

PART ONE

AN INTRODUCTION TO THE EC AND THE EEA AND THE FREE MOVEMENT OF WORKERS

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1. THE EUROPEAN COMMUNITY

1.1 INTRODUCTION TO THE EUROPEAN COMMUNITY

The European Economic Community came into existence in 1958. In the period since then, its competence has been expanded to include social, cultural, and political policies and, to reflect this, it has been renamed the "European Community" (EC). The membership of the EC has also expanded considerably. Twenty-seven countries are now in the EC. In this guidebook, these twenty seven countries are referred to as EC Member States.

The legal structure of the EC is rather complicated. The Treaty, which established the EC is the *EC Treaty*, also known as *the Treaty of Rome*. Signed in 1957, the EC Treaty set certain goals for the EC. The most fundamental goal was to create what are known as the *four freedoms*. That is to say, ensuring the:

- free movement of goods;
- free movement of persons;
- free movement of services; and
- free movement of capital

throughout the EC. Thus, one of the fundamental goals of the EC is to ensure that workers from one EC Member State can move to another EC Member State to take up employment.

The *EC Treaty* has been amended several times, most importantly by:

- the *Single European Act* (1986): this Treaty gave the EC new powers and improved its decision making process in order to ensure that the four freedoms would be better protected and that a single market for goods, services, workers and capital would be created throughout Europe.
- the *Maastricht EC Treaty* (1992): this Treaty gave the EC new powers in areas such as foreign policy and justice matters. It also provided for the introduction of the Euro. Finally, it gave the EC an alternative name: the *European Union* (EU). However, to be consistent, we refer only to the EC in this guidebook.

- the *Treaty of Amsterdam* (1997): this Treaty made further changes to the EC legislative process and gave the EC certain additional powers.
- *the Treaty of Nice* (2001); dealt mainly with reform of the institutional structure in advance of enlargement of the Union to 25 Member States.

1.2 MEMBER STATES OF THE EUROPEAN COMMUNITY

When the EC came into existence in 1958, there were only six Member States. There are now twenty seven EC Member States.

The table below lists the EC Member States and the date that each joined.

Country	Year	Country	Year	Country	Year
Austria	1995	Germany	1958	Netherlands	1958
Belgium	1958	Greece	1981	Poland	2004
Bulgaria	2007	Hungary	2004	Portugal	1986
Cyprus	2004	Ireland	1973	Romania	2007
Czech Republic	2004	Italy	1958	Slovakia	2004
Denmark	1973	Latvia	2004	Slovenia	2004
Estonia	2004	Lithuania	2004	Spain	1986
Finland	1995	Luxembourg	1958	Sweden	1995
France	1958	Malta	2004	United Kingdom	1973

Ireland's membership of the EC commenced in January 1973. But the application of the EC regulations on social security for migrant workers did not commence until 1 April 1973.

For details of the territorial scope of Regulation 883/2004 see Part 3 of Guidance note "The Scope of the Regulation" subsection 2.

1.3 INSTITUTIONS OF THE EUROPEAN COMMUNITY

The Irish State is made up of various institutions, such as the Oireachtas (Dáil & Seanad), the Government (Ministers and Civil Service) and the Courts. The EC is also made up of various institutions. The main institutions of the EC are described below:

- *The Council of Ministers* is responsible for adopting EC legislation. Sometimes this power to adopt legislation is exercised jointly with

the European Parliament. The Council is composed of a Minister from each EC Member State. The Ministers vary according to the subject under consideration. For example, if the Council is considering adopting new EC laws on social security, then the Council will bring together the Ministers for social protection from each of the EC Member States, including the Irish Minister for Social and Family Affairs.

- *The Commission* is effectively the European Civil Service. It is responsible for administering many EC policies, drawing up proposals for new EC legislation and ensuring that EC Member States comply with their obligations under EC law.
- *The European Parliament* has an increasingly powerful role in adopting legislation along with the Council of Ministers. It also advises on EU policies.
- *The European Court of Justice* is responsible for resolving disputes involving EC law. For example, it is responsible for deciding on the validity of EC legislation and for determining whether EC Member States have met their obligations under EC law. The European Court of Justice also provides answers to questions asked of it by the national courts of the EC Member States on any matter involving the interpretation of EC law.

1.4 EUROPEAN COMMUNITY LEGISLATION

In the EC there are several types of legislation. The most important are:

- the EC Treaty,
- regulations,
- directives and
- decisions.

All these types of legislation share one common feature: they all take precedence over the laws of EC Member States. This means that any provision of the EC Treaty or of a directive, regulation or decision takes priority over any provision of any Irish statutory instrument, act or even of the Irish Constitution. All Irish circulars and administrative practices must also comply fully with EC law.

The following are the main features of EC legislation:

- The *EC Treaty* is the constitution of the EC. It sets out the basic principles that all national and EC laws must follow.
- *Regulations* are *directly applicable* in each EC Member State. This means that once the date of entry into force specified in the regulation has passed, the regulation automatically has legal force in all EC Member States and overrides any conflicting national laws.
- *Directives* are not directly applicable in EC Member States when adopted. Each EC Member State is obliged to implement directives by way of appropriate provisions in national law. A time limit for such implementation is given in each directive. Failure to implement a directive within the time limit is a breach of EC law. In Ireland, directives are normally implemented by acts or statutory instruments. The most important directives in the field of social security are those which provide for equal treatment between men and women.¹
- *Decisions* are another form of EC legislation and are legally binding.² Decisions are usually taken with respect to minor, technical or administrative matters or where the number of people affected by the decision is limited.
- From time to time, the EC also issues *recommendations*. These are suggestions made by the Community as to how the EC Member States might coordinate and develop their policies. Member States are not legally obliged to follow recommendations.

1.5 LEGISLATIVE PROCESS

1.5.1. Competence must be provided by the EC Treaty to adopt legislation

The Council of Ministers, often working with the European Parliament, can adopt directives, regulations, decisions and recommendations. However, the power to do so must be provided by the EC Treaty. For example, Article 42 EC provides competence for the Council of

¹ See, for example Directive 79/7/EEC on equal treatment in social security.

² As regards “decisions” of the Administrative Commission, see Introduction, subsection 1 of Part 2 “An Introduction to Regulation No 1408/71”.

Ministers to adopt measures to protect the social security rights of migrant workers.³ Another example is Article 308 EC which gives the Council a general power to adopt legislation necessary to ensure the four freedoms.⁴

1.5.2. An outline of legislative process

(a) The normal legislative process: Commission, Council and Parliament

The legislative process of the EC begins with the European Commission which alone has the power to propose legislation. Before the European Commission draws up any formal proposal for legislation, it will often engage in consultations.

For example, in the field of social security rights for migrant workers, a body of experts from the EC Member States called the Administrative Commission on Social Security for Migrant Workers (“the Administrative Commission”) will be consulted.⁵ Also, the Commission may decide to consult the Advisory Committee on Social Security for Migrant Workers which is composed of representatives of the EC Member States as well as trade union and employers’ representatives.

It will then be for the Council of Ministers to decide whether to adopt the Commission’s proposal. However, before deciding this, the Council of Ministers must take account of the position of the European Parliament. The powers of the European Parliament will depend on the kind of legislation being adopted.

The EC Treaty allows some kinds of legislation to be adopted according to the *consultation procedure*. Under this procedure, the Council of Ministers must consult with the European Parliament but is not obliged to accept its views. The EC Treaty provides that other legislation must be adopted according to the *cooperation procedure*. Under this procedure, the European Parliament has greater powers. Finally, legislation can be adopted according to the *co-decision procedure*. For example, EC legislation on the social security rights of migrant workers can only be adopted using the co-decision procedure.

³ Regarding Article 42 EC, see further subsection 3.4 below.

⁴ However, Article 308 EC can only be used when no other provision of the Treaty gives the Community the competence to adopt the measure in question.

⁵ See subsection 1 of Part 2 “An Introduction to Regulation No 883/2004”.

(b) Legislative process for minor, technical or administrative measures

Clearly, it would be undesirable if every piece of legislation, no matter how trivial, was submitted to the Council of Ministers and the European Parliament. For that reason, the Council of Ministers often authorises the European Commission to adopt legislation itself in minor, technical or administrative areas.

However, in such cases, the Commission will normally still consult with experts from the EC Member States. For example, in the field of social security for migrant workers, the Commission will consult with the Administrative Commission.

2. THE EUROPEAN ECONOMIC AREA (EEA)

Not all European countries want to join the EC: some fear that it would involve too great a loss of sovereignty in sensitive areas such as foreign and economic policy. At the same time, some of these countries want to avail of the benefits of the four freedoms. To solve this problem, on 1 January 1994 an agreement between the EC Member States and these countries entered into force.⁶ This agreement set up the European Economic Area (EEA).⁷ The countries in the EEA are all twenty seven EC Member States and the following countries which are not in the EC: Iceland, Liechtenstein and Norway.

The following is therefore the complete list of countries in the EEA:

Austria	Greece	Netherlands
Belgium	Hungary	Norway*
Bulgaria	Iceland*	Poland
Cyprus	Ireland	Portugal
Czech Republic	Italy	Romania
Denmark	Latvia	Slovakia
Estonia	Liechtenstein*	Slovenia
Finland	Lithuania	Spain
France	Luxembourg	Sweden
Germany	Malta	United Kingdom

* Iceland, Liechtenstein and Norway are not in the EU
For details of the territorial scope of Regulation 883/2004 see Part 3 of Guidance Note "The Scope of Regulation 883/2004" subsection 2

The four freedoms apply throughout the EEA. So, for example, EC rules on free movement of persons also apply to Iceland, Liechtenstein and Norway.

In order to ensure the four freedoms, Iceland, Liechtenstein and Norway agreed to adopt the most important legislation of the EC, including the most important provisions of EC legislation on social security rights for migrant workers. From time to time, EC legislation is amended. When this happens, a decision is taken making these

⁶ However, the EEA Agreement came into force in Liechtenstein on 1 May 1995.

⁷ See Decision 94/1/ECSC, EC on the conclusion of the Agreement on the European Economic Area, as amended.

amendments also applicable to Iceland, Liechtenstein and Norway.⁸ That way, the legislation of these EEA States is kept up to date with all changes made to EC legislation.

⁸ This decision is taken by the Joint EEA Committee.

3. EC TREATY PROVISIONS ON THE FREE MOVEMENT OF WORKERS AND THE SELF-EMPLOYED

Articles 39-55 of the EC Treaty provide for the free movement of workers and the self-employed and allow for the freedom to provide services throughout the EC.

The most important Articles are

- Article 39 of the EC Treaty (or Article 39 EC for short) on the free movement of workers;
- Article 43 EC on the free movement of the self-employed;
- Articles 49-50 EC on the free movement of services; and
- Article 42 EC on social security rights for migrant workers.

3.1 ARTICLE 39 EC ON THE FREE MOVEMENT OF WORKERS

Article 39 EC gives workers who are nationals of one EC Member State the right to move freely to other EC Member States.

Article 39 EC also abolishes any discrimination based on nationality against workers of EC Member States as regards employment, remuneration and other conditions of work.

Finally, Article 39 EC makes it clear that the free movement of workers includes:

- the right to accept offers of employment in other EC Member States;
- the right to stay in an EC Member State for the purpose of employment in accordance with the provisions governing employment of nationals of that State;
- the right to remain in the territory of an EC Member State having been employed in that State. However, there are some limitations on this right.⁹

⁹ These are laid down in Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that Member State. This Regulation applies in all EEA

Regulation (EEC) 1612/68 is the legal implementation of Article 39 and is based on the general principle in Community law that there shall be no discrimination based on nationality. This principle is enshrined, *inter alia*, in Article 12 of EC Treaty.

3.2 ARTICLE 43 EC ON THE FREE MOVEMENT OF THE SELF-EMPLOYED

Article 39 EC covers employees only. However, Article 43 confers similar rights on the self-employed by giving nationals of one EC Member State the freedom to establish themselves for the purposes of carrying out a self-employed activity, including the setting up or management of an undertaking, in any other EC Member State under the same conditions as nationals of that Member State. This right is often referred to as *freedom of establishment*.

3.3 ARTICLES 49-50 EC ON THE FREE MOVEMENT OF SERVICES

Many self-employed persons do not want to go to the trouble of establishing themselves in another Member State. Instead, they want to be able to provide services in that Member State while remaining established in their home Member State.

Articles 49-50 EC deal with this situation. In particular, Article 50 provides that a national of one EC Member State who wishes to provide a service in another EC Member State should be subject to the same conditions as nationals of that other EC Member State.

3.4 ARTICLE 42 EC ON SOCIAL SECURITY RIGHTS FOR MIGRANTS

A person may not be willing to move to other EC Member States for work if, in so doing, he or his family loses social security entitlements.

States. See also Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

In order to solve this problem, Article 42 EC gives the Council of Ministers the power to adopt measures to secure the social security rights of migrant workers and their dependants. The EC Treaty of Amsterdam has amended Article 42 EC in order to give the European Parliament a greater role in making legislation on the social security rights of migrant workers by extending the co-decision procedure to legislation adopted in this area. See further *subsection 1.5 above*.

The most important measures adopted by the Commission under this Article are:

- *Council Regulation (EC) No883/2004 (formerly Regulation 1408/71) on the coordination of social security schemes to persons moving within the Community. In this guidebook, we refer to this Regulation as Regulation 883/2004.*
- *Council Regulation (EC) No x/x (formerly Regulation 574/72) laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security schemes to employed persons, to persons moving within the Community. In this guidebook, we refer to this Regulation as Regulation x/x .*

In this guidebook, we refer collectively to Regulation 883/2004 and Regulation x/x as "the Regulations".

3.5 EQUIVALENT PROVISIONS OF THE EEA

The EEA agreement contains provisions equivalent to Articles 39,¹⁰ 42,¹¹ 43,¹² 49¹³ and 50 EC.¹⁴ This means that nationals of any EEA State have the same rights as EC nationals regarding:

- free movement of workers,
- freedom of establishment and
- free movement of services.

¹⁰ Article 28 EEA.

¹¹ Article 29 EEA.

¹² Article 31 EEA.

¹³ Article 36 EEA.

¹⁴ Article 37 EEA.

So, for example, a Norwegian national can claim the right of free movement and the right to have his social security rights protected in France or Iceland. Similarly, a French national can claim these rights in Iceland or Norway.

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