EXPLANATORY MEMORANDUM TO

THE HEALTHCARE (EUROPEAN ECONOMIC AREA AND SWITZERLAND ARRANGEMENTS) (EU EXIT) REGULATIONS 2019

2019 No. 1293

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care (DHSC) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument makes provision for the purpose of implementing healthcare arrangements between the United Kingdom (UK) and European Economic Area (EEA) states, Switzerland (Member States) or an international organisation (for example, the European Union (EU)) after the UK leaves the EU in a no deal scenario. It also makes provision for the making of payments in respect of the cost of healthcare provided in Member States. It does this by conferring functions on certain bodies, including the NHS Business Services Authority (the NHS BSA), and requiring them to give effect to healthcare arrangements. The instrument also confers functions on the NHS BSA for the purposes of implementing any arrangements made with Member States to transitionally continue reciprocal healthcare provision under current EU Regulations which were continued by the Social Security Coordination (Reciprocal Healthcare) (Amendment etc.) (EU Exit) Regulations 2019 (the EU Exit Reciprocal Healthcare Regulations).

3. Matters of special interest to Parliament

Matters of Special Interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 This Statutory Instrument is being made under the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 (the Act). The Act provides a legal framework for implementing healthcare agreements with Member States and international organisations (for example, the EU). It also provides powers to fund healthcare, and to make regulations for and in connection with the provision of healthcare, in those countries.

6.2 The Act was introduced as a result of the UK's decision to leave the EU. It provides the Secretary of State with the legislative means to respond to a wide range of possible outcomes relating to reciprocal healthcare resulting from the UK's decision to leave the EU, including the implementation of new healthcare arrangements with Member States or the EU. It sits alongside the European Union (Withdrawal) Act 2018 (2018 Act) and other legislation as part of the Government's legislative response to the UK's withdrawal from the EU.

6.3 The EU Exit Reciprocal Healthcare Regulations, made under the 2018 Act, preserved EU social security coordination regulations covering reciprocal healthcare (including Regulation (EC) 883/2004) in relation to certain transitional cases which began before Exit day, as well as in relation to countries that decide to continue the present arrangements with the UK under those EU Regulations for a transitional period up to 31 December 2020.

6.4 This Statutory Instrument makes provision for the implementation of those EU Regulations (as preserved by the EU Exit Reciprocal Healthcare Regulations) as well as of other agreements or arrangements relating to the provision of healthcare in Member States. It also makes provision in relation to the power under the Act to fund healthcare in those states.

7. Policy background

What is being done and why?

7.1 The current EU reciprocal healthcare arrangements enable people whose state healthcare costs the UK has responsibility for (known as 'UK-insured') to access healthcare when they live, study, work, or travel in Member States (and vice versa for people whose state healthcare costs those states have responsibility for (known as 'EU-insured') when in the UK). This includes healthcare for UK state pensioners, posted workers and disabled people living in those states (the S1 scheme), emergency and needs arising healthcare for UK-insured temporary visitors to the Member States such as tourists and students (the European Healthcare Insurance Card Scheme (EHIC)) and UK-insured individuals travelling overseas to receive planned treatment in other countries (the S2 scheme). They give people more life options, support tourism and businesses, and promote healthcare cooperation.

7.2 The legal framework is in EU social security coordination regulations (chiefly Regulation (EC) 883/2004 Regulation (EC) 987/2009, Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72) (EU SSC Regulations)). The EU SSC Regulations require the UK to pay the EU EFTA state in question for healthcare provided to UK-insured individuals but also, in certain circumstances, provide for direct reimbursement to individuals. They allow the UK to claim reimbursement for healthcare that it provides for EU-insured individuals treated by the health service in the UK.

7.3 The regulations also include the requirement for 'equal treatment', which means that people visiting or residing in a Member State of which they are not a national are able to access local state healthcare on the same terms as domestic nationals.

7.4 Should the UK leave the EU without a deal, the UK is seeking to make arrangements with the EU or with individual Member States to ensure there are no immediate changes to people's access to healthcare after Exit Day and so that there is a strong basis for ongoing co-operation on health issues.

7.5 The EU Exit Reciprocal Healthcare Regulations corrected deficiencies in the retained EU SSC Regulations, caused by the UK's Exit, and preserved relevant aspects in relation to those Member States that continue to operate that body of law reciprocally with the UK. This only applies for a transitional period up to 31 December 2020. The EU Exit Reciprocal Healthcare Regulations also preserved relevant aspects of the EU SSC Regulations in relation to certain transitional situations which began before Exit day.

7.6 This instrument is intended to support these EU Exit Reciprocal Healthcare Regulations and other preparations the UK Government is making with regard to reciprocal healthcare arrangements, following EU Exit.

7.7 This instrument provides for the implementation of the EU SSC Regulations preserved by the EU Exit Reciprocal Healthcare Regulations.

7.8 This instrument also makes provision to implement healthcare arrangements between the United Kingdom and Member States or an international organisation (for example, the EU), after the UK leaves the EU in a no deal scenario should they wish to agree alternative bespoke bilateral reciprocal healthcare arrangements, as opposed to a direct transitional continuation of current EU SSC Regulations. The EEA EFTA no deal citizens' rights agreement between the UK and Iceland, Liechtenstein and Norway contains provisions relating to reciprocal healthcare and is an example of a bespoke agreement that this instrument could be used to implement.

7.9 This instrument also makes provision in relation to powers under the Act to fund treatment in Member States.

7.10 This instrument confers UK-wide functions onto the appropriate authority, the NHS BSA, requiring them to give effect to the EU SSC Regulations preserved by the EU Exit Reciprocal Healthcare Regulations and to healthcare agreements and arrangements. This will provide a framework for the NHS BSA to continue existing functions and activities in relation to the administration and delivery of the EHIC / Provisional Replacement Certificate (PRC) and S1 entitlement schemes under bilateral and transitional arrangements for reciprocal healthcare as provided for in the EU Exit Reciprocal Healthcare Regulations. It will also enable the NHS BSA to make payments and authorise applications for the purposes of implementing healthcare agreements and arrangements.

7.11 The NHS BSA will also be able to administer payments including under section 1 of the Act in respect of healthcare in Member States, both payments to Member States under bilateral arrangements, and payments to individuals or providers. This last aspect is sometimes necessary under healthcare agreements (if the state or provider charges someone inappropriately) but would also enable implementation of no deal contingency arrangements under section 1 of the Act.

7.12 The instrument also confers an information function on the NHS BSA.

7.13 Elements of reciprocal healthcare fall within Scotland, Wales and Northern Ireland's devolved competence. Agreement has therefore been sought and received for this instrument in so far as it makes provision that could have been made by the Devolved Authorities.

7.14 As the authorisation of planned treatment falls within devolved competence, the instrument provides for authorisation of applications made in accordance with healthcare arrangements to be handled by the National Health Service Commissioning Board (NHS England) in relation to England and by the respective health boards in Scotland, Wales and Northern Ireland in relation to those areas. However, the NHS BSA will have a UK-wide role in issuing authorisation certificates for all applicants where such certificates are required under a healthcare arrangement. The NHS BSA will also handle exclusively and entirely any maternity planned treatment applications including for applicants from the Devolved Administrations, as agreed after consultation with the Devolved Administrations. Applications for other planned treatment in the Member States submitted by UK-insured people residing in those states will be authorised by NHS England and the certificates will be issued by the NHS BSA.

7.15 The instrument makes provision for the Secretary of State to maintain a list of the healthcare arrangements with Member States that the NHS BSA and other relevant bodies must give effect to. The list will be published on gov.uk. It is currently the intention that the EEA EFTA no deal citizens' rights agreement which has been reached between the UK and Iceland, Liechtenstein and Norway will be added to that list. The list will be updated to add the bespoke healthcare arrangements that are concluded ahead of and after leaving the EU.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is not being made under the European Union (Withdrawal) Act, but under the Healthcare (EEA and Switzerland Arrangements) Act 2019. However, it relates to the withdrawal of the United Kingdom from the European Union because it provides for the implementation of healthcare arrangements with EEA states or Switzerland after EU Exit and enables payments to be made in respect of the cost of healthcare provided in those countries.

9. Consolidation

9.1 This Statutory Instrument does not involve consolidation and there are no plans to consolidate the relevant legislation at this time.

10. Consultation outcome

10.1 Reciprocal healthcare arrangements are popular and enjoy broad support from the general public. DHSC has not undertaken a consultation on the instrument but has engaged with relevant stakeholders on its approach to the future of EU reciprocal healthcare arrangements.

10.2 DHSC recognises that aspects of reciprocal healthcare arrangements relate to devolved matters and this instrument contains provision which is within devolved competence. The Devolved Administrations have therefore been consulted at official and ministerial level in accordance with the requirement for consultation under section 5 of the Act. There has further been an exchange of ministerial letters with

Scotland and Wales and an exchange of letters between the Permanent Secretaries of DHSC and the Department of Health in Northern Ireland confirming agreement to this instrument.

10.3 DHSC has also engaged with NHS England and the NHS BSA regarding the relevant functions which have been conferred upon them by this instrument.

11. Guidance

11.1 No guidance is published alongside this instrument.

11.2 Information for UK insured individuals in Member States and for EU insured individuals in the UK on how to access healthcare is available on www.gov.uk and www.nhs.uk.

11.3 Administrative guidance for the NHS BSA and other bodies that have been conferred functions under this instrument will be issued as appropriate and updated as further healthcare arrangements are made.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 An Impact Assessment has not been prepared for this instrument because its impacts will depend upon the healthcare arrangements that it is used to implement. An assessment of impacts will be conducted for each healthcare arrangement as appropriate once the parameters are known, whether it is a direct transitional continuation of the EU SSC Regulations or a more bespoke arrangement.

12.3 This instrument includes provisions for both the continuation of reciprocal arrangements with Member States and for bespoke bilateral future arrangements.

12.4 In the former case, there would be no costs or benefits associated with this option as there would not be any changes to the reciprocal healthcare arrangements.

12.5 In the latter case, the parameters of any future bespoke arrangements are to be set in the future. Therefore, it is not possible to do a meaningful analysis of quantitative and qualitative impact at this stage.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is for it to be included in the post-legislative scrutiny memorandum that the Government has committed to producing three to five years after the passage of the Act.

14.2 Under section 6 of the Act, the Secretary of State must also lay a report giving details of payments made under the powers conferred under the Act. That will include the functions conferred on the NHS BSA under this Instrument to make payments under section 1 of the Act and to make payments in order to give effect to healthcare arrangements.

14.3 The instrument does not include a statutory review clause.

14.4 Section 2(7) of the Act provides that the regulation-making powers in section 2(1)(a) and 2(1)(b) may not be exercised after the end of the period of five years, beginning with Exit day.

15. Contact

15.1 Sophie Eltringham at the Department of Health and Social Care. Telephone: 020 7972 4018 or email: Sophie.eltringham@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Charlotte Bright, Deputy Director for Reciprocal Health, Devolved Administrations and Overseas Territories at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Edward Argar, Minister of State for Health at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.