

International Issues

Chapter C2: Personal Independence Payment

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Chapter C2: Personal Independence Payment

Persons subject to immigration control

C2005 Unless one of the exemptions described below applies, a person subject to immigration control is **not entitled** to Personal Independence Payment¹.

1 I & A Act 99, s 115(2)

Meaning of person subject to immigration control

C2006 **[See ADM Memo 10/21]** A person subject to immigration control¹ is a person who is not a European Economic Area or Swiss national and who

1. requires leave to enter or remain in the United Kingdom but does not have it **or**
2. has leave subject to the condition that they do not have recourse to public funds **or**
3. has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking.

1 I & A Act 99, s 115(9)

Meaning of “maintenance undertaking”

C2007 A “maintenance undertaking” means¹ a written undertaking under the immigration rules made by one person to be responsible for the claimant’s maintenance and accommodation.

1 I & A Act 99, s 115(10)

Exemptions

C2008 **[See ADM Memo 10/21]** For Personal Independence Payment, the exemption from the exclusion of persons subject to immigration control applies to¹

1. members of the family of a national of a European Economic Area country provided that²
 - 1.1 the European Economic Area national is exercising their rights as a worker or self-employed person under the European Economic Area Agreement³ **and**
 - 1.2 the family member has rights under the European Economic Area Agreement as a family member

2. a person who is lawfully working in Northern Ireland and is a national of a State with which the European Union has made an Agreement under a specific Treaty⁴ providing, in the field of social security, for equal treatment of workers and any member of their family living with them
3. a sponsored immigrant regardless of the length of stay in the United Kingdom.

Note: The countries mentioned in 2. above are Turkey, Morocco, Algeria, Tunisia, Slovenia and Switzerland. From 1.5.04 Slovenia acceded to the European Union.

1 SS (I&A) Cql Amndt Regs (NI), reg 2(2) & Sch Part II; 2 CDLA/708/07;

3 Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993; 4 Treaty of Amsterdam, art 310

Meaning of member of the family

C2009 For the purposes of C2008 1. someone is a “member of the family” of a person where they are¹

1. their spouse or civil partner
2. direct descendants (e.g. children, grandchildren) of the person or their spouse or civil partner who are
 - 2.1 under the age of 21 or
 - 2.2 dependent on the person or on the person’s spouse or civil partner
3. dependent direct relatives in the ascending line (e.g. father, grandfather) of the person or the person’s spouse or civil partner.

1 Directive 2004/38/EC, art 2; CDLA/708/07

Note: A different definition of “family member” applies in the context of applying the European Union social security co-ordination rules (see C2090).

Meaning of European Economic Area country

C2010 The European Economic Area comprises all the Member States of the European Union plus Norway, Liechtenstein and Iceland.

Meaning of sponsored immigrant

C2011 A sponsored immigrant is a person (A) who has been given leave to enter or remain in the United Kingdom upon another person (B) making a maintenance undertaking for that person (A) in accordance with the immigration rules as defined in specific legislation¹.

1 Immigration Act 1971, s 33(1) & 3(2)

Person subject to immigration control and European Union right to reside

C2012 A person's right to reside in the United Kingdom can depend on

1. their status as determined by the Home Office **or**
2. what right a person may acquire under European Union law.

There are occasions where a person subject to immigration control can claim public funds (see ADM C1753). This can be, for example, where they are the family member of a European Economic Area national, and that European Economic Area national is exercising a freedom of movement right (for example, as a worker or self-employed person), or where they demonstrate a derivative right of residence (for example, Ibrahim/Teixeira) (see ADM C1832). The granting of leave to enter or remain (whether granted with or without recourse to public funds) is made under the Immigration Rules. Where the claimant has been granted leave to enter or remain without recourse to public funds, and that person also has a right to reside under The Immigration (European Economic Area) Regulations 2016, the condition of having "no recourse to public funds" does not have effect for as long as the person has a right to reside under The Immigration (European Economic Area) Regulations 2016¹.

1 Imm (EEA) Regs 2016, reg 43 & Sch 3, para 1

Claimant unable to provide documentary evidence of nationality

C2013 The claimant has primary responsibility to provide documentary evidence of their nationality, to support their continued residence in the United Kingdom. If the claimant has not provided sufficient evidence to the decision maker to confirm that they have leave to enter or remain in the United Kingdom with recourse to public funds, they will be a person subject to immigration control.

C2014 Evidence of nationality must be in the form of

1. a valid passport containing the immigration stamp or vignette granting them leave to remain **or**
2. a Biometric Residence Permit.

Note: A Home Office Immigration Status Document with a residence permit vignette granting leave to remain **or** a Home Office decision letter granting leave to remain may accompany a passport.

C2015 The evidence in C2014 should contain information detailing

1. the type of leave to enter or remain that has been granted (where limited leave to enter or remain has been granted, an expiry date should also be shown) **and**

2. whether the person has been granted recourse to public funds.

C2016 Where the claimant declares that they have leave to enter or remain in the United Kingdom with recourse to public funds, but are awaiting documentation from the Home Office to confirm this, the decision maker should allow the claimant a reasonable timescale to provide supporting evidence before making a decision.

Continuation of leave

C2017 Where a person has a limited period of leave to remain in the United Kingdom and they make a timeous application (i.e. before their existing leave to remain expires) to the Home Office to have their leave extended, the person's existing leave continues until the Home Office has made a decision on the application (or until the application is withdrawn)¹. If the application to extend the leave period is made after the applicant's current leave has expired, the applicant's leave period is not extended and the person is treated as an 'overstayer'.

1 Immigration Act 1971, s 3C

Deportation orders

C2018 A European Economic Area national (or family member of a European Economic Area national) may be deported from the United Kingdom, where it is decided that the person's removal is justified on the grounds of public policy, public security or public health¹.

1 Imm (EEA) Regs 2016, reg 23(6)(b); Immigration Act 1971, s 3(5), s 5 & Sch 3

C2019 A person exercising a right to reside under the Immigration (European Economic Area) Regulations 2016 (for example, a permanent right of residence) continues to hold that status until such time as a deportation order is served¹.

Note: Decision makers should note that the serving of the deportation order invalidates any leave to remain in the United Kingdom².

1 Imm (EEA) Regs 2016, reg 23(9); 2 Immigration Act 1971, Sch 3, para 2(2)

Domestic law - residence and presence conditions

Introduction

C2020 Under the Order, a person is not entitled to Personal Independence Payment unless they meet prescribed conditions relating to residence and presence in Northern Ireland¹.

1 WR (NI) Order 15, art 82(3)

C2021 **[See ADM Memo 9/25]** The prescribed conditions are that **on any day** the claimant¹

1. is present in Northern Ireland **and**
2. has been present in Northern Ireland for a period of (or periods amounting in total to) 104 weeks in the 156 weeks immediately preceding that day **and**
3. is habitually resident in the United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands **and**
4. is
 - 4.1 not a person subject to immigration control within the meaning of specific legislation² (see C2006) **or**
 - 4.2 exempt from the legislation excluding persons subject to immigration control from Personal Independence Payment³ (see C2008 et seq).

Note: These conditions are affected by European Union law (see C2070 et seq below).

1 PIP Regs (NI), reg 16; 2 I & A Act 99, s 115(9); 3 SS (I&A) Conseq Amdts Regs (NI), reg 2(2)

C2022 – C2024

Present in Northern Ireland

C2025 To be present in a place means to be physically there on the day or period in question. It is not the same as being resident in a place. A person may be resident in a place without being present there¹ and vice versa.

1 R(U) 18/60; R(P) 2/67

Past presence test

C2026 **[See ADM Memo 10/21] [See ADM Memo 8/22] [See ADM Memo 2/23] [See ADM Memo 7/23] [See ADM Memo 14/23] [See ADM Memo 9/25]** The condition is that, with regard to any particular day of potential entitlement to Personal Independence

Payment, the claimant must have been present in Northern Ireland for a period of (or periods totalling) 104 weeks in the 156 weeks immediately preceding that day¹.

Note: See C2133 et seq for guidance on the European Union rules which allow periods abroad to be included as periods of presence in the United Kingdom for the purposes of the past presence test.

1 PIP Regs (NI), reg 16(b)

Example 1

Margery claims Personal Independence Payment on 2.9.16. She reports that she had been living in Australia since 2009 but returned to Northern Ireland to live here permanently on 15.8.14. The decision maker calculated that, during the 156 weeks ending immediately before 2.9.16, Margery had been present in Northern Ireland for 107 weeks and so decided that she satisfied the past presence test.

Example 2

Tom claims Personal Independence Payment on 13.10.16. He reports that he has been living with relatives in South Africa since 2008 but says that he moved back to Northern Ireland permanently on 8.11.14. The decision maker calculated that, during the 156 weeks ending on 12.10.16, Tom had been present in Northern Ireland for less than 104 weeks. The decision maker decided that Tom did not immediately satisfy the past presence condition. However he accepted Tom's claim as also being a claim in advance for the period beginning on 22.10.16 because on 21.10.16 Tom completed 104 weeks of presence.

- C2027 From 17.3.16 past presence test is no longer to be applied to claims submitted by refugees and their family members or to people with humanitarian protection status and their families¹. All claimants must satisfy the other conditions of entitlement.

1 [2016] UKUT 149 [AAC]

Terminal illness

- C2028 **[See ADM Memo 6/22]** Where a claimant is terminally ill and makes a claim for Personal Independence Payment expressly on that ground, the past presence test will not apply¹. A person is "terminally ill"² at any time if at that time the person suffers from a progressive disease and the person's death in consequence of that disease can reasonably be expected within 12 months.

1 PIP Regs (NI), reg 21; 2 WR (NI) Order 15, art 87(4)

Habitual residence [See ADM Memo 10/21] [See ADM Memo 8/22]

- C2029 [See ADM Memo 2/23] [See ADM Memo 7/23] [See ADM Memo 14/23] [See ADM Memo 9/25] [See ADM Memo 12/25] The condition of entitlement is that, on any day for which Personal Independence Payment is claimed, the claimant must be habitually resident in the United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands (collectively known as the common travel area).
- C2030 There is no definition of “habitual residence” in United Kingdom domestic or European Union law. However the meaning of this phrase has been discussed in case law. Although broadly similar, there are some differences between the meaning of habitual residence in United Kingdom domestic law and the meaning that has developed in European Union law.
- C2031 Where European Union applies the European Union law meaning will take precedence, but if European Union law does not apply the meaning developed in domestic law should be applied. European Union law will apply if the person concerned has exercised their right¹ to move and reside freely in the territory of the Member States.

1 TFEU, art 21

Meaning in United Kingdom law [See ADM Memo 10/21] [See ADM Memo 8/22]

- C2032 [See ADM Memo 2/23] [See ADM Memo 7/23] [See ADM Memo 14/23] [See ADM Memo 9/25] The expression “habitual residence” should be given its ordinary and natural meaning. Decision makers should determine the question by considering all the facts of the case in a common sense way and applying the relevant case law.

Requirement to establish a residence that is habitual in nature

- C2033 To be habitually resident in a country a person must have actually taken up residence and lived there for a period. It is not sufficient that the person came to this country voluntarily and for settled purposes. He must be resident in fact for an appropriate period of time which demonstrates that his residence has become, and is likely to remain, habitual in nature¹.

1 House of Lords, Nessa v CAO (1999) 1 WLR 1937 HL

Settled intention to remain

- C2034 The period of time cannot begin before the person is both living in the United Kingdom, and has a settled intention to remain in the United Kingdom for the time being. The person does not have to intend to remain permanently.

Relevant factors

C2035 Whether and when a person's residence has become habitual in nature is a question of fact. The period is not fixed and depends on the facts of each case. Amongst the relevant factors to be taken into account are bringing possessions so far as is practicable, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, and having durable ties with the country of residence or intended residence¹. The list is not exhaustive and any facts which may indicate whether or not the residence is habitual in nature should be taken into account.

1 House of Lords, Nessa v CAO (1999) 1 WLR 1937 HL

C2036 Only the appropriate weight should be given to factors wholly or partly outside the person's control. The person may have close relatives, even immediate family, outside the United Kingdom. There may be an intention that family members will join the person here when permission to do so can be obtained. The person may, quite reasonably, visit them regularly. That need not indicate that the person himself does not have a settled intention to remain in the United Kingdom, or that he cannot be habitually resident here. Cultural differences in the nature of contact between family members should be respected.

C2037 It is not necessary to have permanent or private accommodation to establish habitual residence. A person may be resident in a country whilst having a series of temporary abodes.

C2038 A person's financial viability may be a relevant factor, but the test for habitual residence should not be applied so as to prevent access to public funds. It must be applied in a way that allows for the possibility of a claimant establishing both habitual residence and an entitlement to benefits¹.

1 House of Lords, Nessa v CAO (1999) 1 WLR 1937 HL

Appropriate period of time

C2039 The appropriate period of time need not be lengthy if the facts indicate that a person's residence has become habitual in nature at an early stage¹. In some circumstances the period can be as little as a month, but it must be a period which is more than momentary in a claimant's life history². A period of between one and three months is likely to be appropriate to demonstrate that a person's residence is habitual in nature. Cogent reasons should be given where a period longer than three months is considered necessary³.

1 House of Lords, Nessa v CAO (1999) 1 WLR 1937 HL; 2 CIS/4389/99; 3 CIS/4474/03

Becoming habitually resident

- C2040 The nature of a person's residence should be considered throughout the period in question, to establish whether or when it became habitual. The fact that a person's residence has become habitual in nature after a period of time does not mean that the residence was habitual in nature from the outset. Residence only changes its quality at the point at which it becomes habitual.

Resuming a previous habitual residence

- C2041 There may be special cases where a person who has previously been habitually resident in the United Kingdom resumes that habitual residence immediately when he returns to the United Kingdom following a period living abroad¹. The only element of habitual residence that is bypassed by a returning former resident is the need to be resident in the United Kingdom for an appreciable period. Factors to be considered in deciding whether the previous habitual residence has been immediately resumed include the settled intention to remain, whether the person is in a position to make an informed decision about residence in the United Kingdom, the ties and contacts with the United Kingdom retained or established by the person while abroad, the reasons why the claimant left the United Kingdom and became habitually resident elsewhere, the similarity between their residence in the United Kingdom now and when they were previously here, and the length of the period of absence². This is a different situation to that where a person is temporarily absent from the United Kingdom and does not lose their habitual residence during that period of absence.

1 House of Lords, Nessa v CAO (1999) 1 WLR 1937 HL; 2 CIS/1304/1997 and CISA/5394/1998

Meaning in European Union law

- C2042 When deciding whether a person is habitually resident for European Union law decision makers should consider whether a person is resuming a previous habitual residence before taking into account other factors in paragraph C2043 below.

Resuming previous residence

- C2043 A person with habitual residence in the common travel area who exercised his right to freedom of movement under European Union law and then returns to resume his residence in the common travel area may be habitually resident immediately on his return¹.

1 Case C-90/97, Swaddling v CAO (1999) All ER (EC) 217

- C2044 A Personal Independence Payment claimant who

1. was previously habitually resident in the common travel area **and**

2. moved to live in another Member State **and**
3. returns to resume the previous habitual residence

is habitually resident immediately on arrival in the common travel area.

C2045 In deciding whether the claimant is resuming previous residence the decision maker should take account of the length and continuity of the previous residence in the common travel area and whether the claimant has maintained sufficient links with the previous residence to be said to be resuming it rather than commencing a new period of residence.

Factors to take into account

C2046 When deciding where a person is habitually resident for European Union law, the decision maker should take into account the

1. person's main centre of interest¹
2. length and continuity of residence in a particular country
3. length and purpose of the absence from that country **and**
4. intention of the claimant.

Note: This is not an exhaustive or conclusive list. There may be other factors that are important in deciding whether a person is habitually resident in an individual case.

1 Case 76/76 Di Paolo; R(U)7/85; R(U)8/88

Centre of interest

C2047 People who maintain their centre of interest in the United Kingdom, for example a home, a job, friends, membership of clubs, are likely to be habitually resident in the United Kingdom. People who have retained their centre of interest in another country and have no particular ties here are unlikely to be habitually resident in the United Kingdom.

Length and continuity of residence

C2048 A person who has a home or close family in another country would normally retain habitual residence in that country. A person who has previously lived in several different countries but has now moved permanently to the United Kingdom may be habitually resident here.

Length and purpose of absence

- C2049 Where a person spends time away from the United Kingdom, the decision maker should consider the frequency, length and purpose of the absences and decide whether habitual residence in the United Kingdom has been lost. If a person who is working abroad returns frequently, for example to visit family or because a home has been retained here, it is likely that habitual residence in the United Kingdom has not been lost. Infrequent visits or the purchase of a home abroad may point to the opposite.

Employment

- C2050 The claimant's employment record and in particular the nature of any previous occupation and plans for the future are relevant. A person with the offer of genuine and effective work in the United Kingdom, whether full time or part time is likely to be habitually resident here.

Intentions

- C2051 The fact that a person may intend to live in the United Kingdom for the foreseeable future does not, of itself, mean that habitual residence has been established. However, the claimant's intentions along with other factors, for example the purchase of a home in the United Kingdom and the disposal of property abroad may indicate that the claimant is habitually resident in the United Kingdom.
- C2052 A claimant who intends to reside in the United Kingdom for only a short period, for example on holiday, to visit friends or for medical treatment, is unlikely to be habitually resident in the United Kingdom.

Treated as habitually resident

Members of His Majesty's Forces

- C2053 A claimant who is resident outside Northern Ireland in their capacity of a member of His Majesty's Forces (see the definition in C2062-3) is treated as habitually resident in the common travel area¹.

1 PIP Regs (NI), reg 20(a)

His Majesty's Forces - Family Members

- C2054 A claimant who is living with a person who is abroad in the capacity of a member of His Majesty's Forces (as defined in C2062-3), and who is that person's
1. spouse or civil partner
 2. son or daughter

3. step-son or step-daughter
4. father or mother
5. father-in-law or mother-in-law
6. step-father or step- mother

shall be treated as habitually resident in the common travel area¹.

1 PIP Regs (NI), reg 20(b)

C2055

Absence from Northern Ireland

Introduction

C2056 [See ADM Memo 9/20] [See ADM Memo 12/25] In certain circumstances a person who is absent from Northern Ireland can be treated as present. This applies to four groups.

1. Claimants who are temporarily absent.
2. Claimants who are temporarily absent in order to receive medical treatment abroad.
3. Members of His Majesty's Forces, aircraft workers and mariners.
4. Family of Members of His Majesty's Forces.

Note: Periods when the claimant is treated as present under paragraphs C2057 to C2069 also count as periods of presence for the purpose of the past presence test.

Meaning of “temporarily absent”

C2057 A claimant is temporarily absent if, at the beginning of the period of absence, their absence is unlikely to exceed 52 weeks¹.

1 PIP Regs (NI), reg 17(2)

Temporary absence - up to 13 weeks

C2058 A claimant who is temporarily absent (see C2057) from Northern Ireland shall be treated as present for the first 13 weeks of absence¹. At the end of that 13 weeks, unless helped by the European Union law provisions - see C2070 et seq or, exceptionally, one of the other absence rules described in C2059 to C2069 applies, the claimant will cease to satisfy the condition of entitlement to Personal Independence Payment that they be present in Northern Ireland.

1 PIP Regs (NI), reg 17(1)

Absence to receive medical treatment

C2059 Where¹

1. the claimant's absence is unlikely to exceed 52 weeks **and**
2. the absence is solely in connection with arrangements made for the medical treatment (see C2060) of the claimant for a disease or bodily or mental disablement (which started before the claimant left Northern Ireland) **and**

3. the arrangements referred to in sub-paragraph 2. relate to medical treatment (see C2060)
 - 3.1 outside Northern Ireland **and**
 - 3.2 during the period whilst the claimant is temporarily absent from Northern Ireland **and**
 - 3.3 by, or under the supervision of, a person appropriately qualified to carry out that treatment

that claimant shall be treated as present in Northern Ireland for the first 26 weeks of the absence.

1 PIP Regs (NI), reg 18

Example

The claimant, a British citizen, left Britain for the Czech Republic. Her absence was solely in connection with arrangements for medical treatment. The treatment was supervised by appropriately qualified doctors in the Czech Republic. Her intention at the outset was to return to Northern Ireland within 52 weeks. She remained habitually resident in the United Kingdom. Although the claimant claimed whilst she was in the Czech Republic as she was still habitually resident in Northern Ireland this wasn't a first claim from abroad. At the Upper Tribunal Judge Ward decided that as the claimant was habitually resident in the United Kingdom and hadn't switched her habitual residence then she was therefore subject to domestic legislation. The claimant's temporary absence was for 26 weeks, and they had intended to return within 52 weeks. The claimant was entitled to both components for the remainder of the temporary absence but not beyond that period.

Meaning of "medical treatment"

- C2060 "Medical treatment" means¹ medical, surgical or rehabilitative treatment (including any course or diet or other regimen).

1 PIP Regs (NI), reg 2

Members of His Majesty's Forces, aircraft workers and mariners

- C2061 Where¹ the claimant is
1. abroad in the capacity of
 - 1.1 a member of His Majesty's Forces **or**
 - 1.2 an aircraft worker **or**
 - 1.3. a mariner **or**

2. in employment prescribed for the purposes of specific legislation² in connection with continental shelf operations

that claimant is to be treated as present in Northern Ireland.

Note: Persons resident outside Northern Ireland in their capacity as members of His Majesty's Forces are also treated as habitually resident in the common travel area (see C2053).

1 PIP Regs (NI), reg 19(1); 2 SS C&B (NI) Act 92, sec 120

Meaning of "His Majesty's Forces"

C2062 Except where C2063 applies, "a member of His Majesty's Forces" means¹

1. a member of the regular forces², namely the Royal Navy, the Royal Marines, the regular army or the Royal Air Force **or**
2. a member of the reserved forces², namely the Royal Fleet Reserve, the Royal Naval Reserve, the Royal Marines Reserve, the Army Reserve, the Territorial Army, the Royal Air Force Reserve or the Royal Auxiliary Air Force

who is over the age of 16 and not absent on desertion.

1 PIP Regs (NI), reg 19(2); 2 Armed Forces Act 06, s 374

C2063 A person is not a member of His Majesty's Forces if¹ they are serving as a member of

1. any naval force of His Majesty's Forces and locally entered that naval force at an overseas base, provided that the person
 - 1.1 has not previously been an insured person under Part 1 of the National Insurance Act 1965 **and**
 - 1.2 is not paying and has not previously paid primary Class 1, Class 2 or Class 3 contributions under
 - 1.2.a the Social Security (NI) Act 1975 **or**
 - 1.2.b the Social Security Contributions and Benefits (NI) Act 1992 **or**
2. any military force of His Majesty's Forces
 - 2.1 who entered that force or was recruited to that force outside the United Kingdom **and**
 - 2.2 where the depot of their unit is situated outside the United Kingdom **or**
3. any air force of His Majesty's Forces
 - 3.1 who entered that force or was recruited for that force outside the United Kingdom **and**

- 3.2** is liable under the terms of engagement to serve only in a specified place outside the United Kingdom.

1 PIP Regs (NI), reg 19(2) & Sch 2

Meaning of “aircraft worker”

- C2064 An “aircraft worker” means¹ a person who is employed under a contract of service
1. as a pilot, commander, navigator or other member of the crew of any aircraft **or**
 2. in any other capacity on board any aircraft, provided the employment is for the purposes of the aircraft or its crew or any passengers, cargo or mail carried on that aircraft

provided that the contract is entered into in the United Kingdom with a view to its performance (in whole or in part) while the aircraft is in flight

Note: the definition excludes a person who is in employment as a member of His Majesty's Forces.

1 PIP Regs (NI), reg 19(3)

Meaning of “mariner”

- C2065 A “mariner” means¹ a person who is in employment under a contract of service as a
1. master or member of the crew of any ship or vessel **or**
 2. in any other capacity on board any ship or vessel provided that the employment is for the purposes of that ship or vessel or her crew or any passengers, cargo or mails carried by the ship or vessel.

Provided the contract is entered into in the United Kingdom with a view to its performance while the ship or vessel is on her voyage.

Note: The definition excludes a person who is in employment as a member of His Majesty's Forces.

1 PIP Regs (NI), reg 19(3)

Continental shelf operations - prescribed employment

- C2066 For the purposes of C2061 **2.** employment prescribed for the purposes of specific legislation in connection with continental shelf operations means¹ any employment, whether or not under a contract of service, in any designated or prescribed area in connection with any activity mentioned in specific legislation².

1 SS Ben (PA) Regs (NI), reg 12A(1); 2 Oil and Gas (Enterprise) Act 1982, s 23(2)

C2067 Designated area means¹ any area set out by Order in Council under specific legislation² as an area where the United Kingdom may explore the seabed, subsoil and exploit their natural resources.

1 SS Ben (PA) Regs (NI), reg 12A(2)(a); 2 Continental Shelf Act 1964

C2068 Prescribed area means¹ any area over which Norway or any European Union country (except the United Kingdom) exercises sovereign rights to explore the seabed and subsoil and exploit the natural resources or other named areas. This area must be outside the territorial water of

1. Norway **or**
2. any European Union country (except the United Kingdom).

1 SS Ben (PA) Regs (NI), reg 12A(1)

His Majesty's Forces - family members

C2069 A claimant who is living with a person who is abroad in the capacity of a member of His Majesty's Forces (as defined in C2062-3), and who is that person's

1. spouse or civil partner
2. son or daughter
3. step-son or step-daughter
4. father or mother
5. father-in-law or mother-in-law
6. step-father or step- mother

shall be treated as present in Northern Ireland¹ (including for the purposes of the past presence test).

1 PIP Regs (NI), reg 19(1)(c)

The effect of European Union law

[See ADM Memo 2/25]

Introduction

C2070 There are two main kinds of European Union legislation: regulations and directives. European Union regulations apply directly and are part of United Kingdom law. Directives are binding upon each European Union Member State but each country chooses how to implement them.

Note: For more guidance on competency see Appendices 1 and 2.

C2071 There are two current sets of European Union regulations relating to the co-ordination of Social Security benefits across the Member States. These are

1. Regulation (EC) No. 883/2004 which sets out the main rules **and**
2. Regulation (EC) No. 987/2009 which deals with the administrative procedures to be followed in implementing the main rules.

Note: For the European Union Member States, these regulations replaced earlier regulations¹ with effect from 1.5.10. They applied to Switzerland from 1.4.12 and to Norway, Iceland and Liechtenstein from 1.6.12. The old regulations¹ continue to apply in certain transitional cases. See also C2087 to C2088 below concerning third country nationals.

1 Reg (EEC) 1408/71 & Reg (EEC) 574/72

C2072 European Union provisions do not create a harmonized social security system common to all European Union countries. European Union provisions coordinate the national social security systems of European Union countries so that a worker moving within the European Economic Area may

1. be protected against the risks covered by European Union provisions **and**
2. maintain rights acquired in one European Economic Area country when moving to another country.

C2073 Where Regulation 883/04 applies it can have the effect that the United Kingdom's domestic rules about residence and presence are modified.

C2074 – C2079

Countries where European Union regulations apply

The European Union Member States

C2080 The European Union regulations relating to the co-ordination of social security apply to the Member States of the European Union which are

1. Austria (joined the European Union on 1.1.95)
2. Belgium
3. Bulgaria (joined the European Union on 1.1.07)
4. Cyprus (joined the European Union on 1.5.04)
5. Czech Republic (joined the European Union on 1.5.04)
6. Denmark (excluding the Faroe Islands and Greenland)
7. Estonia (joined the European Union on 1.5.04)
8. Finland (including the Aaland Islands) (joined the European Union on 1.1.95)
9. France (including Guadeloupe, Martinique, Mayotte, Reunion, French Guiana, Saint Barthelemy and Saint Martin but excluding Monaco)
10. Germany
11. Greece
12. Hungary (joined the European Union from 1.5.04)
13. Ireland
14. Italy (excluding the Vatican City and San Marino)
15. Latvia (joined the European Union on 1.5.04)
16. Lithuania (joined the European Union on 1.5.04)
17. Luxembourg
18. Malta (joined the European Union on 1.5.04)
19. Netherlands (excluding for the purposes of this Chapter, the Dutch Antilles)
20. Poland (joined European Union on 1.5.04)
21. Portugal (including Madeira and the Azores)
22. Romania (joined the European Union on 1.1.07)
23. Slovakia (joined the European Union on 1.5.04)
24. Slovenia (joined the European Union on 1.5.04)
25. Spain (including the Balearic Islands, the Canary Islands and the Spanish enclaves of Ceuta and Melilla)
26. Sweden (joined the European Union on 1.1.95)
27. United Kingdom (including Gibraltar but excluding the Isle of Man and for the purposes of this Chapter, the Channel Islands).

The European Economic Area

C2081 The European Economic Area comprises the Member States of the European Union plus Iceland, Liechtenstein and Norway.

Meaning of “European Economic Area State”

C2082 For the sake of simplicity, for the purposes of the guidance below references to an “European Economic Area State” means any Member State of the European Union, plus Iceland, Liechtenstein, Norway **and Switzerland** and “European Economic Area national” means a national of any of those countries.

Personal scope

C2085 A person is within the personal scope of European Union provisions if that person¹

1. is
 - 1.1 a national of a European Economic Area State **or**
 - 1.2 a stateless person or refugee residing in a European Economic Area Statewho is or has been subject to the legislation of one or more European Economic Area States **or**
2. is a member of the family or a survivor of a person falling within sub-paragraph 1..

1 Reg (EC) 883/04, art 2(1)

C2086 Also within the personal scope of European Union provisions¹ are survivors of persons who have been subject to the legislation of one or more European Economic Area States (regardless of the nationality of such persons - but see C2087 below), provided the survivor is

1. a national of a European Economic Area State **or**
2. a stateless person or refugee residing in one of the European Economic Area States.

1 Reg (EC) 883/04, art 2(2)

Third Country Nationals

C2087 The United Kingdom is not covered by the extension of rights to Third Country Nationals under Reg (EC) 883/04, which came in to force on 1.5.10. However Third Country Nationals will continue to be subject to the terms and limitations of Reg (EEC) 1408/71 as summarised below.

C2088 An amendment to European Union Regulations¹ extended the provisions of Reg (EEC) 1408/71 to Third Country Nationals from 1.6.03 provided those nationals were legally resident in the territory of a Member State, were insured workers, and were in a situation that involved more than one state. However the following states did not extend the terms of Reg (EEC) 1408/71 to Third Country Nationals:

Denmark

Iceland

Norway

Liechtenstein

Switzerland.

1 Reg (EC) 859/2003

C2089 Therefore a Third Country National who has worked will be able to export an award of Attendance Allowance or Disability Living Allowance (Care Component) or Carer's Allowance if he satisfies the same conditions that apply to a European Economic Area national (and the United Kingdom is the competent state for payment of a sickness benefit) **except** where he leaves Northern Ireland to live in Denmark, Iceland, Norway, Liechtenstein, or Switzerland. Of course, the Third Country National must be legally residing in both the United Kingdom and then the new state of residence that they move to.

Meaning of “member of the family”

C2090 In the context of the European Union regulations relating to the co-ordination of Social Security benefits “Member of the family means¹

1. the spouse (or civil partner) **and**
2. children under 18 **and**
3. children over 18 who are dependent.

1 Reg (EC) 883/04, art 1(i)

Meaning of dependent

C2091 An Upper Tribunal Judge has analysed the European Union case law on the meaning of “dependent” in the context of the European Union Citizenship Directive¹. He summarised that case law² as finding that³

1. a person is only dependent who actually receives support from another
2. there need be no right to that support and it is irrelevant that there are alternative sources of support available

3. that support must be material, although not necessarily financial, and must provide for, or contribute towards the basic necessities of life.

1 Directive 2004/38/EC; 2 Case C-316/85, Centre Public D'Aide Sociale de Courcelles v Lebon; Case C-2000/02, Chen v Secretary of State for the Home Department; Case C-1/05, Jia v Migrationsverket; 3 CIS/2100/07

C2092 – C2094

Deciding whether Reg 883/04 applies

- C2095 **[See ADM Memo 13/22]** The decision maker will need to decide whether the claimant comes within the personal scope of the Regulations (see C2085 et seq). They will then need to decide whether the United Kingdom is the State responsible for payment of the benefit involved (“the competent state”).

What type of benefit is Personal Independence Payment?

- C2096 The European Union Social Security Co-ordination Regulations set out different rules depending upon the branch of social security involved (e.g. “sickness benefits”, “old-age benefits”, “family benefits”). On 18.10.07 the Court of Justice of the European Union held¹ that the care component of Disability Living Allowance was a sickness benefit. However on 5.5.11 the Court of Justice of the European Union confirmed that the mobility component of Disability Living Allowance was a special non-contributory benefit².

1 ECJ Judgement Case C 299/05; 2 Bartlett, Gonzales Ramos and Taylor v Secretary of State for Work and Pensions Case C-537/09

- C2097 The daily living component of Personal Independence Payment is a “sickness benefit” for the purposes of Reg (EC) 883/04; the Mobility Component of Personal Independence Payment should be treated as a special non-contributory benefit.

European Union Regulations apply - effect on the daily living component

- C2098 **[See ADM Memo 18/20] [See ADM Memo 13/22] [See ADM Memo 5/24]** On any day where the European Union regulations relating to the co-ordination of social security systems¹ apply to a claimant, the United Kingdom is the competent state for the payment of cash sickness benefits (see C2110 et seq) for that claimant and that claimant is habitually resident in a European Economic Area state (other than the United Kingdom), the claimant does **not have to**

1. be present in Northern Ireland **or**
2. be habitually resident in Northern Ireland **or**

3. satisfy the past presence test

provided that claimant can demonstrate a **genuine and sufficient link** to the United Kingdom² (see C2130 et seq below).

1 Reg (EEC) 1408/71; Reg (EC) 883/04; 2 PIP Regs (NI), reg 23

European Union Regulations apply - effect on the Mobility Component

C2099 If the European Union Regulations relating to the co-ordination of social security systems¹ apply, **for the purposes of the Mobility Component**, the claimant is not required to satisfy the past presence test, provided that the claimant can demonstrate a **genuine and sufficient link** to the social security system of the United Kingdom² (see C2130 et seq below).

Note: As regards the Mobility Component of Personal Independence Payment, the claimant will still have to satisfy the conditions in C2021 **1. & 3.** i.e. they will have to be present in Northern Ireland and habitually resident in the United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands.

1 Reg (EEC) 1408/71, Reg (EC) 883/04; 2 PIP Regs (NI), reg 17

C2100 – C2109

Deciding if the United Kingdom is the competent state

C2110 **[See ADM Memo 18/20] [See ADM Memo 13/22] [See ADM Memo 5/24] [See ADM Memo 5/26]** The Order specifically states¹ that a person to whom the European Union regulations concerning the co-ordination of social security apply is not entitled to the daily living component of Personal Independence Payment for any period, unless, during that period, the United Kingdom is the competent state for the payment of sickness benefits in cash.

1 WR (NI) Order 15, art 89

Which State's legislation applies?

C2111 **[See ADM Memo 18/20] [See ADM Memo 13/22] [See ADM Memo 5/24]** The European Union regulations include provisions intended to avoid situations where the legislation of more than one Member State applies. In deciding whether the United Kingdom is the competent state for the payment sickness benefits in cash, decision makers will need to consider these provisions.

Note: The rules about which State's legislation applies are not necessarily conclusive as to competency, the European Union co-ordination regulations have to be read as a whole.

C2112 The general rules are¹ that

1. a person pursuing activity as an employed or self-employed person in a European Economic Area State is subject to the legislation of that State
2. a civil servant is subject to the legislation of the European Economic Area State to which the administration employing him is subject
3. a person receiving unemployment benefits in accordance with a specific provision in the European Community co-ordination regulations² from the European Economic Area State of residence is subject to the legislation of that European Economic Area State
4. a person called up or recalled for military or civilian service by a European Economic Area State, is subject to the legislation of that Member State
5. any other person to whom sub-paragraphs 1. to 4. do not apply is subject to the legislation of the European Economic Area State of residence.

1 Reg (EC) 883/04, art 11; 2 art 65

C2113 Except in relation to the benefits listed at paragraph C2114, for the purposes of paragraph C2112.1, a person receiving cash benefits because of, or as a consequence of, their activity as an employed or self-employed person shall be considered to be pursuing that activity¹.

1 Reg (EC) 883/04, art 11(2)

C2114 Paragraph C2113 does not apply to¹

1. invalidity benefits
2. old age or survivors' pensions
3. pensions in respect of accidents at work or occupational diseases
4. sickness benefits in cash which are for treatment for an unlimited period.

1 Reg (EC) 883/04, art 11(2)

Meaning of “legislation”

C2115 “Legislation” means¹ the laws, regulations, statutory provisions and all other implementing measures relating to the branches of social security listed in the European Union co-ordination regulations².

1 Reg (EC) 883/04, art 1(l); 2 art 3

Meaning of “competent Member State”

C2116 The “competent Member State” means¹ the European Economic Area State in which the competent institution is situated.

1 Reg (EC) 883/04, art 1(s)

Meaning of “competent institution”

C2117 The “competent institution” means¹

1. the institution with which the person concerned is insured at the time of the application for benefit **or**
2. the institution from which the person concerned is or would be entitled to benefits if he or a member of his family resided in the European Economic Area State in which the institution is situated **or**
3. the institution designated by the competent authority of the European Economic Area State concerned.

1 Reg (EC) 883/04, art 1(q)

C2118

Competency for cash sickness benefits

C2119 **[See ADM Memo 18/20] [See ADM Memo 8/21] [See ADM Memo 13/22] [See ADM Memo 5/24]** There are two main rules depending upon whether the claimant is an “insured person” or a member of an “insured person’s” family (see C2090) or a person receiving a pension or a member of the family of a person receiving a pension (see C2123).

Insured persons **[See ADM Memo 8/21]**

C2120 In relation to sickness benefits an “insured person” means¹ any person who satisfies the conditions of entitlement for a sickness benefit.

1 Reg (EC) 883/04, art 1(c)

C2121 An “insured person” (and members of that person’s family - see C2090) who is residing or staying in a European Economic Area State (A) other than the European Economic Area State (B) in which they are insured, is entitled to sickness benefits in cash from European Economic Area State B¹.

1 Reg (EC) 883/04, art 21

C2122 The following persons should be regarded as persons insured in the United Kingdom for cash sickness benefits

1. those covered by United Kingdom contributions in the relevant income tax years that would enable them to claim contribution-based Employment and Support Allowance (relevant income tax years cover) **provided** they have not been insured for sickness benefits in a European Economic Area State other than the United Kingdom since they worked and paid national insurance contributions in respect of that work in the United Kingdom

2. posted workers (see C2135) and frontier workers (see C2136) who work in the United Kingdom **and**
3. claimants who retain worker status whilst in receipt of contribution-based Jobseeker's Allowance, short-term Incapacity Benefit, contribution-based Employment and Support Allowance in the assessment phase, and Maternity Allowance.

Note: Decision makers are reminded of the need to consider which European Economic Area State's legislation applies (see C2111 to C2114). In general, where a person is living and working in a European Economic Area State other than the United Kingdom, it is the legislation of that European Economic Area State which will apply.

Pensioners

C2123 **[See ADM Memo 18/20] [See ADM Memo 13/22] [See ADM Memo 5/24] [See ADM Memo 5/26]** The general rule is that a person (and any member of that pensioner's family) receiving a pension under the legislation of one or more Member States is to be paid cash sickness benefits by the European Economic Area State responsible for the cost of sickness benefits in kind¹ (but see C2126 et seq below for details of how responsibility is determined).

1 Reg (EC) 883/04, art 29

C2124 In receipt of a **pension** (under United Kingdom legislation) means entitled to and actually in receipt of

1. State Retirement Pension of any category (except Category D only awards with no contributory element) **or**
2. main phase contribution-based Employment and Support Allowance, long-term Incapacity Benefit, Severe Disablement Allowance **or**
3. a bereavement benefit, including widows' benefit and Industrial Injuries Death Benefit (but not a bereavement payment which is not a pension but a Death Grant) **or**
4. a pension for Industrial Injuries Disablement Benefit (including Reduced Earnings Allowance and Retirement Allowance).

Note: This definition of "pension" derives from the European Union co-ordination regulations.

Meaning of sickness “benefits in kind”

C2125 For the purposes of the European Union rules about sickness and maternity benefits “benefits in kind” means¹ benefits in kind provided for under the legislation of a European Economic Area State which are intended to

1. supply
2. make available
3. pay directly to a provider for
4. reimburse the cost of

medical care and products and services ancillary to that care, including long term care benefits in kind.

1 Reg (EC) 883/04, art 1(va)(i)

Deciding which State is responsible for sickness benefits for a pensioner or a member of their family

Entitled to sickness benefits in kind

C2126 **[See ADM Memo 5/26]** Where a person who receives a pension or pensions under the legislation of one or more European Economic Area States, one of which is the European Economic Area State of residence and the person is entitled to sickness benefits in kind under the legislation of the European Economic Area State of residence, then that State will be responsible for payment sickness benefits (in cash and in kind)¹ to that pensioner and members of their family.

1 Reg (EC) 883/04, art 29

Example

Martin resides in Germany. He receives pensions under both German and United Kingdom legislation and he is entitled to sickness benefits in kind under German legislation. Germany is the Member State responsible for paying cash sickness benefits to Martin.

C2127

Not entitled to sickness benefits in kind

C2128 **[See ADM Memo 5/26]** Where a person receives a pension or pensions under the legislation of one or more European Economic Area States but there is no entitlement to benefits in kind under the legislation of the European Economic Area State of **residence**, sickness benefits in cash and in kind will be provided to the pensioner and

members of their family by one of the European Economic Area States responsible for the pension(s) determined as follows¹

1 Reg (EC) 883/04, art 24

1. where the person is entitled to benefits in kind under the legislation of only one European Economic Area State then that European Economic Area State will bear the cost of benefits in kind and pay the cash sickness benefits
2. where the person is entitled to benefits in kind under the legislation of two or more European Economic Area States responsible for the pension(s) then the European Economic Area State where the person had pensions insurance for the longest period of time will bear the cost of benefits in kind and pay cash sickness benefits.

Example 1

Chris resides in Spain. He is entitled to and receives a full United Kingdom Retirement Pension. He does not receive a pension from any other Member State and he is not entitled to benefits in kind under Spanish legislation. Chris claimed the daily living component of Personal Independence Payment and the decision maker decided that, under European Union rules the United Kingdom was the state responsible for paying sickness benefits in cash and in kind and that therefore the daily living component of Personal Independence Payment could be paid to him in Spain

Example 2

Renate resides in Greece. She is entitled to a United Kingdom Retirement Pension at a reduced rate but she is also entitled to a German Retirement Pension. Renate is not entitled to benefits in kind under Greek law. The decision maker found out that Renate had worked and paid pensions insurance in Germany for 25 years but had only paid Class 1 national insurance contributions for 10 years in the United Kingdom. The decision maker decided that the United Kingdom was not the competent state for the payment of sickness benefits.

Sickness benefits in kind not dependent on insurance

- C2129 Where a person who receives a pension under the legislation of one or more European Economic Area States (other than the European Economic Area State of residence) resides in a European Economic Area State where entitlement to sickness benefits in kind is not subject to conditions of insurance or activity as an employed or self-employed person then the responsible state is determined in accordance with the rule in C2128 above. The responsible State ("State A") will pay sickness benefits in

cash and in kind to the pensioner and members of their family to the extent that they would be entitled to those benefits if they were resident in that State A.

Example

Julie resides in Cyprus. She receives a full United Kingdom Retirement Pension and is entitled to sickness benefits in kind under Cypriot law. She is not entitled to any Cypriot pensions or benefits. The decision maker decided that the United Kingdom was responsible for the payment of cash sickness benefits to Julie.

Deciding if there is a “genuine and sufficient link”

C2130 **[See ADM Memo 10/19]** The phrase “genuine and sufficient link” is not defined, but European Union case law gives some indications of the factors to take into account. Decision makers will have to make a balanced judgement based on all the facts of the case. Among the relevant factors which may be considered are¹

1. **Personal factors**, for example whether the claimant is receiving a United Kingdom benefit or pension.

Note: Where the claimant has a spouse’s or survivor’s pension, that will be a relevant factor but is not sufficient in itself where the claimant has never lived in the United Kingdom or been a United Kingdom worker.

2. Periods of residence or work in the United Kingdom for example

- 2.1 Whether the claimant has spent a significant part of their life in the United Kingdom

- 2.2 Whether the claimant has worked and paid United Kingdom national insurance contributions as a result of that work **and**

3. **Family factors**, for example where the claimant is an adult dependant child of a person who is receiving a United Kingdom pension. Where the claimant is the spouse or civil partner of a person with a genuine and sufficient link with the United Kingdom then that will be a relevant but not conclusive factor in deciding whether the claimant has a genuine and sufficient link.

Note: This is not a checklist and it will be for the decision maker to decide how much weight to give to each relevant factor in coming to an overall determination of whether there is a genuine and sufficient link to the United Kingdom.

1 Case C-503/09 LS v Secretary of State for Work and Pensions

C2131 – C2132

Effect of European Union law - the past presence test [See ADM Memo 2/25]

C2133 Persons within the scope of the European Union co-ordination regulations claiming Personal Independence Payment do not have to satisfy the past presence test, if they can show that they have a genuine and sufficient link to the United Kingdom (see C2130). However a person within the personal scope of European Union legislation who moves to the United Kingdom, or returns to the United Kingdom, from another European Economic Area Member State who **does not** have a genuine and sufficient link as at the first day of potential entitlement may nonetheless be able to satisfy the past presence test by means of European Union law (see C2134 to C2137 below).

Past presence test deemed to be met

C2134 [See ADM Memo 8/21] The past presence test is deemed to be met for certain categories of claimant who are European Economic Area nationals and who demonstrate a sufficient link to the United Kingdom in another way. The following groups are not required to satisfy the past presence test at the first date from which benefit could be established if on that date they are

1. current workers (and their family members), whether employed or self-employed, who pay United Kingdom national insurance contributions. This includes posted workers (see C2135) and frontier workers (see C2136) **or**
2. people who are treated as workers (and their family members) who, although not currently employed, are receiving Employment and Support Allowance in the assessment phase or those who continue to be insured for Employment and Support Allowance after they cease work
3. decision makers and, on appeal, the courts are entitled to be cautious about self-serving statements by applicants, especially if the benefits are claimed immediately on or only shortly after arrival in the United Kingdom. Such caution is justified not only because self-serving statements as to motives, intentions and expectations may not be genuine but also because, even if they are genuine, actual realisation of the intentions and expectations of the applicant will not have been tested by the passage of time and the realities of the situation.

Meaning of “posted worker”

C2135 A posted worker¹ is an employed or self-employed person normally working in the United Kingdom but posted temporarily to work in the territory of another European

Economic Area member state, for a period which is anticipated to be no longer than 24 months.

1 Reg (EC) 883/04, art 12

Meaning of “frontier worker”

C2136 Frontier worker¹ means an employed or self-employed person who works in the United Kingdom but lives in another European Economic Area member state where he returns daily, or at least once a week.

1 Reg (EC) 883/04, art 1(f)

Aggregation and the past presence test

Daily living component

C2137 Where the claimant is within the personal scope of the European Union co-ordination regulations and the United Kingdom is the competent state for the payment of cash sickness benefits, for the purposes of the daily living component of Personal Independence Payment, periods recognised as insurance whether for residence, employment or self-employment can be aggregated¹ with presence in the United Kingdom when considering whether the past presence test is met.

1 Reg (EC) 883/04 art 6 & Annex XI entry 2

Mobility Component

C2138 As the Mobility Component is to be treated as a special non-contributory benefit, it is only payable in the United Kingdom. However, for the purpose of satisfying the past presence test, periods of insurance for social security benefits arising from periods of employment, self-employment or residence in another European Economic Area State qualify to be aggregated with residence in the United Kingdom when considering whether the past presence test is met.

C2139 – C2159

The content of the examples in this document (including use of imagery) is for illustrative purposes only.

Appendix 1

[See ADM Memo 18/20] [See ADM Memo 5/24] [See ADM Memo 2/25]

Deciding the competent state to pay cash sickness benefits

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Introduction

- 1 This appendix expands the guidance in ADM Chapter C2 for deciding the competent State to pay cash sickness benefits. It also incorporates Regulation (EC) 883/2004.

General rule

- 2 In general a person is only subject to the legislation of one European Union Member State¹.

1 Reg (EC) 883/04, art 11(1)

- 3 A person will not be entitled to Personal Independency Payment daily living component¹ unless the United Kingdom is the competent State for payment of cash sickness benefits to that person.

1 WR (NI) Order 2015, art 89

- 4 Special Non-Contributory Cash Benefits can only be paid to people by and in their Member State of residence. In the United Kingdom

1. State Pension Credit **and**
 2. income-based Jobseeker's Allowance **and**
 3. Disability Living Allowance mobility component **and**
 4. Personal Independency Payment mobility component **and**
 5. income-related Employment and Support Allowance
- are Special Non-Contributory Cash Benefits¹.

1 Reg (EC) 883/2004, Annex X

Additional voluntary insurance

- 5 Although a person is subject to compulsory insurance in one European Union Member State, that person may voluntarily decide to join the optional insurance scheme in another European Union Member State for the purposes of entitlement to

1. invalidity benefit **and**
2. retirement pension **and**
3. widow's benefits¹.

1 Reg (EC) 883/04, art 14(3)

Deciding whose legislation applies

General rules

- 6 The general rules are¹ that
1. a person pursuing activity as an employed or self-employed person in a European Economic Area Member State is subject to the legislation of that Member State
 2. a civil servant is subject to the legislation of the Member State to which the administration employing him is subject
 3. a person receiving unemployment benefits in accordance with a specific provision in the European Union co-ordination Regulations² from the Member State of residence is subject to the legislation of that Member State
 4. a person called up or recalled for military or civilian service by a Member State, is subject to the legislation of that Member State
 5. any other person to whom sub-paragraphs 1. - 4. do not apply is subject to the legislation of the Member State of residence.

Note: The rule in sub-paragraph 5. operates subject to any other rules in the European Union co-ordination Regulations which may guarantee a person benefits under the legislation of one or more Member States.

1 Reg (EC) 883/04, art 11(3); 2 art 65

- 7 Except in relation to the benefits listed at paragraph 8, for the purposes of paragraph 6, a person receiving cash sickness benefits because of, or as a consequence of, their activity as an employed or self-employed person shall be considered to be pursuing that activity¹.

1 Reg (EC) 883/04, art 11(2)

- 8 The benefits to which the rule detailed in paragraph 7 do not apply are¹
1. invalidity benefits **or**
 2. old age or survivors' pensions **or**
 3. pensions in respect of accidents at work or occupational diseases **or**
 4. sickness benefits in cash which are for treatment for an unlimited period.

1 Reg (EC) 883/04, art 11(2)

Meaning of “legislation”

- 9 In paragraph 6 “legislation” means¹ the laws, regulations, statutory provisions and all other implementing measures relating to the branches of social security listed in the co-ordinating Regulations.

1 Reg (EC) 883/04, art 1(l)

Meaning of “competent member state”

- 10 The “competent Member State” means¹ the Member State in which the competent institution is situated.

1 Reg (EC) 883/04, art 1(s)

Meaning of “competent institution”

- 11 The “competent institution” means¹ the institution
1. with which the person concerned is insured at the time of the application for benefit **or**
 2. from which the person concerned is or would be entitled to benefits if he or a member of his family resided in the Member State in which the institution is situated **or**
 3. designated by the competent authority of the Member State concerned.

1 Reg (EC) 883/04, art 1(q)

Meaning of “competent authority”

- 12 “Competent authority” means¹ the Minister or other equivalent authority responsible for social security schemes throughout (or in any part of) the Member State in question.

1 Reg (EC) 883/04, art 1(m)

Posted to another European Economic Area country

- 13 An employed person who is posted by their employer to another European Economic Area State remains subject to the legislation of the Member State where the employer is based and where that person normally works, provided
1. the work is not expected to last more than twenty-four months **and**
 2. that person has not been sent to replace somebody who has completed a posting¹.

1 Reg (EC) 883/04, art 12

Working in more than one Member State

- 14 Persons who normally pursue activity as an employed person in two or more Member States will be subject to the legislation of¹
1. the Member State of residence if they
 - 1.1 pursue a substantial part of their activity in that Member State **or**
 - 1.2 are employed by two or more employers, at least two of which have registered offices or places of business in Member States different to that of the Member State of residence **or**
 2. the Member State in which the employer's registered office or place of business is situated, if the person does not pursue a substantial part of his work in the Member State of residence, and either
 - 2.1 the person is employed by only one employer **or**
 - 2.2 the person is employed by two or more employers, all of which have their registered office or place of business in only one Member State.

1 Reg (EC) 883/04, art 13(1)

- 15 A person who normally pursues activity as a self-employed person in two or more Member States shall be subject to the legislation of¹
1. the Member State of residence if they pursue a substantial part of their activity in that Member State **or**
 2. if the person does not reside in one of the Member States in which they pursue a substantial part of their activity, the Member State in which the centre of interest of their activities is situated.

1 Reg (EC) 883/04, art 13(2)

- 16 If a person spends less than a quarter of their time on their activities as an employed or self-employed person in a Member State, that shall be taken as an indication that a person is not pursuing a substantial part of their activities in that Member State¹.

1 Reg (EC) 987/2009, art 14(8)

Employed on a ship

- 17 Subject to paragraph 18 below, activity as an employed or self-employed person normally pursued on board a vessel at sea, flying the flag of a Member State is deemed to be an activity pursued in that Member State¹.

1 Reg (EC) 883/04, art 11(4)

- 18 However¹ a person employed on board a vessel flying the flag of a Member State who is paid by an undertaking or person whose registered office or place of business is in a Member State other than that in which the vessel is registered is subject to the legislation of the latter Member State if they reside in that Member State.

1 Reg (EC) 883/04, art 11(4)

Example

A claimant is employed on a cruise ship that flies the United Kingdom flag. The claimant lives in France and she is paid by a company registered in France. The claimant is subject to the legislation of France.

Civil servants

- 19 Civil servants, and people treated as civil servants, are subject to the legislation to which the administration employing them is subject¹.

1 Reg (EC) 883/04, art 11(3)(b)

Example

A United Kingdom official is working in Brussels but remains employed by a United Kingdom department. That person remains subject to United Kingdom legislation.

Members of the armed forces

- 20 A member of the armed forces is subject to the legislation of the country in whose forces that person is serving¹.

1 Reg (EC) 883/04, art 11(3)(d)

Claims from pensioners

- 21 As a general rule, if a claimant receives a pension and is entitled to benefits in kind from a single Member State, that Member State is competent for the payment of cash sickness benefits to that person¹.

1 Reg (EC) 883/04, art 24(2)(a)

Example

A claimant resides in the United Kingdom, and only receives a pension from Greece. Greece is the competent state for cash sickness benefits.

- 22 Where a claimant

1. receives a pension from two or more Member States **and**
2. resides in one of those Member States **and**

3. is entitled to benefits in kind under the legislation of that Member State
- the Member State of residence will be competent for payment of cash sickness benefits to that person¹.

1 Reg (EC) 883/2004, art 23, article 29(1)

Example

A claimant resides in the United Kingdom and receives a pension from both Greece and from the United Kingdom. The United Kingdom is the competent State for benefits in kind and for the payment of cash sickness benefits.

Note: The general rule ceases to apply if the person receiving a pension from another Member State undertakes activity as an employed or self-employed person in the Member State of residence. In these circumstances, the Member State of residence may become competent for the payment of cash sickness benefits to that person for such time as that person is employed or self-employed.

23 If a claimant

1. receives a pension from two or more Member States **and**
 2. is consequently entitled to benefits in kind from two or more Member States **but**
 3. is not entitled to a pension from the State of residence
- the competent Member State for payment of cash sickness benefits is the Member State to whose legislation the claimant has been subject for the longest period of time¹.

1 Reg (EC) 883/04, art 24(2)(b)

Example

A claimant resides in Spain and receives pensions from the United Kingdom, Germany and France. The claimant worked in the United Kingdom for 6 years, Germany for 12 years and France for 20 years. France is the competent state for cash sickness benefits.

Derived rights

Family members

- 24 Claimants can derive a right to payment of benefits¹ from their family members². Family members are
1. a spouse **or**
 2. a parent of a child under 18 **or**

3. a parent of a child over 18 who is a dependant.

1 Reg (EC) 883/04, art 2(1); 2 Reg (EC) 883/04, art 1(i)(2)

Prioritising rights

- 25 Claimants may have both an independent right to benefits and a derived right to benefits at the same time. An “independent right” to benefits is a right a person has acquired independently themselves as a consequence of, for instance, their activity as an employed or self-employed person in a Member State, their residence in a Member State, or their receipt of a pension from a Member State. A derived right is a right to benefits a person can derive from a family member. Subject to paragraphs 26 and 27 below, an independent right to cash sickness benefits should take priority over a derived right to cash sickness benefits as the family members of those covered by the Regulation¹.

1 Reg (EC) 883/04, art 32(1)

Example

A claimant who is a Polish national is in receipt of a Polish pension and a disability benefit also from Poland. He arrives in the United Kingdom to be with his wife. His wife has been working in the United Kingdom and paying National Insurance contributions for the last 5 years. As the claimant is in receipt of a pension from Poland he has an independent right to cash sickness benefits from Poland. However, he also has a derived right to benefits in the United Kingdom which he derives from his working wife. As the general rule is that a person’s independent right to benefits takes priority over their derived right, the claimant’s independent right to benefits in Poland takes priority and Poland is therefore the competent state for the payment of cash sickness benefits to the claimant.

- 26 However, where a claimant has an independent right to cash sickness benefits arising purely from their residence in a Member State, any rights they derive from a family member who is, for example, receiving a pension from, or who is employed in, another Member State will take priority over that claimant’s independent right to benefits¹.

1 Reg (EC) 883/04, art 32(1)

Example 1

A claimant has returned to reside in the United Kingdom, having been resident in another European Union Member State. The claimant’s husband lives and works in Germany but the couple are still together. The claimant is not working in the United Kingdom. The claimant has an independent right to cash sickness benefits in the United Kingdom arising solely out of their residence in the United Kingdom. The claimant also has a right to benefits in Germany derived from her husband, who is

living and working in Germany. In these circumstances, Germany is the competent State for payment of cash sickness benefits to that claimant.

Note: Should the claimant in the above example start work in the United Kingdom then the United Kingdom would become the competent state, as the claimant's independent right to benefits would no longer arise solely out of her residence in the United Kingdom.

Example 2

A claimant returns to live in the United Kingdom having been resident in another European Union Member State. The claimant is self-employed in the United Kingdom. The claimant's husband lives and works in Spain. In this situation, the independent rights of the claimant do not arise solely out of her residence in the United Kingdom. The United Kingdom is therefore the competent state for payment of cash sickness benefits to the claimant.

- 27 Where a claimant is employed or self-employed in a Member State their independent right takes priority over a derived right even if they have a family member employed in or receiving a pension from another Member State¹.

1 Reg (EC) 883/04, art 32(1)

Example

A claimant lives and works part-time in the United Kingdom but is financially dependent on their parent. Their parent lives and works in Germany. The United Kingdom is the competent State for cash sickness benefits for the claimant.

Note: Should the claimant in the above example stop working in the United Kingdom then Germany would become the competent state, as the claimant's independent right to benefits would arise solely out of their residence in the United Kingdom.

Exchange of claims between members states

- 28 If on considering the claim the decision maker decides that the United Kingdom is not the competent State the decision maker should forward the claim without delay to the competent institution in the Member State the decision maker considers competent¹.

1 Reg (EC) 883/04, art 81

- 29 Where the decision maker receives a claim from another Member State the date of claim will be the date the claim was made in the other Member State¹.

1 Reg (EC) 883/04, art 81

Appendix 2

Action to take once competency has been decided

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Introduction

- 1 This Appendix expands the guidance for decision makers on the approach to take to cases where a decision on competency has been reached.

The decision maker decides that the United Kingdom is the competent State for the payment of cash sickness benefits

- 2 Where the decision maker decides that the United Kingdom is the competent State to pay cash sickness benefits to a person, the decision maker should then go on to consider whether the relevant domestic conditions of entitlement are met.

The decision maker decides that the United Kingdom is not the competent state for the payment of cash sickness benefits

Scenario one: Where there is no acceptable evidence of a dispute regarding competence between Member States

- 3 Where the decision maker decides that the United Kingdom is not the competent State they should
1. refuse the claim **and**
 2. immediately forward the claim to the Member State the decision maker considers is competent¹.

1 art 81 Reg (EC) 883/04; [2015] AACR 26

Scenario two: Difference of opinion between Member States as to competence

- 4 Where there is a difference of opinion between the United Kingdom and one or more other Member States as to the identification of the State competent to provide cash benefits to a person, then either the
1. State where the claimant resides **or**
 2. Member State where the claim was first made (if the claimant does not reside in any of the Member States concerned in the dispute)

will provide cash benefits to that person on a provisional basis, provided that person meets the relevant domestic eligibility criteria¹.

1 Reg (EC) 987/09, art 6(2)

Note: Competency is not contingent on the other Member State having a similar benefit to the one applied for by the claimant. Therefore the position regarding competence will not be altered if the other Member State does not have a similar benefit to the one applied for by the claimant. Further, payment on a provisional basis will not need to be made in these circumstances.

- 5 Should a dispute regarding competence arise between the United Kingdom and another Member State the decision maker should not await
1. an appeal **or**
 2. the outcome of an appeal
- before making provisional payments¹.

1 [2015] AACR 26

Resolving the dispute

- 6 Where no agreement can be reached between the Member States as to who is competent the decision maker should refer the matter to Decision Making Services. Decision Making Services will liaise with policy and legal services to decide whether to refer to the Administrative Commission¹.

1 Reg (EC) 987/09, art 6(3)

- 7 The Administrative Commission will try to reconcile the dispute within 6 months¹.

1 Reg (EC) 987/09, art 6(3)

- 8 Where the United Kingdom has paid benefit on a provisional basis and the Administrative Commission decides another Member State is competent that Member State will reimburse the United Kingdom benefits paid¹.

1 Reg (EC) 987/09, art 73