

## **PART EIGHT**

### **Unemployment Benefit – Chapter Six of Regulation 883/04**

#### **1. INTRODUCTION**

#### **2. AGGREGATION**

**2.1 Determining the applicable legislation**

**2.2 Aggregation where the unemployed person resides and was lastly employed in Ireland**

#### **3. CALCULATION OF BENEFIT**

**3.1 Main Provisions**

**3.2 Increases for family members**

#### **4. EXPORT OF UNEMPLOYMENT BENEFITS – UNEMPLOYED PERSON GOING TO A MEMBER STATE OTHER THAN THE COMPETENT STATE**

**4.1 Introduction**

**4.2 Conditions and limits for retention of the right to benefits**

**4.3 Discretionary powers afforded the Competent State, Institutions or Services**

**4.4 Administration of Export of Unemployment Benefit**

**4.5 Electronic Data Exchange for Export of Benefit under Article 64**

## **5. UNEMPLOYMENT BENEFIT FOR PERSONS WHO LIVE IN ONE STATE AND WORK IN ANOTHER**

### **5.1 Introduction**

### **5.2 Who is a frontier worker**

### **5.3 Wholly and Partially or Intermittently Unemployed**

### **5.4 Wholly unemployed frontier workers**

### **5.5 Partially or Intermittently Unemployed Frontier Workers**

### **5.6 Unemployment benefit for workers other than frontier workers who do not reside in the State of employment – Article 65(2)(3)(5)(b)**

#### **5.6.1 Determining the State of Residence**

#### **5.6.2 Benefits from the Competent State**

#### **5.6.3 Right to choose between States of residence and employment**

#### **5.6.4 Claiming benefits in Competent State before returning to State of residence**

#### **5.6.5 Bergemann Ruling**

## **6. CORRELATION TABLE FOR STRUCTURED ELECTRONIC DOCUMENTS (SED'S)**

## **1. Introduction: Scope of the Chapter**

Most claims for unemployment benefit can be dealt with under national legislation. However, in some cases, particularly in the case of EEA migrant workers, it will be necessary to invoke the EU Regulations. The relevant provisions are set out in Chapter 6 of Title III of Regulation 883/04 (Articles 61 to 65) and Chapter V of Title III of the Implementing Regulation 987/09 (Articles 54 to 57).

In the case of Ireland, the only benefit that comes under the scope of this chapter is Jobseekers Benefit.

The rules contained in this chapter differ somewhat to the rules on other types of benefits. This is because it is recognised that Member States wish to keep greater control over how, when and where unemployment benefits are paid, as compared to other benefits. For this reason, these benefits are not subject to the general rule on exportability and, instead restrictions are placed on the export of unemployment benefit from the competent State. These restrictions are explained in the following paragraphs.

These guidelines will deal with the following situations:

- Aggregation of periods of insurance completed in another EEA Member State when Ireland is competent for Jobseekers Benefit
- Calculation of Jobseekers Benefit, including increases for family members
- Export of Jobseekers Benefit from Ireland to another EEA Member State

- Jobseekers Benefit for frontier workers<sup>1</sup>
- Jobseekers Benefit for workers other than frontier workers who do not reside in the State of employment.

## 2. Aggregation

### 2.1 Determining the applicable legislation

The general rules for determining the legislation applicable in relation to unemployment benefit are determined by Article 11 of Regulation 883/04, and under these provisions, it will usually be the legislation of the State of last employment. In other words, a claim for unemployment benefit can generally only be made in the State in which the unemployed person was last employed. Certain exceptions do exist, and are set out later in this note.

**Electronic Data Exchange, using Structured Electronic Documents (SED's) between the relevant Member States** is used to certify the legislation a worker is subject to. A correlation table detailing all the relevant SED's is included at the end of this chapter.

### 2.2. Aggregation where the unemployed person resides and was lastly employed in Ireland.

The Regulation provides that where a claim for unemployment benefit is made in the competent State, and where that State makes entitlement to benefits conditional on completion of periods of insurance or employment, then account can be taken, to the extent necessary, of periods of insurance<sup>2</sup> or employment<sup>3</sup> completed in another Member State<sup>4</sup>.

#### **Example 1:**

*Mr Z has been living and working in the UK for ten years when he decides to return to Ireland. On his return he begins working and is liable for Class A contributions. After 2 months he is made redundant and claims Jobseekers*

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<sup>1</sup> A 'frontier worker' is defined by Article 1(f) of Regulation 883/04 as 'any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week'.

<sup>2</sup> In relation to unemployment benefits, 'period of insurance' refers not only to periods in which contributions to an unemployment insurance scheme were paid but also to periods of employment considered by the legislation under which they were completed as equivalent to periods of insurance – Case 388/87 – Warmerdam-Steggerda

<sup>3</sup> The term 'period of employment' covers only periods of work which, according to the legislation under which they were completed, are not regarded as periods conferring entitlement to affiliation to a scheme providing unemployment benefits – Case 388/87 – Warmerdam-Steggerda

<sup>4</sup> Article 61(1) Regulation 883/04

*Benefit. For the purposes of determining his entitlement to Irish Jobseekers Benefit account must be taken to the extent necessary of contributions paid in the UK.*

However, it is for each EEA State to decide to make the award of unemployment benefit conditional on the person concerned having last completed periods of insurance classed as 'periods of insurance' under its own legislation. This is of relevance in an Irish context because it means that it is a matter for Irish, and not EU, legislation to determine whether a person who is working in Ireland qualifies for aggregation by virtue of the class of insurance being paid.

**Example 2:**

*In Example 1, Mr Z on his return to Ireland begins working part-time and is liable for Class J contributions. After 2 months he is made redundant and claims Jobseekers Benefit. Although Mr Z has 10 years contributions in the UK which are reckonable for unemployment benefit, his claim is not allowed in Ireland because he did not lastly complete a period which counted as a 'period of insurance' in Ireland. Mr Z had a period of Class J insurance which is not reckonable for Jobseekers Benefit in Ireland.*

In addition, any periods of employment completed in another EEA State will only be used if they would count as periods of insurance had they been completed in the competent State.

**Example 3:**

*A person makes a claim for JB in Ireland, but does not meet the contribution conditions because (s)he has only worked here for 3 months. However, prior to that, the person was employed in France for 5 years. Account should therefore be taken of the periods completed in France as if they had been completed in Ireland, to the extent necessary to qualify the person for JB in Ireland.*

The above rule is subject to the condition that any period of employment from another EEA State which is being aggregated must count as a period of insurance had it been completed under the legislation of the competent State<sup>5</sup>. This means that where a person worked in another EEA State, but was not insured for unemployment benefit, that period of insurance can only

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<sup>5</sup> Regulation EEC 883/04, Art 61(1)

be aggregated by Ireland if it would have counted as a period reckonable for Jobseekers Benefit had it been completed in Ireland.

**Example 4:**

*In the above example, the person working in France was earning only €100 per week. However, under French legislation, the contributions payable on those earnings do not count for unemployment benefit. However, if those periods of insurance had been completed in Ireland, they would have been reckonable for Jobseekers Benefit, and therefore, Ireland can take account and aggregate the periods.*

However, the European Court of Justice has ruled that the above condition will not apply when the employment in another EEA State is reckonable for unemployment benefit in that State, even if those periods of insurance would not be reckonable in the competent EEA State.<sup>6</sup> The result of this appears to be to put the customer in the most favourable position as regards enabling receipt of unemployment benefits.

**Example 5:**

*A person working in Ireland for 3 months becomes unemployed but is not eligible for JB as he has insufficient number of contributions made in order to satisfy the qualifying criteria. However, he had previously worked part-time in the Netherlands earning €35 euro per week. In Ireland, this level of earnings would only qualify as a class J contribution. However, because there is no income threshold for periods relating to unemployment in the Netherlands, those periods would have been reckonable for Unemployment Benefit there. Therefore, Ireland is obliged to take account of these periods as if completed in Ireland.*

**Electronic data exchange** is used to confirm periods of employment or periods of insurance.

### **3. Calculation of Benefit**

#### **3.1 Main Provisions**

EU rules lay down that where the legislation of an EEA State provides that the calculation of unemployment benefits is based on average earnings, average contributions or standard earnings, such average earnings, contributions or standard earnings shall be determined exclusively by reference to earnings, contributions or the standard earnings of contributions or periods completed under the legislation of the competent State<sup>7</sup>.

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<sup>6</sup> See Case 126/77 Frangiamore

<sup>7</sup> Regulation (EEC) 883/04, Art 62(1)

However, an annex entry allows Ireland to calculate cash benefits in a different way. Annex XI (Entry No. 5) of Regulation 883/04 allows for, when calculating the earnings for the granting of Jobseekers Benefit under Irish legislation, an amount equal to the average weekly wage in that year to be credited to an employed person in respect of each week of employment completed as an employed person under the legislation of another EEA State<sup>8</sup>.

### **Example 6:**

*Mr X makes a claim for Jobseekers Benefit in 2006. During 2004 (the Governing Contribution year - GCY) he worked for 6 months in France and 6 months in Ireland. In calculating his average earnings for the purpose of determining his personal rate of benefit account should be taken of his actual earnings in Ireland together with the amount credited to him in respect of each week worked in France in that year.*

### **3.2 Increases for family members**

Where the amount of cash benefits varies with the number of members of the family of the person concerned, account must be taken of the members of the family who are resident in the territory of another EEA State as if they were resident in the competent State. The only exception to this rule is if the members of the family living in the other EEA State are being taken into account for similar calculation of benefits for family members in their State of residence<sup>9</sup>.

**Electronic Data Transfer:** The relevant information is provided via **SED U005 and/or U006**.

Therefore, where Ireland is the competent State for Jobseekers Benefit and the members of the claimant's family are living in another EEA State, increases in respect of adult and/or children should be determined in accordance with Irish legislation. If the Spouse/Civil Partner is in receipt of a social security payment from another EEA State equivalent to an Irish payment which would disqualify the spouse/Civil Partner from being a qualified adult, then the qualified adult increase is not payable.

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<sup>8</sup> Regulation (EEC) 883/04, Annex XI

<sup>9</sup> Regulation (EEC) 883/04, [Art 5](#)

Equally, if the spouse/Civil Partner of the claimant has earnings in another EEA State in excess of the prescribed limit the qualified adult increase is not payable and any increase in respect of qualified child/ren will be paid at half-rate.

National rules providing for disallowance of payment of increase in respect of a qualified adult while absent from the State should not be applied.

**Example 7:**

*Ms X is working in Ireland when she becomes unemployed. She applies for Jobseekers Benefit under Irish legislation. Ms X declares on her application form that she has 3 dependent children who are living with their father, her spouse/Civil Partner, in Spain. Ms X's spouse/Civil Partner is not working or in receipt of any unemployment payments in Spain, as the income of X was supporting the entire family. This information is certified by the competent authority in Spain via transfer of electronic data.*

*Therefore, when the amount of benefit is being calculated, Ms X must be paid the qualified child and qualified adult allowances she would be entitled to if the members of the family were resident in Ireland.*

*However, if Ms X's spouse/Civil Partner is working in Spain, Ms X should be asked to provide a certified statement of her husband's/Civil Partner's earnings. The certificate should be issued by the competent institution in Spain using official transfer of electronic data.*

## **4. Export of Unemployment Benefits - Unemployed person going to a Member State other than the competent State (Article 64)**

### **4.1 Introduction**

Under Article 64 of the Regulation, a wholly unemployed person who qualifies for unemployment benefits in an EEA State is allowed to retain his/her entitlement to such benefits should s/he go to one or more other EEA States

to seek employment. Where Article 64 applies, the benefits continue to be paid directly by the institution of the EEA State where the beneficiary was last employed or subject to its legislation.

#### **4.2 Conditions and Limits for Retention of the Right to Benefits**

Previously, under EC Regulation 1408/71, a person was only permitted to export their claim once between two periods of employment. The introduction of EC Regulation 883/04 now means that this entitlement is available several times between two periods of employment as long as the wholly unemployed person respects the overall maximum period of three (or six, if extended by the competent institution) months, and is subject to the following conditions<sup>10</sup>:

- (a) Before going to another EEA State, the unemployed person must have been registered as a person seeking work and been available to the competent State's employment services for work for at least four weeks after becoming unemployed. The competent services or institutions may allow the unemployed person to depart before the end of this four-week period [see 4.3];
- (b) The unemployed person must register as a person seeking work with the employment services of the host State (that to which (s)he travels) within seven days of the date when (s)he ceased to be available to the employment services of the State from which (s)he came, that is, the competent State. This seven-day period may be extended in exceptional circumstances by the competent services or institutions [see 4.3];
- (c) Unemployment benefits can be retained for a period not exceeding three-months (can be extended to six months in exceptional circumstances) from the date the unemployed person ceased to be available to the employment services of the EEA State (s)he left - the competent State - provided that this is within the period granted for receipt of such benefits as established under the legislation of that competent State.
- (d) If the unemployed person returns to the competent State within this designated period (s)he shall continue to be entitled to benefits under the legislation of that State. This designated period can be extended by the competent services or institutions in exceptional cases [see 4.3].

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<sup>10</sup> Regulation 883/04, Article 64

**Example 8:**

*Ms Y, who works and lives in Dublin, becomes unemployed and registers as such with her local office. After five weeks of receiving Jobseekers Benefit (formerly Unemployment Benefit) and failing to find work in Dublin, Y decides to travel to Portugal in search of work. Y is entitled to receive her Jobseekers Benefit while in Portugal. This is paid directly by the Department of Social and Family Affairs. After 36 days (six weeks) in Portugal, Y returns to Dublin without having found work. Y is entitled to continue to receive Jobseekers Benefit in Dublin, provided her circumstances have not changed since first qualifying for the benefit.*

Should Y find employment in Portugal, Portugal becomes the competent State within the context of Article 64 of Regulation 883/04.<sup>11</sup>

**4.3 Discretionary Powers Afforded the Competent State, Institutions or Services**

- (a) Article 64 (1) provides that the competent institutions or services may decide to reduce the period described at 4.2 (a) above and, in exceptional cases, extend the period described at 4.2 (b) above. There is no specific Court ruling to guide deciding officers in this, but reference to the Court's findings in the case *Coccioli* may be of use insofar as it states that competent institutions and services are free to take into consideration all factors that they consider relevant.<sup>12</sup>
- (b) Article 64 (2) states that the competent institutions or services may, in exceptional cases, extend the period referred to at 4.2 (c) above. In deciding whether to grant exception to the rules of Article 64, again reference to the Court's findings in the *Coccioli* case may be of use to the deciding officer.<sup>13</sup> The Court interpreted Article 64 (2) in a way that provides broad discretion to the institutions or services of the competent State. As mentioned above, it concluded that competent institutions and services are free to take into consideration all factors that they consider relevant.
- (c) Competent services or institutions of the EEA States are afforded wide discretion in determining whether to extend the period laid down under Article 64 (2) of the Regulation. In exercising that discretion they must take account of the general principle of proportionality enshrined in

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<sup>11</sup> Court of Justice 28 April 1988, Case 192/87 *Vanhaeren*, [1988] ECR 2411

<sup>12</sup> Court of Justice 20 March 1979, Case 139/78 *Coccioli*, [1979] ECR 991

<sup>13</sup> Court of Justice 20 March 1979, Case 139/78 *Coccioli*, [1979] ECR 991

Community law. Consequently, in each case the competent services or institutions must consider the extent to which the period in question has been exceeded, the reason for this and the seriousness of the legal consequences arising from this delay.

#### **4.4 Administration of Export of Unemployment Benefit**

Unlike under EC Regulation 1408/71, the new EC Regulations mean that the competent State shall now pay the recipient directly, in accordance with its own legislation, and at its own expense (FOOTNOTE Art 64 (1)(d) of EC Regulation 883/04).

- (a) Some internal Guidelines of the Department of Social and Family Affairs state that in order to transfer Jobseekers Benefit/Unemployment Benefit abroad an unemployed person must inform her/his local office at least 4 weeks in advance so that the necessary arrangements may be made before (s)he leaves. It should be noted that although such pre-warning is desirable it is not mandatory under the terms of the Regulation and cannot therefore be used as a reason to deny transfer of Jobseekers Benefit/Unemployment Benefit.
- (b) The institution of the competent State must ensure that the unemployed person seeking to export their benefit is made aware of his/her obligations under the Regulations, e.g. need for statement certifying that they retain entitlement to benefits under Article 64 of 883/04, time limits etc.
- (c) An unemployed person seeking to transfer her/his Jobseekers Benefit to another EEA State should apply to her/his local office for a certified statement for presentation to the institution of the host State. This certificate must include the following details:
  - i. The date on which the unemployed person ceased to be available to the employment services of the competent State;
  - ii. The time limit within which the recipient must register as a person seeking work in the host State. This is typically 7 days but may be extended in exceptional circumstances (see 4.2 (b));

- iii. The maximum time limit within which the recipient must return to the competent State to ensure retention of his/her right to benefit. This is typically no more than 78 days (or three calendar months) but can be extended in exceptional circumstances (see 4.2 (c) and (d) above); and
  - iv. Any facts that may alter the recipient's right to benefit.
- (d) Should the unemployed person fail to apply for a certified statement prior to travelling to another EEA State or fail to submit it to the institution of that State, the institution of the host State shall obtain the certified statement from the competent institution.
- (e) The institution of the host State is required to inform the competent institution of the date the recipient registered in that country
- (f) The host State must afford the recipient the same treatment it affords its own unemployed workers claiming unemployment benefit. In other words, it should carry out the same checks as would be carried out on a domestic claimant and inform the competent institution of any facts that may alter the right to benefit of the recipient.
- (g) Should any facts emerge which demand the termination or suspension of the right to benefit, the circumstances should be communicated to the competent institution who will decide whether payments should be stopped immediately.

## **5. Unemployment Benefit for persons who live in one State and Work in another.**

### **5.1 Introduction**

The Unemployment Chapter contains special provisions for '*unemployed persons who resided in a Member State other than the competent State.*'

This section has only one article: Article 65, which contains provisions that **diverge from the general rule** under which it is the responsibility of the competent State to pay social security benefits.

The determining factor for the application of this article is the residence of the person concerned in an EEA State other than that to whose legislation (s)he was subject during his/her last employment. Article 65 distinguishes between:

- A frontier worker and an employed person other than a frontier worker; and
- A frontier worker who is partially or intermittently unemployed and a frontier worker who is wholly unemployed.

Article 65(1) provides that:

- A frontier worker who is partially or intermittently unemployed shall make themselves available to his/her employer or to the employment services in the competent Member State, and shall receive unemployment benefits from the competent State (i.e. the State of employment) as if (s)he resided there.

Article 65(2) provides that:

- A frontier worker who is wholly unemployed shall make themselves available to the employment services in the Member State of residence, and shall receive benefits from the State of residence.
- Without prejudice to their right to export unemployment benefits under Article 64, a frontier worker may, as a supplementary step in attempting to gain employment, make himself available to the employment services of the Member State in which he was last employed or self-employed. However, the fact that a person makes themselves available to the employment services of the State of last employment has no impact on their entitlement to unemployment payments which will remain the responsibility of the State of residence.
- an employed person other than a frontier worker who does not return to his Member State of residence, shall make himself available to the employment services in the Member State to whose legislation he was last subject.

The underlying intention of Article 65 is to guarantee unemployment benefits to the migrant worker under the most favourable conditions for seeking employment.

## **5.2 Who is a frontier worker?**

A frontier worker is defined in Article 1 (f) as *'any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week'*<sup>14</sup>.

It is for the competent institution to decide on whether a person comes within the definition of a 'frontier worker'. However, the requirement that the frontier worker travel to the State of residence at least once a week should be strictly applied<sup>15</sup>.

However, even if an employed person meets the definition given above, there may be circumstances in which such a person would not be considered a 'frontier worker'. This would only arise in very exceptional circumstances and might involve a person who satisfies the criteria (i.e., travels between the States of residence and employment at least once a week) but who has maintained such personal or professional links with the State of employment so as to give him/her a better chance of finding employment in that State than in the State of residence<sup>16</sup>.

**Example 9:**

*A German national, who has always lived and worked in Germany, moves with his family to Belgium to live close to his children's school. The person retains an office in Germany, as well as sleeping quarters which he uses during the week, and has declared himself a resident of the town in which his office is situated. In addition, all of his business and social contacts are in Germany. Because of these uniquely close links with the State of employment, when he becomes unemployed he would have a better chance of finding new employment in the State of last employment than the State of residence. Because of this, the person should not be regarded as an unemployed frontier worker, but should be regarded as an unemployed person 'other than a frontier worker'*<sup>17</sup>.

### **5.3 Wholly and Partially or Intermittently Unemployed**

The provisions on unemployment benefits for frontier workers are contained in Article 65. This article draws a distinction between a *wholly unemployed* frontier worker and a *partially or intermittently unemployed* frontier worker.

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<sup>14</sup> Article 1(f) Regulation 883/04

<sup>15</sup> Case 236/87 Bergemann

<sup>16</sup> Case 1/85 Miethé

<sup>17</sup> The rules for unemployment benefit for 'workers other than frontier workers' are contained in Article 65. Please see Section 5.6 of this Chapter.

In general, a *wholly unemployed* frontier worker is one whose employment relationship has been broken or has expired, who is looking for new employment and who no longer has any link with the competent State (State of last employment), although they have the right, as a supplementary step, to also make themselves available to the employment services of the state of last employment.<sup>18</sup> They will continue to receive unemployment benefits from the state of residence however.

On the other hand, if there is still an employment link with the State of employment, such as part-time work, then that person will be considered to be *partially or intermittently unemployed* for purposes of the Regulation.

The European Court of Justice has ruled that in order to determine whether a frontier worker is to be regarded as *partially unemployed* or *wholly unemployed* uniform EU criteria must be applied. Such an assessment may not be made on the basis of criteria from national law.<sup>19</sup>

The EU criteria adopted provides<sup>20</sup>:

- Determination of the nature of unemployment (whole or partial) depends on whether or not any contractual link exists or is maintained, and not on the duration of any temporary suspension of the worker's activity.
- If the worker's activity is merely suspended the person should be regarded as partially unemployed.
- In the absence of any contractual link, if the person no longer has any link with the State of last employment, the person should be regarded as wholly unemployed and benefits should be provided by the State of residence at its own expense.

**Example 10:**

*A Dutch national living in the Netherlands is working full-time for a company in Belgium. The employed person then accepts a new contract with the same company, but on a part-time basis. Because there is still a link with the State of employment, this person should be considered a partially or intermittently unemployed person for purposes of Article 65(1).*

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<sup>18</sup> The regulation contains no definition of wholly, partially or intermittently unemployed. This interpretation draws on the both opinion of the Advocate General and the judgement of the Court in the de Latt case, C-444-98.

<sup>19</sup> Case C-444/98 de Laat

<sup>20</sup> See Decision U3 of the Administrative Commission

**Example 11:**

*A person living in Northern Ireland is working on a one year temporary contract as a teacher in the Republic of Ireland. The contract of employment is for 1 academic year – September to June. When the contract expires in June, the teacher wishes to claim Unemployment Benefit. Because the teacher is residing in Northern Ireland and no longer has a link to the Republic of Ireland, (s)he should be considered a wholly unemployed frontier worker, and is therefore subject to UK legislation (Northern Ireland) – as the State of residence.*

It is for the competent institution to decide, having regard to the above criteria, which of the above categories an employed person falls into when deciding on entitlement to unemployment benefit.

**5.4 Wholly unemployed frontier workers**

An exception to the general rule that unemployment benefit should be claimed in the State of employment is made for a wholly unemployed frontier worker who, instead, shall receive unemployment benefits in accordance with the legislation of the State of residence, as if that worker had been subject to the legislation of that State while lastly employed. These benefits shall be paid by the institution of the place of residence according to its own rules and conditions and at its own expense, meaning there will be no reimbursement from the State of employment<sup>21</sup>. Moreover, there is no choice in this for the unemployed person; the State of residence is the competent State and a claim for unemployment benefit cannot be made in the State of employment<sup>22</sup>. As already stated, the unemployed person has the option, as a supplementary step, to make themselves available to the employment services of the State of last employment, but the state of residence remains the competent State.

**Example 12:**

*A person working in Northern Ireland is living in the Republic of Ireland and travels across the border every day. The person is subject to UK legislation(Northern Ireland) and pays his contributions there. However, when (s)he becomes unemployed, the Republic of Ireland is the competent State for Unemployment Benefit/Jobseekers Benefit. The unemployed person must apply to the DSP for Jobseekers Benefit and will have to satisfy the conditions of Irish legislation for entitlement to benefit. They may, as a supplementary step, make themselves available to the northern employment authorities as a way of increasing the likelihood of them getting a job, i.e.*

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<sup>21</sup> Article 65(5)(a) Regulation 883/04

<sup>22</sup> See case C – 1/85 Miethe

*being available for work in both States, but DSP will continue to be the competent state.*

However, if a wholly unemployed frontier worker, who is in receipt of unemployment benefit from the State of residence, decides to transfer his/her residence to the State of last employment, then competency for unemployment benefits will also transfer to that State<sup>23</sup>. In such a case, Article 64 would not apply (i.e. the State of former Residence would not 'export' its unemployment benefit for 3 months) but instead entitlement in that State would cease.

**Example 13:**

*The person in Example 12 who is in receipt of Jobseekers Benefit from DSP decides to transfer his residence to Northern Ireland. In this case, DSP would not apply Article 64, and instead would cease to pay /Jobseekers benefit to the unemployed person. When (s)he moves to Northern Ireland (s)he should claim unemployment benefit there, where the claim would be decided under UK legislation alone.*

**5.5 Partially or Intermittently Unemployed Frontier Workers**

A partially or intermittently unemployed worker shall receive benefits from the State of employment<sup>24</sup>. The benefits will be provided by the competent institution according to its rules and conditions, and at its own expense.<sup>25</sup> The unemployed person will not be able to claim benefits from the State of residence while he is receiving benefits from the competent State<sup>26</sup>.

**Example 14:**

*An employed person is living in Northern Ireland and travels to work in the Republic of Ireland every day. The employed person is placed on short-term work by the employer, meaning (s)he is employed for only 3 days per week. If the employed person wishes to claim Unemployment Benefit for the remaining 3 days, Ireland is competent and the employed person must apply to DSP for Unemployment Benefit/Jobseekers Benefit.*

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<sup>23</sup> Case 131/95 Huijbrechts – ECJ ruled that Article 71(1)(a)(ii) of EC regulation 1408/71, as replaced by Article 65 of 883/04, which provides that State of Residence is competent, is a 'legal fiction' which suspends, but does not extinguish, the competency of the State of Employment. Where the unemployed person then moves residence to the State of employment, this derogation ceases to apply and the principle of competency for the State of Employment is reinstated.

<sup>24</sup> Article 65(1) Regulation 883/04

<sup>25</sup> Article 65(5)(a) Regulation 883/04

<sup>26</sup> Article 10, Regulation 883/04,

## **5.6 Unemployment Benefit for workers other than frontier workers who do not reside in the State of employment – Article 65(2)(3)(5)(b)**

The provisions on unemployment benefits for workers other than frontier workers are contained in Article 65(2)(3)(5)(b). These Articles provide that a wholly, or partially or intermittently unemployed person, other than a frontier worker, has a choice between the unemployment benefits of the State of last employment and those of the State of residence.

Such a person, who does not return to his Member State of residence, is entitled to unemployment benefits from the State of last employment, providing they make themselves available to the employment services of that state. However, a wholly unemployed person, other than a frontier worker, may choose to claim unemployment benefits from the State of residence. These rules are set out in more detail in the following paragraphs.

### **5.6.1 Determining the State of residence**

For the purposes of this section, the State of residence means the State in which the employed person, although employed in a different State, is habitually resident, or where s/he has his/her habitual centre of interests<sup>27</sup>. In determining habitual residence, a deciding officer must take account of a range of factors e.g. how long the person lived in the State of residence before moving to the State of employment, the expected duration and type of employment relationship, the intentions of the employed person.

The factors listed above are not exhaustive and the overall judgement will depend on the EEA State to which the employed person has the strongest ties, and where s/he will find it easier to find employment. However, the concept of residency should be defined relatively strictly, and simply because an employed person's family reside in another EEA State should not be taken as a factor which automatically qualifies the person to be regarded as residing in a State other than the State of employment.

### **5.6.2 Benefits from the Competent State**

A partially, intermittently or wholly unemployed person who does not live in the State of employment, and who is not a frontier worker<sup>28</sup>, shall receive benefits from the competent State provided that the unemployed person does not return home and makes himself available to the employment services of

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<sup>27</sup> See the Di Paolo Judgement, case C-76/76

<sup>28</sup> i.e. one who does not return to the State of residence at least once a week. This could include seasonal workers, or those who return less frequently, e.g., once a month. It would also include workers who temporarily move to another MS to work, but who maintain their centre of interests in the State of Residence.

that State<sup>29</sup>. He will not be able to claim benefits from the State of residence while he is receiving benefits from the competent State<sup>30</sup>.

**Example 15:**

*A UK national comes to Ireland to work on a project for 3 years. However, he maintains his home in the UK while he is in Ireland, and returns there on occasional weekends during his time in Ireland. After 18 months, the project is stopped and he becomes unemployed. So long as he satisfies the conditions for receipt of Jobseekers Benefit under Irish legislation, he shall be entitled to JB from Ireland, to be provided at the expense of DSP.*

**5.6.3 Right to choose between States of Residence and Employment**

In certain very specific circumstances, a wholly unemployed person, who is not a frontier worker, can claim benefits in the competent State, or can choose to return to the State of residence after becoming unemployed and claim unemployment benefits there<sup>31</sup>. In such a case, the requirement that the person has completed a period of insurance will not apply and the State of residence will provide unemployment benefits according to its legislation and at its own expense.

**Example 16:**

*An Irish national goes to the UK to do seasonal work on a farm picking apples on the basis of a 2 month contract. He keeps his residence in Ireland during that time. At the end of the two month period he becomes unemployed, and he decides to return to Ireland without having claimed Jobseekers Benefit in the UK. Provided that the worker presents himself at his local office and satisfies all the normal conditions taking account of periods of insurance completed in the UK, he shall be entitled to Jobseekers Benefit from DSP at its own expense, as if he has last been employed in Ireland.*

**The people to whom this provision applies are those who** resided during their last professional activity in a Member State other than the competent State. The particular categories involved are set out in Decision U2 of the Administrative Commission and include ;

a) the persons referred to in Article 11(4) of Regulation 883/2004. This refers to seafarers employed or self employed on board a vessel flying the flag of a Member State.

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<sup>29</sup> Article 65(2), Regulation 883/04

<sup>30</sup> Article 10 Regulation 883/04

<sup>31</sup> Article 65 (5)(a) Regulation 883/2004

b) the persons referred to in Article 13 of Regulation 883/2004 which include employed and self-employed people pursuing activities in two or more Member States.

c) persons to whom an agreement as referred to in Article 16(1) of Regulation 883/2004 applies. This is where two or more Member States have, by common agreement, provided for exceptions to the standard rules on applicable legislation.

Persons referred to above who, during their last professional activity, were subject to the legislation of a Member State other than the State of the place of activity as an employed or self-employed person, shall be eligible for benefits under the provisions of the legislation of the State of residence, as if they had previously been subject to that legislation.

#### **5.6.4 Claiming benefits in Competent State before returning to State of residence**

If a wholly unemployed worker claims unemployment benefit in the competent State before returning to the State of residence, then (s)he will receive benefits under Article 64 from the competent State, and should not claim benefits from the State of residence until his/her entitlement under Article 64 has expired. The person will be subject to the normal rules contained in an Article 64 procedure, e.g. that the unemployed person register with the employment services of the destination State. After the expiry of the 3 month period under Article 64, unless this period is extended by the competent state up to a maximum of 6 months,, the unemployed person can claim benefit under the legislation of the State of residence, and the requirement that he have completed a period of insurance in that State will not apply.

#### **Example 17:**

*The Irish national in Example 16 above, after becoming unemployed, claims Jobseekers Benefit from the UK (competent State). He then decides to return to Ireland (State of residence) and, because he is already in receipt of Unemployment Benefit from the UK, he will continue to receive his benefit in Ireland for up to 3 months under Article 64, provided that he registers with his nearest local office within 7 days of leaving the UK, and continues to satisfy other domestic requirements. At the expiry of the 3 month period, unless the UK decides to extend the period for which they pay JB, he will be entitled to claim JB from DSP as if he had lastly been employed here.*

## **Reimbursement of Benefits**

The benefits provided by the institution of the place of residence in accordance with Article 65(5) shall continue to be at its own expense. However, the competent institution of the Member State to whose legislation the person was last subject shall reimburse to the institution of the place of residence the full amount of the benefits provided by the latter institution during the first three months. The amount of the reimbursement during this period may not be higher than the amount payable, in the case of unemployment, under the legislation of the competent Member State. The period of reimbursement is extended to five months where the person has, during the preceding 24 months has complete periods of employment or self employment of at least 12 months in the Member State to whose legislation he was last subject. In the case of a person who first received benefits under the legislation of the competent State before returning home, the period during which benefits were provided under Article 64 shall be deducted.

### 5.6.5 Bergemann Ruling<sup>32</sup>

In the *Bergemann* case, The ECJ considered the entitlement of a wholly unemployed person who was not a frontier worker to unemployment benefit from the State of residence, who for family reasons moved residence to an EEA State other than the State of last employment.

Mrs. Bergemann lived and worked in the Netherlands. When she married she transferred her residence to the home of her husband in Germany, where she has never worked or been insured. She applied for unemployment benefit in Germany, which was refused.

The ECJ ruled that Article 71(1)(b)(ii) of the Regulation 1408/71 which is now replaced by Article 65 (5)(b) of EC Regulation 883/04 is applicable to a worker who, in the course of his/her last employment, transfers his/her residence to another EEA State for family reasons and who, after the transfer, no longer returns to the State of employment in order to pursue an occupation there. This rule should be interpreted strictly.

#### **Example 18:**

*Mr. and Mrs. B have lived and worked in the Netherlands. Mr. B is transferred to Ireland by his employer in the Netherlands. Mr. and Mrs. B decide to move to Ireland with their children and Mrs. B resigns from her employment in the Netherlands. She registers as being unemployed in Ireland. As she transferred her residence to Ireland for family reasons, Ireland becomes the competent State and she is entitled to Unemployment Benefit from DSP.*

#### **Example 19:**

*A and B are in a Civil Partnership, and have been living and working in the Netherlands. B is transferred to Ireland by his employer in the Netherlands. A and B decide to move to Ireland with their children and A resigns from her employment in the Netherlands. She registers as being unemployed in Ireland. As she transferred her residence to Ireland for family reasons, Ireland becomes the competent State and she is entitled to Unemployment Benefit from DSP.*

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<sup>32</sup> Case C-236/87 Anna Bergemann

6. CORRELATION TABLE FOR SED's

<b>SEDs NUMBER + NAME</b>	<b>ARTICLE 883/04</b>	<b>ART 987/09</b>	<b>E- FORM</b>	<b>DESCRIPTION OF BUSINESS FLOW (meaning + purpose)</b>	<b>REMARKS ON SEDs</b>
U001 - Request for insurance record	61	54(1)	E301	Competent state requests other Member State(s) to provide it with necessary information about insurance history in order to aggregate periods of insurance, employment or self employment	This SED contains data needed by state of former activity to identify unemployed person's records (specific SED for NO)

U002 - Notification of insurance record	61	54(1)	E301	Member State of former activity of person concerned provides information necessary for aggregation (insurance history)	Insurance history (specific SED for DE)
U003 - Request for salary or professional income	62	54(2)	E301	Competent state calculates benefits based upon previous salary and requires data on earnings	Competent state asks for detailed information on earnings from Member State where unemployed person was previously insured
U004 - Reply request for salary or professional income	62	54(2)	E301	Member State of former activity of person concerned provides information necessary for calculation	Information on earnings (specific SEDs for DE and IT)
U005 - Notification of a benefit claim request for details of dependant family members	5	54(3)	E302	Member State whose calculation of benefits varies with number of members of family requests information on family members of person	Competent state asks for information about family members from each Member State in which a family member resides

				concerned	
U006 - Notification of details of dependant family members	5	54(3)	E302	Member State where family member resides provides required information	Detailed information on each family member
U007 - Request document certifying export of UB	64	55(1 and 2)	E303	State of registration requests document on export	Request for export, indication of date of registration and address of person
U008 - Document certifying mentioned entitlement	64	55(1 and 2)	E303	Competent State provides document on export	Document on export
U009 - Information on date of registration and new address of unemployed person	64	55(4)	E303	State of registration informs competent State about registration of a jobseeker with export	Date of registration and address of person
U010 - Information concerning circumstances likely to affect entitlement	64	55(4)	E303	In case of export of benefits, if circumstances likely to affect entitlement occur, assisting institution informs institution of	Information on occurrence of circumstances and indication whether consequences are required

				competent State about their nature	
U011 - Information about effect of circumstances to entitlement	64	55(4)	-	On request, competent institution informs assisting institution about consequences these circumstances have on entitlement	Information on consequences
U012 - Request for relevant information concerning follow-up of unemployed person's situation	64	55(4)	-	Competent State asks for information concerning follow-up on monthly basis	Request for follow-up
U013 - Information concerning follow-up of unemployed person's situation	64	55(4)	-	Assisting institution informs competent institution on monthly basis whether person is still registered and complying with checking procedures	Yes/no indication each month
U014 - Notification of returning of person in	64	55	-	Competent institution informs assisting	Date of return

competent State				institution about return of unemployed person	
U015 - Notification of extended period granted to unemployed person to export UB	64	55	-	Competent institution informs assisting institution about extension of export period for person	New ending date of export
U016 - Notification of end of entitlement to UB	64	55	-	Competent institution informs assisting institution about termination of entitlement to UB which are exported	Date of termination of entitlement
U017 - Request data	61, 65	54(1)	E301	Exchange of data necessary for award of UB to former cross-border worker by State of residence	Request for data including information needed by state of former activity to identify unemployed person's records
U018 - Reply to request data	61, 65	54(1)	E301	State of last employment provides data necessary for award of UB (BF 2 and 3 may follow if necessary)	Insurance history and specific data for cross-border workers

U019 - Request information on person's registration and search for employment	65(2, 3)	56	-	If former cross-border worker registers also in State of last employment institution of latter State requires information on registration and search for employment in State of residence	Request for information and reference period
U020 - Reply to request for information on person's registration and search for employment	65(2, 3)	56	-	Institution of State of residence informs about date of registration and search for employment	Date of registration and details on search of employment
U021 - Request for information on job seeking activities of unemployed person	65(2, 3)	56	-	Institution of State of residence requests information on job seeking activities of person in State of last employment	Request for information and reference period
U022 - Reply to request for information on job seeking activities of unemployed person	65(2, 3)	56	-	Institution of State of last employment informs State of residence about person's job seeking activities in State of last employment	Details on job-seeking activities in State of last employment

U031 - Request information on entitlement	65(5)(b)	56(3)	E301	Institution of State of residence checks whether person has a right to have UB exported from State of last employment (followed by U008 from State of last employment)	Information on registration of person in State of residence and request for export document (U008 follows from State of employment)
U023 - Request reimbursement	65(6, 7)	70	-	State of residence requests reimbursement of UB paid to cross-border worker	Reimbursement request (overview and single cases details)
U024 - Full acceptance of request	65(6, 7)	70	-	State of last employment accepts request fully	
U025 - Partial or non acceptance of request for reimbursement	65(6, 7)	70	-	State of last employment raises objections against reimbursement request (clarification of objections may follow - governed by EESSI under communication feature)	Reject of reimbursement request as whole or partly indicating reasons

U026 - Information about amount reimbursed	65(6, 7)	70	-	State of last employment informs State of residence about refund made	Identification of corresponding reimbursement request and amount which is reimbursed
U027 - Confirmation of receiving amount reimbursed	65(6, 7)	70	-	State of residence confirms receiving of reimbursed amount	Date of receipt and confirmation of closure of case
U028 - Notification that reimbursement case is closed	65(6, 7)	70	-	State of last employment confirms closure of refund case	
U029 - Information about decision whether interest will be charged	65(6, 7)	68, 70	-	In case of delay, State of residence (creditor) informs State of last employment (debtor) whether interest will be charged	Indication of interest in total and breakdown of single cases
U030 - Response to information about decision to charge interest	65(6, 7)	68, 70	-	State of last employment (debtor) indicates its agreement or disagreement with interest	In case of disagreement, reasons have to be provided