

EXPLANATORY MEMORANDUM TO
THE HEALTH SERVICES (CROSS-BORDER HEALTH CARE AND
MISCELLANEOUS AMENDMENTS) (NORTHERN IRELAND) (EU EXIT)
REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament Act.

2. Purpose of the instrument

- 2.1 The Health Services (Cross-Border Health Care and Miscellaneous Amendments) (Northern Ireland) (EU Exit) Regulations 2019 makes amendments, revocations, transitional and savings provisions to address deficiencies arising as a consequence of the United Kingdom's (UK) withdrawal from the European Union (EU) without an agreement.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The European Union Directive 2011/24/EU on the application of patients' rights in cross-border healthcare ("the Directive") sets out a framework of rules which allow patients to seek and pay for treatment in either the state or private sectors in another EEA country and have the costs of that treatment reimbursed by their home state. 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, that is the NHS in relation to the UK, with reimbursement capped at the cost of state-provided treatment in their home healthcare system.

The Directive was implemented in Northern Ireland by the Health Services (Cross-Border Health Care) Regulations (Northern Ireland) 2013 (SR 2013 No.299)

Why is it being changed?

- 2.3 Following the UK's exit from the EU ("exit day"), the Directive and the Treaty on the Functioning of the European Union will no longer apply in the UK. Therefore, the domestic legislation implementing the Directive will no longer be appropriate given that it is based on a reciprocal relationship with the EU of which the UK will no longer be a part.

What will it now do?

- 2.4 The amendments to the relevant domestic legislation will no longer allow a UK patient to seek and pay for treatment in either the state or private sectors in an EEA country and have the costs of that treatment reimbursed by the UK. It will also remove the obligation to provide National Contact Points (NCP) for the provision of information about treatment for incoming patients from an EEA country.

- 2.5 The amendments will ensure that a patient whose treatment has commenced, or been authorised, on or before exit day will retain entitlement to Cross Border Health Care ("CBHC").
- 2.6 This instrument will also seek to ensure an orderly closedown, with transitional provision, of the rights enjoyed under the Directive. Where an EEA country enters a bilateral agreement with the UK to guarantee the status quo in relation to reciprocal healthcare, savings provisions will allow the Directive provisions to apply in those circumstances until 31 December 2020

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 The territorial application of this instrument is limited to Northern Ireland.
- 3.3 The subject matter of this instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter.
- 3.4 This instrument applies to health which is a transferred matter for Northern Ireland under the Northern Ireland Act 1998. The UK Government remains committed to restoring the Assembly in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. UK Government Ministers have decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is limited to Northern Ireland.
- 4.2 The territorial application of this instrument is limited to Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Minister of State for Health Stephen Hammond, has made the following statement regarding Human Rights:

“In my view the provisions of The Health Services (Cross-Border Health Care and Miscellaneous Amendments) (Northern Ireland) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The Directive allows access to healthcare under the EU principles of access to goods and services across the EEA supporting the free movement of people. It allows patients to avail of both public and private sector medical treatment in another EEA country, pay for treatment up front and have the costs of that treatment reimbursed by

their home state. There are reciprocal elements to the process within the public sector and once the UK leaves the EU the Directive no longer applies to the UK.

- 6.2 The amendments made by this instrument will ensure that a patient whose treatment has commenced, or been authorised, on or before exit day will retain entitlement to Cross-Border Health Care. This instrument will also seek to ensure an orderly closedown, with transitional provision, of the rights enjoyed under the Directive. Where an EEA country enters a bilateral agreement with the UK to guarantee the status quo in relation to reciprocal healthcare, savings provisions will allow the Directive provisions to apply in those circumstances until 31 December 2020.
- 6.3 Part 1 of this instrument amends primary legislation and Part 2 amends and revokes secondary legislation that will be redundant when the UK withdraws from the EU including the Health Services (Cross-Border Health Care) Regulations (Northern Ireland) 2013.¹ These Regulations require the provision of a National Contact Point to provide information services about the Directive to resident patients and to patients enquiring from an EEA country. The UK will no longer be an EEA country after it leaves the EU so these Regulations will be redundant.
- 6.4 This instrument specifically amends:
- Part 1
- Health and Personal Social Services (Northern Ireland) Order 1972.²
- Part 2
- Health and Personal Social Services General Dental Services Regulations (Northern Ireland) 1993,³
 - The Health and Personal Social Services (General Medical Services Contracts) Regulations (Northern Ireland) 2004,⁴
 - Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015.⁵
 - The Health Services (Cross-Border Health Care) Regulations (Northern Ireland) 2013,⁶
 - The Health Services (Cross-Border Health Care) (Amendment) Regulations (Northern Ireland) 2015.⁷
- 6.5 Separate instruments will make similar provisions for England, Scotland and Wales.

7. Policy background

What is being done and why?

- 7.1 When the UK exits the EU, the UK will no longer be a signatory to the Directive. It will no longer be appropriate to allow UK patients to avail of both public and private

¹ <http://www.legislation.gov.uk/nisr/2013/299/contents/made>

² S.I. 1972 No.1265(N.I.14)

³ S.R. 1993 No. 326

⁴ S.R. 2004 No. 140

⁵ S.R. 2015 No.27

⁶ S.R. 2013 No.299

⁷ S.R. 2015 No.130

sector medical treatment in an EEA country, pay for treatment upfront and have the costs of that treatment reimbursed by the UK.

7.2 The current policy needs changed to address deficiencies arising as a consequence of the United Kingdom's (UK) withdrawal from the European Union (EU) without an agreement. Without amending the policy the EU Withdrawal Act will automatically retain CBHD domestic legislation and the scheme could continue to operate allowing patients to receive reimbursement for overseas healthcare purchases.

7.3 Significant risks and drawbacks associated with this have been identified:

- **Redundancy:** The same access can largely be delivered through EHIC and S2, both of which the UK is seeking to maintain with Member States.
- **Issues of principle:** It is odd to operate this scheme when it is not possible for UK patients to obtain reimbursement for private healthcare purchases within the UK (whether for patients within Northern Ireland, England, Scotland and Wales, or patients moving between each part of the UK). There is also a risk of inequalities as patients with financial means to access treatments abroad may be treated more quickly than otherwise and get reimbursement from the NHS, whilst less well-off, vulnerable patients cannot do so.
- **Financial exposure to the NHS:** In theory all UK tourists could obtain direct reimbursement from the NHS for any healthcare costs they faced if they travelled without insurance in a Member State where we did not have an arrangement in place similar to EHIC or an agreement with the current cost capping provisions under the Directive. In theory the costs might be the same as the EHIC scheme, but would be more complex and prone to fraud due to reimbursing individuals directly. For Northern Ireland residents the costs would fall to Department of Health in Northern Ireland (DoH NI) rather than the UK as they would for EHIC.
- **As Northern Ireland is disproportionately impacted due to the land border with the Republic of Ireland, the Directive already creates severe pressures on the DoH budget which is viewed as having a negative bearing on the length of waiting lists for those that cannot avail of the Directive provision. Any further financial exposure would again fall to DoH NI.**
- **WTO / Global Risk:** If we maintain reimbursement after leaving the EU, we may over time be challenged as to why we do not reimburse patients who travel to third countries, such as America or India.

Because of these risks, we do not plan to maintain the Directive legislation long-term into the future. However, an orderly closedown, with transitional provision, of the rights enjoyed under the Directive is planned, including ensuring provision for people in the middle of a course of treatment or who applied before exit day.

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

- 8.1 This instrument is made in exercise of powers in section 8 of the European Union (Withdrawal) Act 2018 (the “Withdrawal Act”)⁸. The Withdrawal Act makes provision for repealing the European Communities Act 1972⁹ and will preserve EU law, as it stands at the moment of exit, in UK law. It enables the creation of a new body of domestic legislation by bringing the texts of directly applicable EU legislation into domestic legislation, as well as saving EU-derived domestic legislation which was made to implement the UK’s obligations as a member of the EU. Together they are referred to as “retained EU law”. The Withdrawal Act also contains temporary power to make secondary legislation to enable Ministers and the devolved administrations to deal with deficiencies in retained EU law, to ensure that the UK’s legal system continues to function properly outside the EU. The Withdrawal Act does not preserve EU directives. Changes made under section 8 of the Withdrawal Act are therefore made to the relevant legislation which implements an EU directive in Northern Ireland.
- 8.2 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 There are no plans for consolidation.

10. Consultation outcome

- 10.1 Consultation between Devolved Administration officials and Government officials began in August 2018 and took the form of regular meetings and engagement specific to the amendments made by this instrument. This consultation has centred on policy implications of the regulations and how proposed amendments could impact service provision in devolved regions.
- 10.2 Policy responsibility for the regulation of Health is fully devolved in Northern Ireland. Northern Ireland officials have agreed that they are content for DHSC to lay this instrument. This approach follows the decision by UK Government Ministers that, in the interest of securing legal certainty in Northern Ireland, the UK Government will progress necessary secondary legislation at Westminster for Northern Ireland in close consultation with NICS officials/ the Northern Ireland departments.
- 10.3 A public consultation was not considered necessary at this time because the deficiencies that will arise when the UK leaves the EU in relation to this Directive will render it in most part inoperable.

⁸ <http://www.legislation.gov.uk/ukpga/2018/16/contents>

⁹ <http://www.legislation.gov.uk/ukpga/1972/68/contents>

11. Guidance

- 11.1 The Department of Health in Northern Ireland will be providing guidance to the Health and Social Care sector in Northern Ireland on the changes that will be made by this instrument.

12. Impact

- 12.1 There is no, or no significant impact on business, charities, or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full impact assessment has not been prepared for these Regulations because they will, as far as possible, maintain the status quo during the savings period until 31 December 2020. However, a de minimis assessment has been carried out and it has been concluded that there is no significant impact on businesses, charities, voluntary bodies or the public sector

13. Regulating small business

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

14. Monitoring & review

- 14.1 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

- 15.1 Patricia Quinn-Duffy at the Department of Health NI Telephone: 028 9052 0242 or email: Patricia.Quinn-Duffy@health-ni.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Mark Lee, Director for Primary Care at the Department of Health NI can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Stephen Hammond at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

- 1.1 The Minister of State for Health Stephen Hammond, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view The Health Services (Cross-Border Health Care and Miscellaneous Amendments) (Northern Ireland) (EU Exit) does no more than is appropriate”.

- 1.2 This is the case because the instrument only makes changes required to correct the deficiencies arising from the United Kingdom’s withdrawal from the European Union without an agreement and to allow for an orderly closedown with transitional provisions, including ensuring provision for people in the middle of a course of treatment or who applied before Exit Day.

2. Good reasons

- 2.1 The Minister of State for Health Stephen Hammond, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 2.2 This is the case because the instrument only makes changes required to the United Kingdom’s domestic legislation to correct the deficiencies arising from the United Kingdom’s withdrawal from the European Union without an agreement.
- 2.3 These are given in the policy background section of the Explanatory Memorandum (paragraphs 7.1 to 7.3).

3. Equalities

- 3.1 The Minister of State for Health Stephen Hammond, has made the following statement(s):

“The Health Services (Cross-Border Health Care and Miscellaneous Amendments) (Northern Ireland) (EU Exit) Regulations 2019 does 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.

- 3.2 The Minister of State for Health Stephen Hammond, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to The Health Services (Cross-Border Health Care and Miscellaneous Amendments) (Northern Ireland) (EU Exit) Regulations 2019, I, Stephen Hammond, 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. This Act does not extend to these regulations, and as they extend to Northern Ireland only, I

have given equivalent due regard to the need to eliminate discrimination, harassment and victimisation in relation to Northern Ireland.”

4. Explanations

- 4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.

5. Legislative sub-delegation

- 5.1 The Minister of State for Health has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view it is appropriate to create a relevant sub-delegated power in The Health Services (Cross-Border Health Care and Miscellaneous Amendments) (Northern Ireland) (EU Exit) Regulations 2019.

- 5.2 This instrument makes provision for the Secretary of State to publish and maintain a list specifying the Member States with which the UK has reciprocal arrangements. This list mechanism is appropriate because it can be updated quickly in response to the conclusion of negotiations with Member States to continue cross-border healthcare arrangements with them. The list will be published and accessible to the public so that it is clear which countries continue to operate these cross-border healthcare arrangements with the UK and can provide individuals with certainty about the continuation of those arrangements as soon as negotiations are concluded. Including the list in legislation would delay the UK’s ability to give effect to agreements seeking to maintain the current healthcare arrangements and would require multiple amending instruments as negotiations with different Member States are concluded in advance of exit day.