

Kidney dialysis patients seeking care in selected EU Member States following Brexit: the expected legal position under the Withdrawal Agreement and ‘No Deal’

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Note. This analysis must not be treated as formal legal advice, not least because its authors are not insured to give such advice. Anyone seeking such advice should consult a solicitor.

Introduction

As the UK is a member of the European Union (EU), people who are entitled to NHS treatment in the UK are entitled to access state healthcare when travelling abroad as temporary visitors.¹ In practice, this right is accessed through the European Health Insurance Card (EHIC). EHIC entitlements include the right to state-provided dialysis treatment when abroad.²

When the UK leaves the EU, this will change. Patients’ legal entitlements will differ depending on what kind of Brexit occurs. This briefing note analyses two possible forms of Brexit, that under the Withdrawal Agreement and that under ‘No Deal’. It explains the consequences of each for kidney dialysis patients travelling abroad in an EU Member State (MS). We focus analysis on five selected Member States (Spain, France, Ireland, Italy and

¹ Treaty on the Functioning of the European Union 2008, Articles 9 and 168(1); Regulation 883/2004/EC.

² ‘Apply for A Free EHIC (European Health Insurance Card)’ (*nhs.uk*, 2019) <<https://www.nhs.uk/using-the-nhs/healthcare-abroad/apply-for-a-free-ehic-european-health-insurance-card/>> accessed 11 June 2019.

Greece) as these are the countries most visited by dialysis patients known to Kidney Care UK.

EU Legislation

Regulation 883/2004/EC entitles patients to emergency medical treatment that becomes necessary during their stay in the territory of another MS.³ The regulation is ‘directly applicable’ in all MS⁴ meaning it takes legal effect without any act of transposition into domestic law. Under the European Communities Act 1972, section 2, Regulation 883/2004/EC takes effect in UK law in line with the requirements of EU law. Regulation 883/2004/EC must be applied in preference to any contradictory domestic law, in accordance with the principle of supremacy of EU law. Regulation 883/2004/EC defines ‘benefits in kind’ which it provides for, as including “long-term care benefits” which the MS pay for directly.⁵

Effectively, visitors who are nationals of any EU MS are treated in the same way as locals, the costs of which are offset by a system of reimbursement between EU MS.⁶ This right to access healthcare is administered in the form of the EHIC, granting UK nationals access to free or reduced cost healthcare within the European Economic Area (EEA).⁷ The EHIC extends the access to emergency healthcare to include the access to kidney dialysis treatment.⁸

The existing rights to free NHS care for EEA nationals and Swiss nationals under EU law and the rights of UK citizens to access cross-border healthcare in the EU MS will

³ Regulation 883/2004/EC, Article 19.

⁴ Article 288 TFEU.

⁵ Regulation 883/2004/EC, Article 1(va)(i), “for the purposes of Title III, Chapter 1 (sickness, maternity and equivalent paternity benefits), benefits in kind provided for under the legislation of a Member State which are intended to supply, make available, pay directly or reimburse the cost of medical care and products and services ancillary to that care. This includes long-term care benefits in kind”.

⁶ Regulation (EC) 883/2004 (5) “it is necessary, within the framework of such coordination, to guarantee within the community equality of treatment under the different national legislation for persons covered.

(13) The coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the advantages acquired and in the course of being acquired.

⁷ Thomas Powell, *Healthcare (International Arrangements) Bill 2017-2019* (Briefing Paper Number 08435 2019) House of Commons Library.

⁸ 'Apply for A Free EHIC (European Health Insurance Card)' (*nhs.uk*, 2019) <<https://www.nhs.uk/using-the-nhs/healthcare-abroad/apply-for-a-free-ehic-european-health-insurance-card/>> accessed 11 June 2019.

continue until the point at which the UK formally leaves the EU,⁹ currently scheduled for 31st October 2019.

The default position under the UK's EU (Withdrawal) Act 2018 is that, when brought into force, it will ensure legal continuity by converting relevant existing EU law into 'retained EU law' until such time as it is repealed or amended/modified domestically.¹⁰ But this does not mean reciprocal healthcare will continue in the same way as pre-Brexit, because this would require reciprocity from the EU-27 MS.

The Electronic Exchange of Social Security Information¹¹ (EESSI) is an IT system enabling the exchange of personal data across EU social security institutions.¹²¹³ It provides for an accurate, efficient and secure exchange of the necessary information for treating patients, routing all healthcare documents to the correct destination in another Member State. The information shared is subject to EU data protection legislation: namely, the EU's General Data Protection Regulation (GDPR).¹⁴ The GDPR protects the fundamental rights of natural persons whose data are 'processed' within the material scope of EU law,¹⁵ where the entity processing the data is within the EU, or the data subjects are within the EU. The GDPR also provides for the free movement of data both within and into the EU by providing harmonised minimum level standards of data protection.¹⁶¹⁷

⁹ The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019 No.516, Explanatory Memorandum.

¹⁰ ss.2-4 of the EU (Withdrawal) Act 2018.

¹¹ Provided for in Regulation (EC) 883/2004, Article 78.

¹² 'Electronic Exchange Of Social Security Information (EESSI) - Employment, Social Affairs & Inclusion - European Commission' (*Ec.europa.eu*) <<https://ec.europa.eu/social/main.jsp?catId=869>> accessed 3 July 2019.

¹³ Implemented by Regulation (EC) 987/2009, Article 3 Paragraph 3 "When collecting, transmitting or processing personal data pursuant to their legislation for the purposes of implementing the basic Regulation, Member States shall ensure that the persons concerned are able to exercise fully their rights regarding personal data protection, in accordance with Community provisions on the protection of individuals with regard to the processing of personal data and the free movement of such data".

Provided for in Regulation 883/2004/EC in the preamble, paragraph 40, "The use of data-processing services for exchanging data between institutions... are to be carried out in accordance with the Community provisions on the protection of natural persons with regard to the processing and free movement of personal data".

¹⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal *data* and on the free movement of such *data*, and repealing Directive 95/46/EC (General *Data Protection Regulation*) OJ 2016 L 119/1.

¹⁵ GDPR, Article 2 (2) (a).

¹⁶ GDPR, Article 3.

¹⁷ Regulation (EC) 987/2009, Article 2, Paragraph 2 "The institutions shall without delay provide or exchange all data necessary for establishing and determining the rights and obligations of persons to whom the basic

In December 2018, the UK government issued a technical note giving guidance on data protection post-Brexit. That was withdrawn¹⁸ and replaced with revised guidance adopted on 6 February 2019.¹⁹ It is in accordance with the guidance from the ICO²⁰ on the future data protection regime in case of a ‘No Deal’ Brexit. This will be discussed latterly in this briefing note when the two forms of Brexit are discussed.

The EESSI also facilitates the payment of the treatment²¹ by the ‘competent state’, in this case the UK, to the country which provides the benefit, the country in which the patient receives dialysis treatment.

Timeline

On 29th March 2017 the UK expressed its intention to withdraw from the EU, engaging Article 50 TEU.²² Article 50(2) dictates that the EU and the UK will negotiate an agreement setting out the arrangements of the withdrawal. On 19th June 2017 negotiations surrounding the terms of the UK’s exit began.²³ By 25th November 2018, a draft Withdrawal Agreement

Regulation applies. Such data shall be transferred between Member States directly by the institutions themselves or indirectly via the liaison bodies”.

¹⁸ Department for Digital, Culture, Media & Sports (13 September 2018, this guidance was withdrawn on the 1st of March

2019) Data protection if there’s no Brexit deal. <https://www.gov.uk/government/publications/data-protection-if-theres-no-brexit-deal/data-protection-if-theres-no-brexit-deal>. Accessed 17 June 2019.

¹⁹ Department for Digital, Culture, Media & Sports (6 February 2019) Using personal data after Brexit.

<https://www.gov.uk/guidance/using-personal-data-after-brexit>. Last accessed 17 June 2019. We make no further comment

on the obvious unsatisfactory nature of guidance from 6 February 2019 not replacing guidance from December 2018 until

1 March 2019.

²⁰ ICO, Data protection and Brexit <https://ico.org.uk/for-organisations/data-protection-and-brexit/>. Last accessed 17 June

2019.

²¹ 'Electronic Exchange Of Social Security Information (EESSI) - Employment, Social Affairs & Inclusion - European Commission' (*Ec.europa.eu*) <<https://ec.europa.eu/social/main.jsp?catId=869>> accessed 3 July 2019.

²² Treaty of the European Union 2008, Article 50.

²³ 'European Commission - PRESS RELEASES - Press Release - Brexit Negotiations: What Is In The Withdrawal Agreement' (*Europa.eu*, 2018) <http://europa.eu/rapid/press-release_MEMO-18-6422_en.htm> accessed 17 June 2019.

had been agreed by the negotiating team²⁴. However, the UK government was unable to secure support in Parliament for ratification of the Withdrawal Agreement.²⁵ On 10th April 2019, the EU and UK agreed to a further extension of Article 50 until 31st October 2019²⁶ unless the Withdrawal Agreement is ratified before that date, in which case the UK will leave when the Withdrawal Agreement enters into force, or unless a further extension is agreed. The Withdrawal Agreement must be endorsed by the European Council (which occurred on 25th November 2018) and ratified by the EU and the UK. The UK government under PM May failed to secure Parliamentary support for the Withdrawal Agreement. The Johnson government is seeking to renegotiate it but the EU has declined to do so. If no Withdrawal Agreement is ratified, it will result in a 'No Deal' Brexit.

Withdrawal Agreement

The Withdrawal Agreement (WA) continues the application of all EU law during the transition period,²⁷ which the UK government calls an 'implementation' period, (currently from 31st October 2019 until 31st December 2020), even though the UK is no longer a MS. The transition period may be extended once, by a decision of a 'Joint Committee'²⁸ made before 1 July 2020.²⁹ The EU legal framework will be encompassed under the WA, and the practicalities of making that law in the UK will be implemented through an Act yet to be passed by the UK Parliament. All of EU law includes Regulation 883/2004 and everything that flows from it, which includes EHIC.

As well as providing continuity through the transition period, the WA also covers people who are subject to the legislation of the UK or an EU-27 MS at the end of the

²⁴ See Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2019 C 66 I/01; Council Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community OJ 2019 LI 47/1.

²⁵ So far there have been three attempts to secure approval for the Withdrawal Agreement from the UK's House of Commons on 15 January 2019 (defeated by 230 votes); 12 March 2019 (defeated by 149 votes) and 29 March (defeated by 58 votes).

²⁶ Department Affairs, 'Brexit Negotiations - Department Of Foreign Affairs And Trade' (*Dfa.ie*, 2019) <<https://www.dfa.ie/brexit/brexit-negotiations/>> accessed 19 June 2019.

²⁷ Withdrawal Agreement, Article 126.

²⁸ An institution comprising representatives of the EU and UK, established by the WA, Article 164.

²⁹ Withdrawal Agreement, Article 132.

transition period.³⁰ Everyone who meets the UK's ordinary residence test therefore, having free access to the NHS, is 'subject to the legislation' of the UK.

The WA means that the EU law upholding UK citizens' right to access cross-border healthcare will continue to be able to be relied on by dialysis patients until 31st December 2020³¹ - or longer if the transition period is extended. If a patient is abroad in another MS on 31st December 2020, they will continue to be able to rely on their rights under the WA until they leave that MS.³² Neither the maximum duration of stay, nor the reason for the stay, is determined by law. Therefore, for instance, a holiday period with 31st December 2020 falling within it would qualify.

The WA also states that the UK will continue to take part in the Electronic Exchange of Social Security Information (EESSI) during transition.³³ This is important because practically, for cross border healthcare to operate successfully, personal data concerning the patient must be transferred between the MS, and because this mechanism is through which reciprocal payments are made under the scheme of Regulation 883/2004. Under the WA, GDPR rules would continue to apply.³⁴ The WA confirms the UK's continuation of using EESSI during the transition period by continuing the application of all EU law. The WA also confirms that the UK will continue to pay its share of the costs.³⁵

'No Deal'

If the UK leaves the EU on the 31st October 2019, or a later date, without ratifying the WA, this is what has been termed a 'No Deal' Brexit. This means no reciprocal healthcare agreements will operate between the UK and the EU-27 as a bloc. UK patients will immediately lose their rights in EU law to access treatment in another EU country. But there are alternative possibilities for patients to access treatment. None of these are certain, and they involve new law, which has not been tested in courts, and new administrative structures, which are equally untested. Relying on these rights thus involves greater risk than the known situation currently under EU law, and that the situation under the WA which seeks to

³⁰ Withdrawal Agreement, Article 28.

³¹ Withdrawal Agreement, Article 127. "Scope of the transition 1. Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period."

³² Withdrawal Agreement, Article 32 Paragraph 1(c).

³³ Withdrawal Agreement, Article 34 Paragraph 2.

³⁴ Withdrawal Agreement, Article 126.

³⁵ Regulation 997/2009/EU

continue the position under EU law as far as possible for a transitional period after the UK leaves the EU.

One possibility is for the UK to secure bilateral agreements with each of the MS, or with the EU as a whole, and to implement these through domestic law. On 23rd March 2019 the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 received royal assent, establishing the legal basis for implementing reciprocal healthcare arrangements after Britain's exit. The UK government has proposed that, even in the event of a no deal scenario, reciprocal healthcare continues until the end of December 2020. However, this has not been accepted by the EU, and it is difficult to see how it could be, given the EU's current negotiating mandate.³⁶

A second possibility is for UK patients to rely on domestic law in the country they are visiting. Many EU 27 MS, such as Ireland, Spain, Italy, France and Greece, have already passed domestic legislation in case of a 'No Deal' Brexit scenario.

In a 'No Deal' scenario, there would be no immediate change to data protection law *in the UK*.³⁷ The Data Protection Act 2018 would remain in place and the EU Withdrawal Act would incorporate the GDPR into UK law. The EU (Withdrawal) Act and secondary legislation such as the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 make no distinction between different types of Brexit. However, although the UK will continue to recognise the EU as a safe place to send data, the EU will treat the UK, as a third-country with no adequacy decision,³⁸ as potentially non-compliant with its data protection law.

In the absence of an adequacy decision, data transfer may take place where 'appropriate safeguards' are provided. One such appropriate safeguard is the use of standard contractual clauses.³⁹ The ICO has produced guidance on what organisations need to include

³⁶ 'Reciprocal Healthcare' (*Nhsconfed.org*, 2018) <<https://www.nhsconfed.org/regions-and-eu/nhs-european-office/brexit-and-the-nhs/brexit-implications-for-health-and-care/reciprocal-healthcare>> accessed 19 June 2019.

'Healthcare (European Economic Area And Switzerland Arrangements) Bill - Hansard' (*Hansard.parliament.uk*, 2019) <[https://hansard.parliament.uk/lords/2019-03-19/debates/759004D8-D2CB-40B7-9A82-B8EC98B29884/Healthcare\(EuropeanEconomicAreaAndSwitzerlandArrangements\)Bill](https://hansard.parliament.uk/lords/2019-03-19/debates/759004D8-D2CB-40B7-9A82-B8EC98B29884/Healthcare(EuropeanEconomicAreaAndSwitzerlandArrangements)Bill)> accessed 17 June 2019.

³⁷ Department for Digital, Culture, Media & Sports (13 September 2018, this guidance was withdrawn on the 1st of March 2019) Data protection if there's no Brexit deal. <https://www.gov.uk/government/publications/data-protection-if-theres-no-brexit-deal/data-protection-if-theres-no-brexit-deal>. Accessed 17 June 2019.

³⁸ DPA, section 74.

³⁹ GDPR, Article 57

in contracts for data transfer.⁴⁰ The Health Research Authority's guidance confirms the lawfulness of such data transfers.⁴¹

As the legal framework which governs the transfers of personal data from EU institutions to the UK would change on exit, so would the procedures currently in place which administer the transfer of patient data. A new system for transferring payments for emergency treatments would also be needed, as the EESSI would no longer be available. This system does not currently exist. It would need to be created and implemented in a 'No Deal' scenario.

Spain

On 1st March 2019 Spain adopted the Royal Decree-Law 5/2019⁴² which lays down measures in case of a 'No Deal' Brexit. The Royal-Decree-Law seeks to cover all possible sectors concerned by this form of Brexit, focusing primarily on granting British expats resident in Spain the same rights that they previously enjoyed. It includes access to Spanish state healthcare by UK kidney dialysis patients temporarily visiting.

The existence of the rights detailed in the Royal Decree-Law 5/2019 are dependent on the UK reciprocating for Spanish citizens in the UK within two months.⁴³ If this does not occur, the rights detailed in the above Decree will be suspended 2 months after Brexit. The reciprocity must be under the same terms and conditions as existed prior to Brexit.⁴⁴ The UK has since passed the Immigration (European Economic Area Nationals) (EU Exit) Order 2019⁴⁵ which details that EEA and Swiss nationals who arrive before exit day and have been in the UK for less than five years are eligible to apply for limited leave to remain in the UK for five years, which is referred to as "pre-settled status". They are then eligible to apply for settled status once they have been continuously resident in the country for five years.

⁴⁰ ICO What needs to be included in the contract? <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/contracts-and-liabilities-between-controllers-and-processors-multi/what-needs-to-be-included-in-the-contract/>. Last accessed 17 June 2019.

⁴¹ Taylor MJ, Wallace SE, Pricor M United Kingdom: transfers of genomic data to third countries. (n 43) 639 citing Health Research Authority NHS (last updated 8 May 2018) Legal basis for processing data. <https://www.hra.nhs.uk/planning-and-improving-research/policies-standards-legislation/data-protection-and-information-governance/gdpr-detailed-guidance/legal-basis-processing-data/>.

⁴² Royal Decree-Law 5/2019.

⁴³ Royal Decree-Law 5/2019, Article 2 Paragraph 1

⁴⁴ Royal Decree-Law 5/2019, Article 13(1)(a)

⁴⁵ [The Immigration \(European Economic Area Nationals\) \(EU Exit\) Order 2019, Part 4. Immigration Rules: Appendix EU.](#)

Applicants under the settlement scheme will not have to pay the immigration health surcharge.⁴⁶ Under EU Law, namely Directive 2004/38/EC, EU citizens become permanent residents in a MS if they have resided in the MS for a period of five years.⁴⁷ The Settlement Scheme also states that EEA and Swiss citizens who have arrived before exit day are exempt from NHS charging until 31 December 2020.⁴⁸

The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019, however, states that EU *visitors* who arrive in the UK after exit day who are not the subject of a reciprocal healthcare arrangement and do not qualify for pre-settled or settled status will be charged by the NHS after exit day at the same amount as a British citizen who is not ordinarily resident.⁴⁹ It is unclear whether Spain will regard these arrangements as reciprocation, although Spanish visitors will be treated the same way as non-resident British visitors, so it may suffice.

The Royal Decree-Law 5/2019 states that there can be no new administrative constraints on Spanish nationals accessing the NHS from pre-Brexit arrangements in order to have reciprocal healthcare. It is unclear whether Spain considers the ‘settlement scheme’ the UK has introduced which applies in a ‘No Deal’ scenario as an administrative change. Application to the scheme originally cost £65 but is now free.⁵⁰ If it does constitute an administrative change, dialysis patients will no longer have entitlement to dialysis treatment in Spain as they do pre-Brexit, as the requisite reciprocation required under the Royal Decree-Law 5/2019 will not be in place.

The Royal Decree-Law 5/2019 also requires the UK to provide visitors to Spain with documents which “certify health coverage payable by the corresponding British entities”⁵¹ in place of an EHIC. If UK patients are to rely on the Royal Decree-Law, the UK government will have to issue special documentation which satisfies this condition. As far as we have been able to ascertain, no such arrangements have yet been made.

⁴⁶ The Immigration (European Economic Area Nationals) (EU Exit) Order 2019, Part 4.

⁴⁷ Directive 2004/38/EC, Article 16 Paragraph 1.

⁴⁸ The National Health Service (Charges to Overseas Visitors) Regulations 2015, regulation 24A(4) and (5), as inserted by the National Health Service (Charges to Overseas Visitors) (Amendment etc) (EU Exit) Regulations 2019, regulation 8.

⁴⁹ The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019, regulation 7.

⁵⁰ 'Apply To The EU Settlement Scheme (Settled And Pre-Settled Status)' (*GOV.UK*) <https://www.gov.uk/settled-status-eu-citizens-families/applying-for-settled-status?utm_campaign=EUSS&utm_medium=paid_search&utm_source=Google&gclid=CjwKCAjwvJvpBRAtEiwAjLuRPX6bM04dq8WO98xUlm9IJ-BMw1qaWDiF5d92gbGow8ploMvRxAzgcBoCPu0QAvD_BwE&gclsrc=aw.ds> accessed 11 July 2019.

⁵¹ Royal Decree-Law 5/2019, Article 13.

The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019⁵² states that the previous entitlement of “overseas visitors from an EEA state or Switzerland, who are covered by a reciprocal agreement [to] not be directly chargeable”⁵³ will be amended by the 2019 regulation. Although administrative changes, they do not change the fact that Spanish nationals’ resident in the UK will be able to access the NHS. Furthermore, although the amendment appears to restrict Spanish visitors’ ability to access the NHS, the UK has previously stated its commitment to maintaining the reciprocal healthcare agreements, which includes granting EU-27 nationals temporarily visiting the UK access to healthcare.⁵⁴ It is therefore, unclear whether the UK will in fact charge Spanish visitors in a ‘No Deal’ scenario with the adoption by Spain of the Royal Decree-Law 5/2019. If they do, the requirement of reciprocity in Royal Decree-Law 5/2019 will not be fulfilled and dialysis patients will be unable to access the Spanish social security system as they do pre-Brexit.

The Royal Decree-Law 5/2019 only lasts for 21 months. It provides for the same rights as previously enjoyed by UK nationals pre-Brexit, subject to necessary conditions being complied with by the UK. However, it is for a limited time-frame. It ultimately creates a conditional transition period for 21 months after Britain’s exit.

France

France’s Brexit law, Ordinance no 2019-76, was adopted on 6th February 2019. It contains measures relating to social rights but only of UK citizens residing in France. Unfortunately, it does not detail any rights for temporary UK visitors to France accessing medical care. As it stands, dialysis patients will have no entitlement to cross-border healthcare in France following a ‘No Deal’ Brexit.

Ireland

⁵² The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019 No. 516, Regulation 14

⁵³ The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019 No. 516, Explanatory Memorandum.

⁵⁴ ‘Reciprocal Healthcare’ (*Nhsconfed.org*, 2018) <<https://www.nhsconfed.org/regions-and-eu/nhs-european-office/brexit-and-the-nhs/brexit-implications-for-health-and-care/reciprocal-healthcare>> accessed 19 June 2019.

‘Healthcare (European Economic Area And Switzerland Arrangements) Bill – Hansard’ (*Hansard.parliament.uk*, 2019) <[https://hansard.parliament.uk/lords/2019-03-19/debates/759004D8-D2CB-40B7-9A82-B8EC98B29884/Healthcare \(EuropeanEconomicAreaAndSwitzerlandArrangements\)Bill](https://hansard.parliament.uk/lords/2019-03-19/debates/759004D8-D2CB-40B7-9A82-B8EC98B29884/Healthcare%20(EuropeanEconomicAreaAndSwitzerlandArrangements)Bill)> accessed 17 June 2019.

Legal relations between the UK and the Republic of Ireland are not only determined by EU law. The Common Travel Area⁵⁵ (CTA) and north/south cooperation under Strand Two of The Good Friday/Belfast Agreement⁵⁶ concern rights of citizens of the UK and RoI and cooperation in healthcare. In the event of a ‘No Deal’ Brexit, these domestic laws and policies would mean reciprocal healthcare would continue without the need for an EHIC.⁵⁷ The UK government have confirmed that the CTA is not reliant on the EU,⁵⁸ as seen in the National Health Service (Charges to Overseas Visitors) Regulation⁵⁹ which exempts charges for Irish citizens and British Citizens ordinarily resident in Ireland.⁶⁰ Through the CTA, British or Irish citizens have the right to access health care in either state.⁶¹ Similarly to The Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, the Republic of Ireland’s Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019⁶² (also known as the ‘Omnibus Act’) amends the Health Act 1970 to give the Minister power to continue or create reciprocal healthcare agreements with the UK as were in operation prior to Brexit. Although powers are in place for ministers to adopt it, the secondary legislation providing for reciprocal healthcare between the two countries directly has not yet been written.

Legally, kidney dialysis patients with Irish or British citizenship would be able to access the Irish national healthcare free of charge. However, practically, due to the lack of capacity in Ireland, this may not be the case.

⁵⁵ Common Travel Area.

⁵⁶ The Good Friday/Belfast Agreement 1998.

⁵⁷ Healthcare In Ireland' (*nhs.uk*, 2019) <<https://www.nhs.uk/using-the-nhs/healthcare-abroad/healthcare-when-travelling-abroad/healthcare-in-ireland/>> accessed 11 July 2019.

⁵⁸ 'Travelling Within The Common Travel Area And The Associated Rights Of British And Irish Citizens If There Is No Brexit Deal' (*GOV.UK*, 2019) <<https://www.gov.uk/government/publications/travelling-in-the-common-travel-area-if-theres-no-brexit-deal/travelling-within-the-common-travel-area-and-the-associated-rights-of-british-and-irish-citizens-if-there-is-no-brexit-deal#before-brexit>> accessed 13 June 2019.

⁵⁹ The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019 No. 516.

⁶⁰ The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019 No. 516, Explanatory Memorandum.

⁶¹ 'Common Travel Area Guidance' (*GOV.UK*) <<https://www.gov.uk/government/publications/common-travel-area-guidance/common-travel-area-guidance>> accessed 11 July 2019.

⁶² Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019, Part 2 Paragraph 4.

The success of the above bilateral agreements is in part due to the EU's funding for cross-border health cooperation on the island of Ireland. Without this EU funding, the practical ability for people to access healthcare on the island of Ireland may change.⁶³ However, this does not change the fact that the necessary legal framework which entitles both Irish and British patients to treatment in Northern Ireland already exists. It affects more the practicalities involved in reciprocal healthcare, such as funding.

Italy

In March 2019, Italy published a 'No Deal Decree' in the Official Italian Gazette⁶⁴ providing for the continuation of reciprocal healthcare until 31st December 2020, on the condition of reciprocity. As with Spain, it is unclear whether Italy considers the 'settlement scheme' the UK has introduced, which applies in a 'No Deal' scenario, as reciprocating the rights provided for in the 'No Deal Decree' for English Residents permanently living in Italy.

A House of Commons Briefing Paper stated that the UK and Italy are also discussing a "bilateral and reciprocal deal on healthcare" for UK and Italian nationals in the event of 'No Deal'.⁶⁵ Italy confirmed this in the Italian Gazette, stating that the decree ensures the "protection of the health and freedom of residence of Italian citizens and those of the United Kingdom."⁶⁶ There is considerably less focus on temporary visitors (those relying on EHIC). This is not to say it will not be achieved. The UK and Italy have so far agreed that pensioners will continue to be able to access healthcare through EHIC, but no wider access has been agreed.⁶⁷ At present, therefore, there is no domestic law which provides for dialysis patients' entitlement to medical care when temporarily visiting Italy following a 'No-Deal' Brexit.

Greece

⁶³ 'Written Evidence - Co-Operation And Working Together' (*Data.parliament.uk*, 2017) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-reciprocal-healthcare/written/79446.html>> accessed 14 June 2019.

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https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2019-03-25&atto.codiceRedazionale=19G00032&elenco30giorni=true

⁶⁵ Vaughne Miller, *EU Preparations for a no-deal Brexit*, (Briefing Paper Number 8547 2019) (House of Commons Library).

⁶⁶ Stefano Febbi and Diego Cefaro, 'Brexit: "Brexit Decree" And Bank Of Italy's Requirements For UK And Italian Financial Institutions' (*Bird & Bird*, 2019) <<https://www.twobirds.com/en/news/articles/2019/uk/brexit-decree-and-bank-of-italys-requirements-for>> accessed 19 June 2019. [HMM - maybe better source here: <https://www.thelocal.it/20190328/what-we-know-so-far-about-italy-no-deal-brexit-decree>]

⁶⁷ British Medical Association, *Reciprocal healthcare between the UK and the EU* (Briefing Paper 20170835 2017).

Greece has issued Law 4604/2019⁶⁸ in accordance with current EU laws⁶⁹ as a transitional measure in case there is a ‘No Deal’ Brexit.⁷⁰ Article 125(1)(a) provides for limited reciprocal healthcare for UK citizens and their family members legally residing in Greece from the withdrawal date until the end of 2019. UK temporary visitors will also continue to be able to access healthcare in Greece until 31st December 2019.⁷¹ Article 125(2) grants the Greek Healthcare Minister the power to extend the date unilaterally. Unless that happens, after 2019, there will be no entitlement to access the healthcare services in Greece under this legislation for British citizens permanently or temporarily residing in Greece.

Longer term

The Department of Health and Social Care pushed for the UK government to fully protect rights under EHIC in UK law post-Brexit, but there has been a stronger focus on protecting UK nationals residing in any EU MS and vice versa.⁷² Thus far, the UK has agreed that EEA and Swiss citizens who have arrived before exit day who are eligible for limited or indefinite leave to remain under the settled status scheme in Appendix EU are exempt from NHS charging until 31st December 2020.⁷³ They are exempt even if they have not yet applied for leave to remain. Furthermore, EU citizen visitors who arrive after exit day will not be charged for use of the NHS if the UK has negotiated a reciprocal healthcare agreement with their particular country.⁷⁴

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⁶⁹ Regulations 883/2004/EC and 987/2009/EC

⁷⁰ <https://brexit.gov.gr/uk-citizens-in-greece/>

⁷¹ Law 4604/2019, Article 125(1)(b)

'Brexit GR: British Citizens Who Live In Greece' (*BREXIT GR*) <<http://brexit.gov.gr/uk-citizens-in-greece/>> accessed 14 June 2019.

Per Regulation (EU) 2019/500.

⁷² Secretary of State for Health and Social Care, ‘Government response to the House of Lords European Union Committee, 13th report of session 2017-19, ‘Brexit: reciprocal healthcare’ (Cm 9634, 2018) Department of Health and Social Care.

⁷³ [The National Health Service \(Charges to Overseas Visitors\) Regulations 2015, regulation 24A\(4\) and \(5\), as inserted by the National Health Service \(Charges to Overseas Visitors\) \(Amendment etc\) \(EU Exit\) Regulations 2019, regulation 8.](#)

⁷⁴ [The National Health Service \(Charges to Overseas Visitors\) \(Amendment etc.\) \(EU Exit\) Regulations 2019, regulation 14.](#)

Longer term, the UK has indicated that it seeks to enter into reciprocal healthcare agreements with the EU or its Member States. The UK government have expressed their wishes to maintain current reciprocal healthcare agreements with EU MS enjoyed through EU membership.⁷⁵ However, the EU's negotiating principles (which are legally binding on its negotiating team) state that a non-member "that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member".⁷⁶

The Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 merely gives power to the Secretary of State for Health and Social Care to enter into agreements in respect of the cost of healthcare provided in an EEA state or Switzerland.⁷⁷ It does not create any such agreements. The Act provides for the exchange of patient data in the future for the necessary exchange of patient information and for reimbursement purposes.⁷⁸

It is unclear whether the UK government will be successful in its wishes to continue the rights currently enjoyed through the reciprocal healthcare agreements in place prior to Brexit. It is also unclear whether individual EU MS will be able to negotiate reciprocal healthcare agreements with the UK, or whether, lawfully, the EU must negotiate these as a bloc.

Conclusion

An important conclusion to draw from this briefing note is that dialysis patients will continue to be able to access treatment through the NHS through their EHIC in EU MS this summer (2019) and until the UK exits the EU, currently scheduled for 31st October 2019. This may change depending on whether the WA is ratified before this date, although the Johnson government's approach makes this unlikely. Indeed, the more time progresses, the less likely this seems. If the WA is agreed, ratified and entered into force, a period of continuity will be provided for until 31st December 2020, which can be extended.

⁷⁵ Select Committee on EU, 'How Brexit Will Affects Patients In The UK - UK In A Changing Europe' (*UK in a changing Europe*, 2018) <<https://ukandeu.ac.uk/how-brex-it-will-affects-patients-in-the-uk/>> accessed 13 June 2019.

⁷⁶ Preben Aamann, 'European Council (Art. 50) Guidelines For Brexit Negotiations - Consilium' (*Consilium.europa.eu*, 2017) <<https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brex-it-guidelines/>> accessed 22 June 2019.

⁷⁷ The Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, Article 1.

⁷⁸ The Healthcare (European Economic Area And Switzerland Arrangements) Act 2019, Article 4(1) "An authorised person may process personal data held by the person in connection with any of the person's functions where that person considers it necessary for the purposes of implementing, operating or facilitating the doing of anything under or by virtue of this Act".

Similarly, there will be no change to UK dialysis patients' entitlement to receive kidney dialysis treatments in the Republic of Ireland, due to pre-existing domestic law such as the CTA and the Belfast Agreement.

If the UK leaves the EU without agreeing a Withdrawal Agreement, the rights patients can rely on will be those outlined in the domestic legislation adopted by each EU-27 MS individually. This form of Brexit does not provide for legal continuity to anywhere near the same degree as that under the WA. Under a 'No Deal' Brexit, the UK is likely to face obstacles not just with regards to obtaining reciprocal healthcare agreements but also the practicalities necessary that come hand in hand, such as data privacy specifications EU-27 MS must follow relevant for patients' data exchange and for reimbursement purposes, as well as setting up appropriate administrative infrastructure.

It is not possible to predict what the future relationship between the UK and the EU will be in terms of healthcare law. It may be that the UK creates an agreement with the EU which gives UK nationals access to the EU27 MS healthcare services collectively. The UK government have stated their wishes to continue the current reciprocal healthcare agreements in place through the UK's membership to the EU with the EU-27 MS. However, the EU negotiating guidelines are strict with regards to non-members being unable to enjoy the same benefits as members.

The willingness of some EU MS discussed in this briefing paper to adopt domestic legislation which entitles UK nationals to healthcare services in their country is a positive step and should not be overlooked. It demonstrates their willingness to continue reciprocal healthcare with the UK. Nevertheless, the UK's exit from the EU does mean significant drawbacks for kidney dialysis patients' ability to access EU MS healthcare services.

References

UK Domestic Legislation

Common Travel Area (This is embodied in many legal instruments, which are not listed here.)

European Union (Withdrawal Agreement) Bill 2017-2019

Immigration Rules: Appendix EU.

The Belfast Agreement 1998

The EU (Withdrawal) Act 2018

The Healthcare (European Economic Area and Switzerland Arrangements) Act 2019

The Immigration (European Economic Area Nationals) (EU Exit) Order 2019

The National Health Service (Charges to Overseas Visitors) Regulations 2015

The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019 No. 516.

The National Health Service (Charges to Overseas Visitors) (Amendment etc.) (EU Exit) Regulations 2019 No. 516, Explanatory Memorandum.

EU Legislation

Directive 2011/24/EU

Directive 95/46/EC

Regulation (EU) 2016/679

Regulation 500/2019/EC

Regulation 679/2017/EC

Regulation 883/2004/EC

The Treaty of the European Union 2008

The Treaty on the Functioning of the European Union 2008

The Withdrawal Agreement 2018

Domestic Legislation in other MS

Greece: Law 4604/2019

Italy: No Deal Decree

France: Ordinance no 2019-76

Spain: Royal Decree-Law 5/2019

Ireland: Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019

Consultation and Briefing Papers

British Medical Association, *Reciprocal healthcare between the UK and the EU* (Briefing Paper 20170835 2017).

Secretary of State for Health and Social Care, 'Government response to the House of Lords European Union Committee, 13th report of session 2017-19, 'Brexit: reciprocal healthcare' (Cm 9634, 2018) Department of Health and Social Care.

Thomas Powell, *Healthcare (International Arrangements) Bill 2017-2019* (Briefing Paper Number 08435 2019) House of Commons Library.

Vaughne Miller, *EU Preparations for a no-deal Brexit*, (Briefing Paper Number 8547 2019) (House of Commons Library).

Websites

Aamann P, 'European Council (Art. 50) Guidelines For Brexit Negotiations – Consilium' (*Consilium.europa.eu*, 2017) <<https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>> accessed 22 June 2019.

Affairs D, 'Brexit Negotiations - Department Of Foreign Affairs And Trade' (*Dfa.ie*, 2019) <<https://www.dfa.ie/brexit/brexit-negotiations/>> accessed 19 June 2019

‘Apply for A Free EHIC (European Health Insurance Card)’ (*nhs.uk*, 2019)
 <<https://www.nhs.uk/using-the-nhs/healthcare-abroad/apply-for-a-free-ehic-european-health-insurance-card/>> accessed 11 June 2019.

‘Apply To The EU Settlement Scheme (Settled And Pre-Settled Status)’ (*GOV.UK*)
 <https://www.gov.uk/settled-status-eu-citizens-families/applying-for-settled-status?utm_campaign=EUSS&utm_medium=paid_search&utm_source=Google&gclid=CjwKCAjwvJvpBRAtEiwAjLuRPX6bM04dq8WO98xUIm9IJ-BMw1qaWDiF5d92gbGow8ploMvRxAzgcBoCPu0QAvD_BwE&gclsrc=aw.ds> accessed 11 July 2019.

Citizens’ Rights - EU Citizens In The UK And UK Nationals In The EU Policy Paper (Department for Exiting the European Union)
 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790570/Policy_Paper_on_citizens_rights_in_the_event_of_a_no_deal_Brexit.pdf> accessed 14 June 2019

‘Common Travel Area Guidance’ (*GOV.UK*)
 <<https://www.gov.uk/government/publications/common-travel-area-guidance/common-travel-area-guidance>> accessed 11 July 2019.

Department for Digital, Culture, Media & Sports, ‘Data protection if there’s no Brexit deal’
<https://www.gov.uk/government/publications/data-protection-if-theres-no-brexit-deal/data-protection-if-theres-no-brexit-deal>. Accessed 17 June 2019.

Dodwell S, ‘Losing the Right To Access Dialysis Abroad Would Be A Kick In The Teeth’ (*Nhsconfed.org*) <<https://www.nhsconfed.org/blog/2017/10/losing-the-right-to-access-dialysis-abroad-would-be-a-kick-in-the-teeth>> accessed 19 June 2019.

‘Electronic Exchange Of Social Security Information (EESSI) - Employment, Social Affairs & Inclusion - European Commission’ (*Ec.europa.eu*)
 <<https://ec.europa.eu/social/main.jsp?catId=869>> accessed 3 July 2019.

European Commission Memo, ‘Questions and Answers – the rights of EU and UK citizens, as outlined in the Withdrawal Agreement’ (2018)
 <https://ec.europa.eu/commission/sites/beta-political/files/2018-11-26_qa_citizens_rights_en_0.pdf> accessed 25th June 2019.

‘European Commission - PRESS RELEASES - Press Release - Brexit Negotiations: What Is In The Withdrawal Agreement’ (*Europa.eu*, 2018) <http://europa.eu/rapid/press-release_MEMO-18-6422_en.htm> accessed 17 June 2019

European Commission, *Draft Agreement On The Withdrawal Of The United Kingdom Of Great Britain And Northern Ireland From The European Union And The European Atomic*

Energy Community. (Europa 2018) <https://ec.europa.eu/commission/sites/beta-political/files/negotiation-agreements-atom-energy-15mar_en.pdf> accessed 13 June 2019

Febbi S and Cefaro D, 'Brexit: "Brexit Decree" And Bank Of Italy's Requirements For UK And Italian Financial Institutions' (*Bird & Bird*, 2019) <<https://www.twobirds.com/en/news/articles/2019/uk/brexit-decree-and-bank-of-italls-requirements-for>> accessed 19 June 2019.

Hawkins N, '(BLOG) Please Don't Take Away My EHIC Card' (*Kidney Care UK*, 2019) <<https://www.kidneycareuk.org/news-and-campaigns/news/please-dont-take-away-my-ehic-card/>> accessed 17 June 2019.

'Healthcare (European Economic Area And Switzerland Arrangements) Bill – Hansard' (*Hansard.parliament.uk*, 2019) <[https://hansard.parliament.uk/lords/2019-03-19/debates/759004D8-D2CB-40B7-9A82-B8EC98B29884/Healthcare\(EuropeanEconomicAreaAndSwitzerlandArrangements\)Bill](https://hansard.parliament.uk/lords/2019-03-19/debates/759004D8-D2CB-40B7-9A82-B8EC98B29884/Healthcare(EuropeanEconomicAreaAndSwitzerlandArrangements)Bill)> accessed 17 June 2019.

'Healthcare In Ireland' (*nhs.uk*, 2019) <<https://www.nhs.uk/using-the-nhs/healthcare-abroad/healthcare-when-travelling-abroad/healthcare-in-ireland/>> accessed 11 July 2019.

Home Affairs Sub-Committee, 'Select Committee on the European Union' (2017) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-reciprocal-healthcare/oral/75923.html>> accessed 13th June 2019.

House of Lords Home Affairs Sub-Committee Select Committee on the European Union, 'Brexit: reciprocal healthcare' (2017) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-reciprocal-healthcare/oral/75923.html>> accessed 13th June 2019.

'How Brexit Will Affect Patients In The UK - UK In A Changing Europe' (*UK in a Changing Europe*, 2018) <<https://ukandeu.ac.uk/how-brexit-will-affects-patients-in-the-uk/>> accessed 13 June 2019

ICO, 'Data protection and Brexit' <https://ico.org.uk/for-organisations/data-protection-and-brexit/> accessed 17 June 2019.

Kidney Care UK, 'Briefing Paper: Dialysis Patients And Access To Free Health Care: A Special Case;' (*Nhsconfed.org*) <<https://www.nhsconfed.org/-/media/Confederation/Files/public-access/European-Office/Kidney-Care-EHIC-Fact-Sheet.pdf?la=en&hash=24EA47EB08182D84E8BFB360168B3ACB98A4E468>> accessed 19 June 2019

‘Oral Evidence - Brexit And Health And Social Care - 24 Jan 2017’ (*Data.parliament.uk*, 2017)

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/brexit-and-health-and-social-care/oral/46148.html>> accessed 12 June 2019

‘Reciprocal Healthcare’ (*Nhsconfed.org*, 2018) <<https://www.nhsconfed.org/regions-and-eu/nhs-european-office/brexit-and-the-nhs/brexit-implications-for-health-and-care/reciprocal-healthcare>> accessed 19 June 2019.

Stephen Hammond MP, Minister of State for Health, Department of Health and Social Care, ‘DHSC Update’ (*Nhsconfed.org*) <<https://www.nhsconfed.org/-/media/Confederation/Files/EU-Office/20190318---RCH---WMS---Final.pdf?la=en&hash=6BBD0D12DB69BCACDD26104CB2B5F5CC0EC919A4>> accessed 17 June 2019.

‘Travelling Within The Common Travel Area And The Associated Rights Of British And Irish Citizens If There Is No Brexit Deal’ (*GOV.UK*, 2019) <<https://www.gov.uk/government/publications/travelling-in-the-common-travel-area-if-theres-no-brexit-deal/travelling-within-the-common-travel-area-and-the-associated-rights-of-british-and-irish-citizens-if-there-is-no-brexit-deal#before-brexit>> accessed 13 June 2019.

‘Visit Europe After Brexit’ (*GOV.UK*) <<https://www.gov.uk/visit-europe-brexit>> accessed 12 June 2019.

‘What Is The S2 Route?’ (*nhs.uk*, 2019) <<https://www.nhs.uk/using-the-nhs/healthcare-abroad/going-abroad-for-treatment/what-is-the-s2-route/>> accessed 12 June 2019.

‘Written Evidence - Co-Operation And Working Together’ (*Data.parliament.uk*, 2017) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-reciprocal-healthcare/written/79446.html>> accessed 14 June 2019.