, or enable the alleviating of, the pain, disability, discomfort or suffering.

(6) Any authorisation under this section must be in writing.

75D Deduction of NHS charges

(1) A Health Board may deduct from any amount to be reimbursed under section 75B(1), in whole or in part, any NHS charge which would have been payable by the eligible person for the same service or an equivalent service if the service had been made available by the Health Board in whose area the eligible person resides.

(2) Subsection (1) does not apply to the extent that the eligible person would, if the services received had been provided under this Act otherwise than in accordance with sections 75B and 75C, be entitled to any exemption or remission from any NHS charge.

(3) In this section "NHS charge" means any charge payable in accordance with sections 69 to 74 or regulations made under those sections.".

Payment of travelling expenses

4. In section 75A(1) (remission and repayment of charges and payment of travelling expenses), for paragraph (b) substitute—

"(b) for the payment by the Scottish Ministers, in such cases as may be prescribed, of travelling expenses (including the travelling expenses of a companion) incurred or to be incurred for the purpose of their obtaining—

(i) any services provided under this Act,

(ii) any services in respect of which the costs are reimbursable under section 75B,

(iii) any services authorised to be received in another EEA state or Switzerland under Article 20(2) or (3) or Article 27(3) of Regulation (EC) 883/2004.".

Interpretation

5. In section 108(1) (interpretation), at the appropriate place, insert the following definition—

""Regulation (EC) No. 883/2004" means Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29th April 2004 on the coordination of social security systems(**a**),".

A member of the Scottish Executive

St Andrew's House,
Edinburgh
Date

(**a**) O.J. L 166, 30.4.2004, p.1.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations give effect to the judgement of the European Court of Justice in Case C-372/04 *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health*(**a**) which held that the obligation under article 49 of the EC Treaty (now article 56 of the Treaty on the Functioning of the European Union which provides for the freedom to provide and receive services in another member state of the European Union) to reimburse the cost of hospital treatment provided in another member state also applies to a tax funded national health service, such as in Scotland, which provides treatment free of charge. These Regulations also cover non-hospital treatment.

Regulation 3 provides for the National Health Service (Scotland) Act 1978 to be amended by inserting new sections 2CA and 75B to 75D. The new section 2CA gives Health Boards a power to secure the provision of services outside Scotland. This power is not restricted to primary medical services.

The new section 75B places a duty on Health Boards to reimburse the cost of eligible services (defined in subsection (2)) received by NHS patients in another EEA state and sets out the limitations that may be imposed on the amount of reimbursement. The EEA (European Economic Area) consists of the member states of European Union together with Norway, Iceland and Liechtenstein.

The new section 75C provides for prior authorisation to be obtained in respect of certain eligible services and sets out when authorisation must be given by a Health Board.

The new section 75D provides for the rules on charges, remission from charges and exemptions to apply as if the services had been provided by the Health Board.

Regulation 4 amends the regulation making power in section 75A(1)(b) in respect of travelling expenses to cover services received under section 75B or Regulation (EEC) No. 1408/71.

Regulation 5 adds a consequential amendment to the 1978 Act.

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(**a**) [2006] ECR 1-4325.

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