



Department of Health & Social Care

The Lord O'Shaughnessy
Parliamentary Under Secretary of State for Health
39 Victoria Street
London
SW1H 0EU

Vaughan Gething AM
Cabinet Secretary for Health and Social Services
5th Floor
Tŷ Hywel
Cardiff Bay
CF99 1NA

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Dear Vaughan,

The Social Security Coordination (Reciprocal Healthcare) (EU Exit) Regulations 2019, The National Health Service (Cross-Border Healthcare) and (Miscellaneous Amendments) (EU Exit) Regulations 2019

I am writing with regard to our continued cooperation and collaboration with the Welsh Government on reciprocal healthcare legislation to facilitate a smooth transition as we leave the EU.

To this effect, I am writing to advise the UK Government intends to bring forward Regulations under the section 8 powers in the European Union (Withdrawal) Act 2018 to prevent, remedy or mitigate deficiencies in retained EU law relating to healthcare abroad in the unlikely event of a no deal EU Exit scenario.

The first of these regulations will make amendments to EU Regulations 883/04, 987/09, 1408/71, 574/72 and 859/03 (the retained EU regulations), which relate to reciprocal healthcare. The second of these make amendments to prevent, remedy or mitigate other deficiencies relating to the retained EU regime on healthcare abroad, such as correcting domestic provisions implementing the Cross-Border Health Directive and making consequential changes following from EU Exit, such as correcting references to EU rights.

I have provided further information on each of these proposed statutory instruments in the enclosed Annex, and officials within my Department would welcome further discussion on these proposed pieces of legislation.

In so far as the proposed statutory instruments make provisions that could be made by Welsh Ministers in the exercise of their powers under the European Union (Withdrawal) Act, I am further writing to ask for your agreement to the UK Government's proposed approach. This is in line with the UK Government's commitment that it will not normally use the powers set out in sections 8 or 9 of the European Union (Withdrawal) Act 2018 to make provision that could be made by a Devolved Administration without the agreement of the relevant Devolved Administration(s).

The UK is committed to working with the Devolved Administrations on reciprocal and cross border healthcare. Once the outcome of EU Exit is clear I would recommend we have further discussions about the longer-term arrangements we would wish to see. We envisage using the Healthcare (International Arrangements) Bill to legislate for longer-term arrangements, respecting the devolution settlement and alongside domestic legislation we are each responsible for on domestic eligibility and charging.

Subject to your views, we intend to lay this SI under the Withdrawal Act in late January, and in order to facilitate this, we would be grateful for a response soonest.

I look forward to your response, and reiterate the UK Government's intention to work closely with the Welsh Government to deliver an approach that works for all of the UK.

I am copying this letter to the Secretary of State for Wales.

Yours sincerely,



Lord O'Shaughnessy

Annex A: Policy underlying the Social Security Coordination (Reciprocal Healthcare) (EU Exit) Regulations 2019

The retained EU regulations currently provide the legal framework for reciprocal healthcare, including the UK's responsibilities to:

1. Reimburse healthcare costs for UK residents living, working, retired in or visiting the EU (under the S1, European Health Insurance Card and S2 schemes). The regulations assume we pay the Member State but also, in certain circumstances, provide for direct reimbursement of individuals.
2. Provide healthcare to EU nationals living, working, retired in or visiting the UK (with reimbursement from their home Member State).

If we do not legislate any further, the Withdrawal Act will automatically retain these regulations. They would not be coherent or workable without reciprocity by Member States, and in certain circumstances could leave the UK responsible for unilaterally funding healthcare for UK tourists and EU visitors after Exit Day if we did not have reciprocal agreements.

Therefore, pending the implementation of new, longer-term reciprocal care arrangements under the Healthcare (International Arrangements) Bill, we are taking the approach of extinguishing the retained EU regulations, subject to the savings provision below.

We intend to selectively 'save' certain aspects of the regulations to deal with historical liabilities, provide for people in the course of treatment, and (more ambitiously) as a means of implementing short-term bilateral arrangements and supporting certain groups of people with healthcare costs.

First, we will be saving those aspects of the regulations that allow us to deal with our liabilities prior to EU Exit, including paying in arrears for healthcare used by UK residents and expats before 29 March 2019 (and for claiming costs back from Member State for their own nationals).

Second, we will save the health-related aspects of the regulations, so that they will continue to support the provision of healthcare to UK citizens in selected 'listed' countries (as well as healthcare provided in the UK to those countries' citizens). Countries would be selected and listed by the relevant UKG Minister. We envisage listing countries who reach agreement with the UK to continue the status quo for each other's citizens. This will allow us to implement reciprocal agreements with countries who take up the UK offer to continue the current arrangements transitionally until 31 December 2020. The saving would be time-limited (until the end 2020) and would not apply to countries who do not enter into agreements with us.

Third, we recommend saving the EU regulations for key groups in a transitional situation on Exit Day, irrespective of any reciprocity in place. In view of the cost and uncertainties associated with this, the group has been narrowly drawn to cover only those where we have clear legal responsibilities, such as those who have obtained authorisation for pre-planned treatment ahead of Exit Day, though not yet obtained the treatment.

The National Health Service (Cross-Border Healthcare) and (Miscellaneous Amendments) (EU Exit) Regulations 2019

These regulations give effect to English policy with respect to the Cross-Border Healthcare Directive (CBHD) (Directive 2011/24), as well as revoke certain EU decisions and make necessary changes and corrections to domestic law on reciprocal healthcare generally that are required following from the UK's EU Exit.

Cross-border Healthcare Directive

In 2013, the UK Government and Devolved Administrations transposed the CBHD into our domestic legislation. Separate legislation covers England and Wales, Scotland, Northern Ireland and Gibraltar. Currently, the CBHD includes:

- Giving UK residents automatic rights to receive NHS reimbursement for certain healthcare they purchase in the EU/EEA (but not Switzerland), which becomes problematic in a no deal for the reasons below.
- Preventing the NHS from charging EU/EEA (not Swiss) visitors more than domestic residents, which in the long-run could prevent full cost-recovery for EU visitors such as the 150% tariff or the Immigration Health Surcharge.
- Information sharing duties including running a National Contact Point to respond to queries from patients from the EU/EEA (not Switzerland).

Keeping CBHD reimbursement rights on our statute book would make the NHS liable for manually reimbursing substantial healthcare costs incurred abroad by UK tourists. This could expose the NHS to significant operational and financial risk and would also be inappropriate as we could no longer be sure that EU Member States would apply the Directive's constraints on excess charging. Almost all of the 250,000 EHIC claims per annum could in principle become reimbursable by the NHS and Devolved Administrations if we do not get bilateral arrangements with Member States. For these reasons our position is that the UK should not continue CBHD reimbursement in a no deal scenario.

Accordingly, our policy is to revoke the CBHD legislation for England with a savings provision to allow the policy to operate for certain listed countries for a transitional period (until 31 Dec 2020). This is the same approach as that adopted for reciprocal healthcare and would involve listing the same countries (who agree to maintain the status quo). This would allow us to maintain CBHD transitionally (for countries where we have established reciprocity) although it would be suspended for other countries.

As the CBHD was implemented by separate legislation in relation to Scotland, you will wish to give similar consideration to fixing deficiencies in that legislation under the European Union (Withdrawal) Act 2018 in relation to Scotland.

Miscellaneous Amendments

In addition to fixing miscellaneous EU references, such as those to Regulation 883/04, European Health Insurance Card, and EU rights and obligations in certain healthcare legislation relating to England, these Regulations will:

- Omit section 10 of the Health and Social Security Act 1984 and the related references in section 26 of that Act and in Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999; section 10 relates to the reimbursement of cost of medical and maternity treatment in Member States of the European Economic Community and extends to England, Wales and Scotland.
- Revoke the legislation implementing the CBHD and related legislation in relation to England, namely the relevant provisions of the National Health Service Act 2006, the National Health Service (Cross-Border Healthcare) Regulations 2013, the National Health Service and Public Health (Functions and Miscellaneous Provisions) Regulations 2013 and the National Health Service (Cross-Border Healthcare) (Amendment) Regulations 2015. The regulations will also make any necessary consequential amendments within that legislation and any other related legislation. Since the CBHD was implemented for both England and Wales by the same regulations, this will include technical, consequential amendments to ensure that, once the provisions relating to England are omitted, the remaining legislation works in relation to Wales.

- Revoke the relevant provisions of the National Health Service (Reimbursement of the Cost of EEA Treatment) Regulations 2010. These Regulations give effect to the judgment of the then European Court of Justice in relation to the case of *Watts v Bedford Primary Care Trust and Secretary of State for Health (2006)* – namely that the obligation under the Treaty Article relating to the freedom to provide and receive services (now Article 56), to reimburse the cost of hospital treatment provided in another member State, also applies to a tax-funded national health service.
- Revoke EU Decisions 2013/329/EU, 2011/890/EU, 2014/286/EU and 2014/287/EU. Decisions 2013/329/EU and 2011/890/EU concern EU networks on the evaluation of health technology (Health Technology Assessment) and networks on e-health respectively. Decisions 2014/286/EU and 2014/287/EU concern the operation of networks on rare diseases (European Reference Networks).
- Omit the second sub-paragraphs (a) and (b) of paragraph 10 of Schedule 2 to the Human Tissue Act 2004 (Ethical Approval, Exceptions from Licensing and Supply of Information about Transplants) Regulations 2006. This requires certain information to be supplied to NHS Blood and Transplant, by a person who has received material to be transplanted, namely, a statement indicating that the recipient was entitled to the provision of the treatment by virtue of regulations made under Article 48 TFEU or an agreement entered into between the European Union and another country.

The fixes are required to the above retained EU law, as they make provision for, or in connection with, reciprocal arrangements which will not exist or will not be appropriate, or otherwise contain EU references, which will no longer be appropriate following the UK's exit from the EU.

As mentioned above, the fixes will include appropriate savings provision to reflect the policy of maintaining certain reciprocal and cross-border healthcare arrangements, on a time-limited basis, for a list of countries with whom the UK has agreed continued arrangements (yet to be determined) and to protect certain groups in a transitional situation on Exit Day.