

**Brexit and patients:  
How will Brexit affect the rights of EU based patients to use  
the NHS and the right of UK patients to access  
medical treatment in the EU?**

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Landmark Chambers  
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**Introduction**

- Reciprocal healthcare and free movement rights
  - Those ordinarily resident in the UK
  - “Needs-arising” healthcare
  - Those travelling for healthcare
  - Those accessing healthcare services on Brexit day
  - Those wishing to access healthcare services post-Brexit day
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## (1) Reciprocal healthcare and free movement rights

- One of the four fundamental freedoms associated with membership of the EU is the free movement of persons
- The right to access healthcare is a necessary component of the exercise of this right; if access to healthcare were to be restricted, that would be an unlawful fetter on free movement
- But the right to access healthcare is not unlimited; regard must be paid to the circumstances of the person seeking to access healthcare, which broadly requires an assessment of whether the person is resident in a host EU state, those who are temporarily in a host EU state, and those who are travelling for the purpose of accessing healthcare

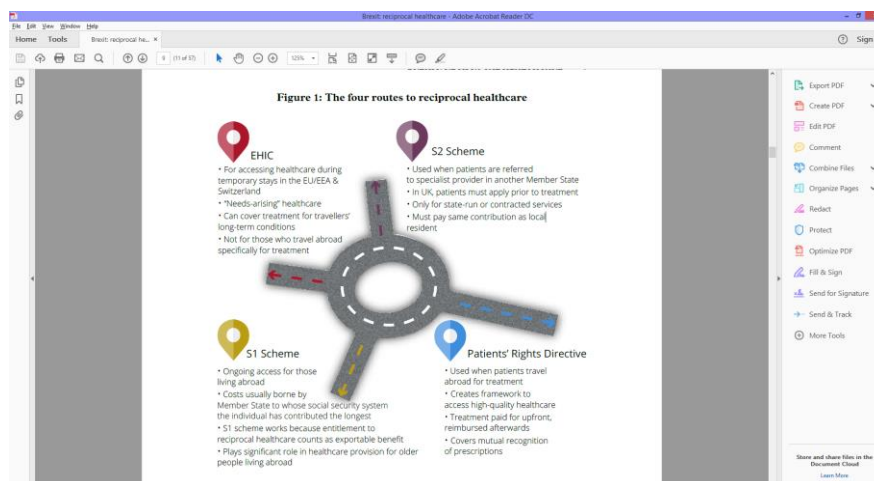


## (2) Those ordinarily resident in the UK

- Those ordinarily resident in the UK are covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 (“the 2004 EU Regulations”) on the coordination of social security systems
- Article 17 provides as follows:  
*“An insured person or members of his family who reside in a Member State other than the competent Member State shall receive in the Member State of residence benefits in kind provided, on behalf of the competent institution, by the institution of the place of residence, in accordance with the provisions of the legislation it applies, as though they were insured under the said legislation”*



### (3) Reciprocal arrangements



### (4) EHIC



- Regulation 19 of the 2004 EU Regulations provides:
 

*"1. Unless otherwise provided for by paragraph 2, an insured person and the members of his family staying in a Member State other than the competent Member State shall be entitled to the benefits in kind **which become necessary on medical grounds during their stay**, taking into account the nature of the benefits and the expected length of the stay. These benefits shall be provided on behalf of the competent institution by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though the persons concerned were insured under the said legislation."*
- See also the DoH *Guidance on implementing the overseas visitor charging regulations*; covers the treatment of chronic or pre-existing conditions, including routine monitoring



## (5) The S2 scheme

- Article 20 of the 2004 EU Regulation provides a route by which EU based patients can apply to their home state healthcare provider to approve the patient securing NHS treatment in advance of a visit to the UK, and vice versa. It provides:

*“Travel with the purpose of receiving benefits in kind - Authorisation to receive appropriate treatment outside the Member State of residence*

*1. Unless otherwise provided for by this Regulation, an insured person travelling to another Member State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent institution.*

*2. An insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving the treatment appropriate to his condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though he were insured under the said legislation.*



## (6) The S1 scheme

- There are 3 categories of overseas visitors who have S1 status. This status enables the patient to free NHS treatment despite being ordinarily resident overseas. These groups are:
  - Frontier workers;
  - Posted workers and their families (see regulation 12 of the 2004 EU Regulations); and
  - UK pensioners living abroad (see regulation 13 of the 2004 EU Regulations).



## (7) Patients' Rights Directive

- Directive 2011/24/EU clarifies the rights of patients to purchase healthcare in another EU / EEA country and apply for the reimbursement of costs from their home country
- The treatment sought must be available in the home country
- In England, see, also, the National Health Service (Cross-Border Healthcare) (England) Regulations 2013



## (8) Brexit day

- The Joint Report from the Negotiators of the EU and the UK Government, 8 December 2017, records *“the progress made in the first phase of negotiations under Article 50”*
- Paragraph 6 says that the overall objective with respects to Citizens' rights is to provide *“reciprocal protection ... [and] to enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights by ...”* Brexit day.
- There is in other words an intention\* that rights associated with the exercise of free movement will continue to accrue up until Brexit day, and will be able to be relied upon afterwards as long as a person's stay or their residence position continues
- \*The caveat is that *“... nothing is agreed until everything is agreed...”*



## (9) Post Brexit

- The Joint Report does not deal with Brexit day +1; this is a “phase 2 issue” since it relates to the UK’s relationship with the EU as a third country, and so still a matter for negotiation
- The Government’s ambition is to continue the rights that the current arrangements provide
- That however is difficult to square with the basis of healthcare rights in EU law terms stemming from the free movement of persons, which however Brexit is intended to stop (or at least stem)
- Saying that, continuing the current arrangements is to the UK’s benefit, including because of the complexities associated with the provision of healthcare on the Irish border



## (10) Post Brexit

- Some potential consequences:
  - Private travel insurance instead of EHIC (disincentive for those who would otherwise come to the UK)
  - Limitations on those with long-term conditions or disabilities travelling for short stays (e.g. due to un-insurable conditions)
  - S2 scheme (to be referred for specialist treatment in another EU / EEA state) and the Patients’ Rights Directive will not be available for UK nationals resident in the UK
  - Increased financial strain on the NHS through fewer pensioners retiring abroad and obtaining cheaper healthcare in their home country
  - Increased bureaucratic strain in administering different arrangements?



## (11) Post Brexit – can the UK have it all?

*“In all the UK papers that we have been receiving until now – which I read carefully with my team – there has been a request to maintain the status quo, a form of continuity, which is paradoxical seeing as the country decided itself to leave the European Union. The United Kingdom seems to want to maintain the benefits of the current relationship, while leaving the EU regulatory, supervision, and application framework. When we respond to UK leaders saying that these benefits are not accessible outside the EU system – because of their decision – some people in the UK try to blame us for the consequences of this. **I simply want to say that we will not be swayed, I will not be swayed, by this blame game.**”*

Press statement by Michel Barnier, Brussels, 8 June 2018