

PART THREE

APPLICABLE LEGISLATION

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I. LEGISLATION APPLICABLE: THE GENERAL RULES

(A) GENERAL RULE 1: LEGISLATION OF ONLY ONE EEA STATE APPLIES AT A TIME

It could cause confusion and hardship if a person was insured in two EEA States at the one time. To overcome this problem, Regulation 883/2004 lays down the following general rule, which we call General rule 1.

General rule 1 The legislation of only one EEA State can apply to a person at any one time.¹

(B) GENERAL RULE 2: LEGISLATION OF THE EEA STATE OF EMPLOYMENT OR SELF-EMPLOYMENT APPLIES

In general, a person can be subject to the social security legislation of only one EEA State at a time. It is therefore necessary to determine which EEA State's legislation is applicable. Regulation 883/2004 lays down a general rule for determining this, which we call General rule 2.

General rule 2 A person is covered by the social security legislation of the EEA State where s/he is carrying out an activity as an employed or self-employed person.²

This general rule also extends to a person who is receiving certain cash benefit because of or as a consequence of pursuing an activity as an employed or self-employed person.³

This rule applies even if:

- the person resides in another EEA State;⁴
- the registered office or place of business of the employer is in another EEA State;⁵

¹ Article 11(1) of Regulation 883/2004.

² Article 11(3)(a) of Regulation 883/2004.

³ Article 12 (2) of Regulation 883/2004

⁴ Article 13(2)(a) and (b) of Regulation 883/2004.

⁵ Article 13(2)(a) of Regulation 883/2004.

- the person is employed only part-time in the EEA State of employment or self-employment;⁶
- the person would have greater social security benefits under the law of another EEA State.⁷

So, for example:

e.g.1 X works in Newry in Northern Ireland but lives in Dundalk in the Republic of Ireland. UK social security law applies.

e.g.2 X works in Strabane in Northern Ireland as a sales representative for a company in Letterkenny in the Republic of Ireland. He also lives in Letterkenny. UK social security law applies.

e.g.3 X works in Newry in Northern Ireland but lives in Dundalk in the Republic of Ireland. He does not meet the eligibility requirements for a certain social security benefit under UK legislation. However, he meets the eligibility requirements for the equivalent social security benefit under Irish legislation. UK legislation is applicable.

e.g. 4 X is a migrant worker from State B. He worked in the Republic of Ireland for 5 years before falling ill. He qualified for Illness Benefit (a cash sickness benefit) from DSP. He returned to State B in order to recuperate. As he is in receipt of a cash benefit as a consequence of his activity as an employed person in Ireland he is to be considered as pursuing that activity. He is therefore subject to Irish legislation.

However, there are *special rules* for:

- certain employed persons (Part II of this Chapter);
- certain self-employed persons (Part III of this Chapter);
- persons who are employed and self-employed in different EEA States (Part IV of this Chapter);
- civil servants and other similar persons (Part V of this Chapter);
- mariners (Part VI of this Chapter);
- post-active persons (Part VII of this Chapter);
- persons subject to Article 16 agreements (Part VIII of this Chapter);
- certain cases regarding voluntary and continued optional insurance.

⁶ Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755.
⁷ Case 302/84 *Ten Holder* [1986] ECR 1821.

Persons who do not fall within any of these special categories are subject to General rule 2.

(C) EXCLUSIVE AND BINDING EFFECT

The rules on applicable legislation in Regulation 883/2004 have exclusive and binding effect. This requires some explanation.

1. Exclusive effect

The rules on applicable legislation in Regulation 883/2004 have exclusive effect. This means that once the legislation of an EEA State is applicable to a person:

- *that person may only rely on the social security legislation of that EEA State.* This is so even if he would have had greater entitlements if the legislation of another EEA State applied.⁸ So, for example, if a person is employed in Dundalk in the Republic of Ireland and in Newry in Northern Ireland but due to the special rules outlined in this Chapter, Irish legislation is applicable, his right to benefits will be determined under Irish legislation and he will have to pay Irish contributions. Of course, there is nothing to prevent the UK also deciding to pay benefits to the person, but Regulation 883/2004 cannot compel the UK to do so.
- *that person may only be required to pay contributions in accordance with the law of that EEA State and should be treated as if he pursued all his activities in the EEA State concerned.*⁹ So, for example, if a person is employed in Dundalk in the Republic of Ireland and in Newry in Northern Ireland, but due to the special rules outlined in this Chapter, Irish legislation is applicable, he will pay the contributions required under Irish legislation. He cannot be obliged to pay contributions under UK legislation.

2. Binding effect

The rules on applicable legislation in Regulation 883/2004 also have binding effect. This means that once the legislation of an EEA State is applicable to a person according to the rules in Regulation 883/2004, that EEA State cannot refuse benefit to a person for reasons such as:

⁸ Case 302/84 Ten Holder [1986] ECR 1821.

⁹ Case 102/76 Perenboom [1978] ECR 815 and Article 13(5) of Regulation 883/2004.

- because he has not been resident for long enough in that EEA State;¹⁰
- because he is not a national of that EEA State;
- because he is not employed or self-employed in that EEA State;
- because his employer is not established in that EEA State.

This is because the rules for the determination of the applicable legislation in Regulation 883/2004 are binding and exhaustive. EEA States cannot add to them by, for example, requiring the claimant to be a resident of the EEA State in question.¹¹

Any attempt to impose such conditions on a person subject to the legislation of an EEA State would be contrary to EC law. However, there are *exceptions* to the binding effect of Regulation 883/2004. An EEA State is entitled to restrict the special non-contributory benefits described in Chapter 3 Part IV(B) to those persons who are resident in that EEA State.¹²

II. SPECIAL RULES FOR CERTAIN EMPLOYED AND SELF EMPLOYED PERSONS

General rule 2 says that a person is subject to the legislation of the place where he is employed or self-employed. However, there are special rules for employed persons who are:

- (A) posted workers;
- (B) persons who pursue an activity as employed persons in two or more EEA States ;
- (C) persons who pursue an activity as self-employed person in two or more EEA States; ;

These rules also apply to mariners unless they come within the special rule applicable to mariners which is dealt with under Part IV below.

¹⁰ Case 276/81 Kuijpers [1982] ECR 3027.

¹¹ See, however, Case 110/79 Coonan [1980] ECR 1445. Under the rules on applicable legislation in Regulation 1408/71, UK legislation was applicable to Mrs Coonan, a 65 year old woman who had taken up employment in the UK. Under UK law a person could not be insured for UK sickness benefits unless she was also insured for UK old age benefits. Mrs Coonan was not admitted to the old age insurance scheme because of her age. She was therefore unable to claim sickness benefits. The Court held that this was not contrary to the rules on applicable legislation in Regulation 1408/71 since EEA States retained the power to determine the conditions for affiliation to social security schemes so long as they did not add to or amend the rules on applicable legislation in Regulation 1408/71.

¹² Article 70(4) of Regulation 883/2004.

A. WHICH SOCIAL SECURITY SYSTEM IS APPLICABLE FOR EMPLOYEES AND SELF-EMPLOYED WORKERS TEMPORARILY POSTED TO ANOTHER MEMBER STATE?

1. BACKGROUND

Sometimes an employer in one Member State (“the posting State”) will want to send an employee to work in another Member State (“the State of employment”)¹³. Such employees are known as *posted workers*.

Under Community rules, workers moving within the European Union must be subject to a single social security legislation¹⁴. Under the Regulations the social security scheme applicable to those who for reasons of work move from one Member State to another is, generally speaking, that established by the legislation of the Member State of new employment.

In order to give as much encouragement as possible to the freedom of movement of workers and services, to avoid unnecessary and costly administrative and other complications which would not be in the interests of workers, companies and administrations, the Community provisions in force allow for certain exceptions to the general principle referred to above.

The main exception is the requirement to maintain the attachment of a worker to the social security scheme of the Member State in which the undertaking which employs him normally operates (the posting State), whenever the worker concerned is sent by that undertaking to another Member State (the State of employment) for a period of time which from the outset is limited (a maximum of 24 months), and provided that certain conditions, discussed below in more detail, continue to apply.

These situations – which give exemption from the payment of insurance contributions in the State of employment – better known as **posting of workers**, are governed by Article 12 of Regulation 883/2004.

The rules, which cover both employed people and self-employed people, are described below.

¹³“ The State of employment” is the State in which the person goes to pursue an activity as an employed (or self-employed) person as defined in Article 1(a) and 1(b) of the Basic Regulation.

¹⁴ (Article 11 (1) of Regulation 883/2004

2. HOW IS THE POSTING OF WORKERS DEFINED IN THE SPECIFIC COMMUNITY LEGISLATION?

In line with the above mentioned provisions of the Regulation, a person who works as an employed person in the territory of a Member State on behalf of an employer **which normally carries out its activities in that State** who is sent by that employer to another Member State to perform work there **for that employer** continues to be subject to the legislation of the posting State provided that:

- **the anticipated duration of that work does not exceed 24 months**
and
- **s/he is not sent to replace another posted person¹⁵.**

The posting arrangements are intended to facilitate employers (and workers) who have a requirement for people to work on a temporary basis in another country. Accordingly, they may not be used to staff enterprises or contracts on an ongoing basis through repeated postings of different workers to the same positions and for the same purposes.

Accordingly, in addition to the temporary nature of the posting and the fact that it is not designed to replace another worker, there are several important points to note about this special rule.

In the first instance, the employer must **normally carry out its activities** in the posting State. Additionally, the rule that the worker 'pursues an activity on behalf of an employer' means that there must exist throughout the period of posting a **direct relationship** between the posting employer and the posted worker.

3. WHAT CRITERIA APPLY TO DETERMINE IF AN EMPLOYER NORMALLY CARRIES OUT ITS ACTIVITIES IN THE 'POSTING' STATE?¹⁶

The expression "which normally carries out its activities there" means an undertaking which ordinarily carries out **substantial activities** in the territory of the Member State in which it is established. If the undertaking's activities are confined to internal management, the undertaking will not be regarded as normally carrying out its activities in that Member State. In determining whether an undertaking carries out substantial activities, account

¹⁵ Article 12 of Regulation 883/2004

¹⁶ Paragraph 1 of Decision A2 of the Administrative Commission

must be taken of all criteria characterising the activities carried out by the undertaking in question. The criteria must be suited to the specific characteristics of each undertaking and the real nature of the activities carried out.

The existence or otherwise of substantial activities in the posting State can be checked via a series of objective factors and the following are of particular importance. **It should be noted that this is not an exhaustive list, as the criteria should be adapted to each specific case and take account of the nature of the activities carried out by the undertaking in the State in which it is established. It may also be necessary to take into account other criteria suited to the specific characteristics of the undertaking and the real nature of the activities of the undertaking in the State in which it is established:**

- the place where the posting undertaking has its registered office and its administration;
- the number of administrative staff of the posting undertaking present in the posting State and in the State of employment – the presence of only administrative staff in the posting State rules out *per se* the applicability to the undertaking of the provisions governing posting;
- the place of recruitment of the posted worker;
- the place where the majority of contracts with clients are concluded
- the law applicable to the contracts signed by the posting undertaking with its clients and with its workers;
- the number of contracts executed in the posting State and the State of employment;
- the turnover achieved by the posting undertaking in the posting State and in the State of employment during an appropriate typical period (e.g. turnover of approximately 25% of total turnover in the posting State could be a sufficient indicator, but cases where turnover is under 25% would warrant greater scrutiny)¹⁷.
- the length of time an undertaking is established in the posting Member State.

When assessing substantial activity in the Posting State it is also necessary for institutions to satisfy themselves that the employer requesting a posting is the actual employer of the workers involved. This would be particularly important in situations where an

¹⁷ In principle, the turnover can be assessed on the basis of the published accounts of the undertaking for the previous 12 months. However, in the case of a newly established undertaking turnover from the time they commenced business (or a shorter period, if that would be more representative of their business) would be more appropriate.

employer is using a mix of permanent staff and agency staff. For example;

Company A from Member State X has an order to do painting work in Member State Y. The work is expected to take two months. Along with 7 members of its permanent staff company A needs in addition 3 temporary workers from temporary work agency B to be sent to Member State Y; these temporary workers have already been working in company A. Company A requests work agency B to post these 3 temporary workers to Member State Y along with its 7 workers.

Provided that all the other conditions of posting are met, the legislation of Member State X will continue to apply to the temporary agency workers – as to the permanent staff members. Temporary work agency B is, of course, the employer of the temporary workers.

4. WHEN IS IT POSSIBLE TO SPEAK OF A DIRECT RELATIONSHIP BETWEEN THE POSTING UNDERTAKING AND THE POSTED WORKER?¹⁸

A number of principles emerge from the interpretation of the provisions and from Community case law and daily practice governing when a **direct relationship** exists between the posting undertaking and the posted worker. These include the following:

- responsibility for recruitment
- it must be evident that the contract was and still is applicable throughout the posting period to the parties involved in drawing it up and stems from the negotiations that led to recruitment;
- the power to terminate the contract of employment (dismissal) must remain exclusively with the 'posting' undertaking;
- the 'posting' undertaking must retain the power to determine the "nature" of the work performed by the posted worker, not in terms of defining the details of the type of work to be performed and the way it is to be performed, but in the more general terms of determining the end product of that work or the basic service to be provided;
- the obligation with regard to the remuneration of the worker rests with the undertaking which concluded the employment contract. This is without prejudice to any possible agreements between the employer in the sending

¹⁸ Paragraph 1 of Decision A2 of the Administrative Commission

State and the undertaking in the State of employment on the manner by which the actual payments are made to the employee;

- the power to impose disciplinary action on the employee remains with the posting undertaking.

Some Examples:

1. Company A based in Member State A sends a worker temporarily abroad to perform work in company B situated in Member State B. The worker continues to hold a contract with company A only from which he is entitled to claim remuneration.

Solution: Company A is the employer of the posted worker since the worker's claim for remuneration is directed at company A only. This is true even if company B refunds the remuneration in part or in full to company A deducting it as operating expenses from tax in Member State B.

2. Company A based in Member State A sends a worker temporarily abroad to perform work in company B situated in Member State B. The worker continues to have a contract with company A. His corresponding claims to remuneration are also directed at undertaking A. However, the worker concludes an additional work contract with company B and receives also remuneration from company B.

Solution a): For the duration of his employment in Member State B the worker has two employers. When he works exclusively in Member State B, the legislation of Member State B applies to him pursuant to Article 11 (3) of Regulation 883/2004. This implies that the remuneration paid by company A is taken into account for determining the social insurance contributions payable in Member State B.

Solution b): If from time to time the worker works also in Member State A, the provisions of Article 13 (1) of Regulation 883/2004 must be used to assess whether the legislation of Member State A or that of Member State B is applicable.

3. Company A based in Member State A sends a worker temporarily abroad to perform work in company B situated in Member State B. The employment contract with company A is suspended for the period of the worker's activity in Member State B. The worker concludes an employment contract with company B for the period of his activity in Member State B and claims his remuneration from that company. Solution: This is not a case of posting since a

suspended employment relationship does not contain sufficient labour law ties to warrant the continued application of the legislation of the posting State. Pursuant to Article 11 (3) (a) of Regulation 883/2004 the worker is subject to the legislation of Member State B.

If the social security legislation of Member State B applies in principle, an exception may be agreed in both cases in accordance with Article 16 of Regulation (EC) No. 833/2004 taking account of the fact that the employment in Member State B is of a temporary nature, provided that such an exception is in the interest of the worker and an application to this effect is made. Such an agreement requires the approval of both of the Member States involved.

5. WHAT ABOUT WORKERS RECRUITED IN ONE MEMBER STATE FOR POSTING IN ANOTHER?

The rules on posting of workers can include a person who is recruited with a view to their being posted to another Member State. However, the Regulations do require that a person being posted to another Member State is attached to the social insurance system of the Member State in which his employer is established immediately before the start of his employment¹⁹. A period of **one month** can be considered as meeting this requirement with shorter periods requiring a case by case evaluation taking account of all the factors involved²⁰. Employment with any employer in the Posting State meets this requirement. It is not necessary that the person work for the employer requesting his posting during this period. The condition is also fulfilled by students or pensioners or someone who is insured due to residence and attached to the social security scheme of the posting State.

All the normal conditions that apply to the posting of workers in general, also apply to such workers.

Some examples to clarify what the term attachment to the social security scheme "immediately before" the start of the employment means in particular cases:

On 1 June, employer A based in Member State A posts among others workers X, Y and Z to Member State B for a period of ten months to perform work on behalf of employer A.

¹⁹ Article 14 (1) of Regulation (EC) No 987/2009

²⁰ Administrative Commission Decision A2

Worker X started his employment with employer A on 1 June. Immediately before the start of his employment he had been living in Member State A being subject to the legislation of Member State A since he attended a course at university.

Worker Y started his employment with employer A also on 1 June. He had lived in Member State A immediately before the start of his employment; he was a frontier worker and as such had been subject to the legislation of Member State C.

Worker Z who also started his employment with employer A on 1 June had worked in Member State A since 1 May. As a result of this employment he was subject to the legislation of Member State A. However, immediately before 1 May worker Z had been subject to the legislation of Member State B for 10 years as a result of an employment relationship.

Solution: One of the requirements for the continued application of the legislation of the posting State is that the social security legislation of the posting State must have applied to the worker immediately before his posting. But it is not required that the worker was employed in the posting undertaking immediately before his posting. Workers X and Z were subject to the legislation of Member State A immediately before 1 June and hence meet the requirement for the continued application of the legislation of the posting State in this respect. Worker Y, however, was subject to the legislation of Member State C immediately before 1 June. Since he was not subject to the legislation of the posting State immediately before his posting, he will in principle be subject to the legislation of Member State B, in which he actually works.

6. WHAT IF A WORKER IS POSTED TO WORK IN SEVERAL UNDERTAKINGS?

The fact that a posted person works at various times or during the same period in several undertakings in the same Member State of employment does not rule out the application of the provisions governing posting. The essential and decisive element in this case is that the work must continue to be carried out on behalf of the posting undertaking. Consequently, it is necessary always to check the existence and continuation throughout the posting period of the direct relationship between the posted worker and the posting undertaking

Posting to different Member States which immediately follow each other shall in each case give rise to a new posting within the

meaning of Article 12 (1). The posting provisions do not apply in cases where a person is normally simultaneously employed in different Member States. Such arrangements would fall to be considered under the provisions of Article 13 of the basic regulation.

7. ARE THERE SITUATIONS IN WHICH IT IS ABSOLUTELY IMPOSSIBLE TO APPLY THE PROVISIONS ON POSTING?

There are a number of situations in which the Community rules *a priori* rule out the application of the provisions on posting.

In particular, when:

- The undertaking to which the worker has been posted places him/her at the disposal of another undertaking in the Member State in which it is situated;
- The undertaking to which the worker is posted places him/her at the disposal of an undertaking situated in another Member State;
- The worker is recruited in a Member State in order to be sent by an undertaking situated in a second Member State to an undertaking in a third Member State without the requirements of prior attachment to the social insurance system of the posting State being satisfied;
- The worker is recruited in one Member State by an undertaking situated in a second Member State in order to work in the first Member State.
- The worker is being posted to replace another posted person. In exceptional circumstances it would be possible to replace a person who has already been posted, provided the period allowed for the posting has not been completed. An example where this might arise would be a situation where a worker was posted for 20 months, became seriously ill after 10 months and needed to be replaced. In that situation it would be reasonable to allow another person to be posted for the remaining 10 months of the agreed period.
- The worker has agreed a labour contract with the undertaking to which he is posted.

In such cases the reasons which prompted stringent exclusion of the applicability of posting are clear: the complexity of the relations stemming from some of these situations, as well as offering no guarantee as to the existence of a **direct relationship** between the worker and the posting undertaking, contrasts starkly with the objective of avoiding administrative complications and fragmentation of the existing insurance history which is the *raison*

d'être of the provisions governing posting. It is also necessary to prevent wrongful use of the posting provisions.

8. WHAT ABOUT SELF-EMPLOYED PEOPLE TEMPORARILY WORKING IN ANOTHER MEMBER STATE?

Sometimes a person who is normally self-employed in one Member State ("the posting State") will want to go to work temporarily in another Member State ("the State of employment").

Like posted employees, it would cause administrative difficulties and confusion if a self-employed person temporarily working in another Member State became subject to the legislation of the State of employment. Also, the self-employed person might lose out on benefit.

The Regulations therefore provide a special rule for self-employed persons working temporarily in another Member State which resembles - but is not identical to - the rule for posted employees.

This rule provides that a person **normally self-employed in the posting Member State** who pursues a **similar** activity in the Member State of employment continues to be subject to the legislation of the posting State provided that the anticipated duration of that work does not exceed 24 months²¹.

²¹ Article 12.2 of Regulation 883/2004

9. WHAT CRITERIA APPLY TO DETERMINE IF A PERSON IS NORMALLY SELF-EMPLOYED IN THE POSTING STATE?²²

The Regulations provide that a person “who normally pursues an activity as a self-employed person” means a person who habitually carries out substantial activities in the territory of the Member State in which he/she is established. In particular this applies to a person who

- has pursued his/her self employed activity for some time before the date when he/she moves to another Member State and
- fulfils any necessary requirements for his/her business in the Member State in which they are established and continues to maintain there the means to enable them to exercise his/her activity on his/her return.

When determining whether a person is normally self-employed in the sending Member State it is important to examine the above criteria. Such examination could involve assessing if the person²³;

- keeps an office in the posting State;
- pays taxes in the posting State;
- maintains a VAT number in the posting State;
- is registered with chambers of commerce or professional bodies in the posting State;
- has a professional card in the posting State.

The Regulations require that a self employed person wishing to avail of the posting arrangements “must have already pursued his activity for some time” before the date of posting. In this regard a period of 2 months can be considered as satisfying this requirement, with shorter periods requiring a case by case evaluation²⁴.

10. WHAT DOES ‘SIMILAR’ ACTIVITY MEAN?

When determining whether a person is going to another Member State to pursue a “similar” activity to that pursued in the posting State, account must be taken of the actual nature of the activity. It does not matter how this type of activity is categorised in the State of employment i.e. whether it is designated as employment or self-employment.

²² Article 14 (3) of Regulation 987/2009

²³ Administrative Commission Decision A2

²⁴ Administrative Commission Decision A2

In order to determine if the work is “similar”, the work which the person sets out to perform must be determined in advance, before departure from the posting State. The self-employed person should be able to prove this, for example by producing contracts regarding the work.

In general, self employed activity in the same sector would be regarded as pursuing a similar activity. However, it must be recognised that even within sectors, work can be very diverse and it may not always be possible to apply this general rule.

Examples:

1. A is a person who normally works as a self employed carpenter in State X and moves to State Y where he works as a self-employed butcher. He would not be regarded as pursuing a “similar activity” as the employment in State Y bears no similarity to his work in State X.

2. B runs a construction company in State X and accepts commissions relating to the installation of piping and wiring systems. B signed a contract in the State Y for the works consisting in installing the wiring system and repairing the foundation.

B may take advantage of the provisions of Article 12(2) because he/she is intending to move to the State Y to take up a similar activity, that is, an activity within the same sector (construction).

3. C pursues activities as a self-employed person in the State X which consists in providing transport services. C temporarily moves to the State Y to perform a contract installing the wiring system and repairing the foundation. Due to the fact that the activity performed in the State Y differs from the activity pursued in the State X (different sectors: X – transport, Y – construction), C cannot take advantage of the provisions of Article 12(2) of the basic Regulation.

4. D is a self-employed solicitor specialising in criminal law in State X. He secures an assignment in State Y advising a large undertaking on corporate governance. While the area he is working in is different, nevertheless, he is still active in the legal area and so can avail of the posting provisions.

11. WHAT PROCEDURES MUST BE FOLLOWED IN THE CASE OF A POSTING?

An undertaking which posts a worker to another Member State, or in the case of a self-employed person the person himself/herself, must contact the competent institution in the posting State and wherever possible this should be done in advance of the posting.

The competent institution in the posting State shall without delay make information available to the institution in the State of employment of the legislation that is to apply. The competent institution in the posting State must also inform the person concerned, and his/her employer in the case of an employed person, of the conditions under which they may continue to be subject to its legislation and the possibility of checks being made throughout the posting period to ensure these conditions are met.

An employee or self-employed person to be posted to another Member State or his employer shall be provided with an attestation A1 (formerly E 101 certificate) from the competent institution. This attestation certifies that the worker comes within the special rule for posted workers up to a specific date. It should also indicate, where appropriate, under what conditions the worker comes within the special rules for posted workers.

12. AGREEMENTS ON EXCEPTIONS TO THE LEGISLATION GOVERNING POSTING.

The Regulations provide that a posting period may not last any longer than 24 months.

However, Article 16 of Regulation 883/2004 permits the competent authorities of two or more Member States to reach agreements providing for exceptions to the rules governing applicable legislation, and that includes the *special rules* governing posting already outlined above. Article 16 agreements require the consent of the institutions of both the Member States involved and can only be used in the interests of a person or category of persons. Accordingly, while administrative convenience may well result from agreements between Member States, the achievement of this cannot be the sole motivating factor in such agreements, the interests of the person or persons concerned must be the primary focus in any considerations.

For example, if it is known that the anticipated duration of a posting for a worker will extend beyond 24 months, an Article 16 agreement must be reached between the posting State and State/s of employment if a worker is to remain subject to the legislation

applicable of the posting State. Article 16 agreements might also be used to permit a posting retrospectively where this is in the interest of the worker concerned, e.g. where the wrong Member State's legislation was applied. However, retrospection should only be used in very exceptional cases.

When it can be foreseen (or becomes clear after the posting period has already commenced) that the activity will take more than 24 months, the employer or the person concerned must submit, without delay, a request to the competent authority in the Member State whose legislation the person concerned wishes to apply to him/her. This request should be sent wherever possible in advance. If a request for an extension of the posting period beyond 24 months is not submitted or if, having submitted a request, the States concerned do not make an agreement under Article 16 of the Regulations to extend the application of the legislation of the sending State, the legislation of the Member State where the person is actually working will become applicable as soon as the posting period ended.

13. ONCE A POSTING HAS BEEN COMPLETED WHEN CAN A PERSON APPLY FOR ANOTHER POSTING?

Once a worker has ended a period of posting, no fresh period of posting for the same worker, the same undertakings and the same Member State can be authorized until at least two months have elapsed from the date of expiry of the previous posting period. Derogation from this principle is, however, permissible in specific circumstances²⁵.

On the other hand, if the posted worker could not complete the work due to unforeseen circumstances, he, or his employer, may request an extension of the initial posting period until the completion of such work (up to 24 months in total) without taking into account the necessary break of at least 2 months. Such request must be submitted and substantiated before the end of the initial posting period.

Examples:

Worker A is posted from Member State A to Member State B for 12 months. During that period he falls seriously ill for 3 months and cannot pursue and complete the anticipated work in Member State B. Because he could not complete the work due to unforeseen

²⁵ See also Administrative Commission Decision A2

circumstances, he, or his employer, can request a 3 month extension of the initial posting period continuing immediately after the original 12 months has elapsed.

Worker B is posted from Member State A to Member State B for 24 months in order to perform construction work there. During that period it becomes evident that, because of difficulties with the project, the work cannot be completed by the end of the 24 months. Even though worker B is unable to complete the work due to unforeseen circumstances, an extension of the initial posting period continuing immediately after the 24 months have elapsed cannot be granted by the posting State. The only way in which this can be dealt with is if the institutions concerned conclude an Article 16 agreement (see point 12). In the absence of such an agreement the posting will finish after 24 months.

14. WHAT IS THE POSITION IN RELATION TO POSTINGS ALREADY AUTHORISED AND STARTED UNDER REGULATION 1408/71? DO THESE PERIODS COUNT TOWARDS THE 24 MONTH PERIOD ALLOWED UNDER REGULATION 883/2004?

Regulation 883/2004 does not contain any explicit provision on aggregation of posting periods completed under the old and new Regulations. However, the clear intention of the legislator was to extend the maximum possible period of posting to 24 months.

Therefore, under the new Regulations, once the worker has ended a posting period of 24 months in total, no fresh period of posting for the same worker, the same undertakings and the same Member State can be granted (except in the context of an Article 16 agreement)²⁶.

The following examples illustrate how periods completed under both Regulations should be treated.

- a. Posting E 101 form issued from 1.5.2009 until 30.4.2010 → continued posting under Regulation 883/2004 until 30.4.2011 possible
- b. Posting E 101 form issued from 1.3.2010 until 28.2.2011 → continued posting under Reg. 883/2004 until 28.2.2012 possible

²⁶ See also Administrative Commission Decision A2

- c. Posting E 101 form issued from 1.5.2008 until 30.4.2009 + E 102 form from 1.5.2009 until 30.4.2010 → no continued posting possible under Reg. 883/2004 as the maximum posting period of 24 months is already completed
- d. Posting E 101 form issued from 1.3.2009 until 28.2.2010 + E 102 from 1.3.2010 until 28.2.2011 → no further extension possible under Reg. 883/2004 as the maximum posting period of 24 months has already been completed.
- e. Request for a posting on 1.4.2010 until 31.3.2012. This period cannot fall under the posting provisions of Reg. 1408/71 because it is longer than 12 months. An Art. 17 agreement is therefore necessary.

15. SUSPENSION OR INTERRUPTION OF THE POSTING PERIOD

Suspension of work during the posting period, whatever the reason (holidays, illness, training at the posting undertaking etc.) does not constitute a reason which would justify an extension of the posting period for an equivalent period. Therefore the posting will end precisely upon expiry of the programmed period, irrespective of the number and duration of events which prompted the suspension of activity.

Derogation from this principle is, however, permissible according to Decision No A2 in specific circumstances if the posting period does not exceed 24 months in total (see point 13).

In case of sickness of 1 month a posting period which was initially programmed to take 24 months cannot be extended to 25 months from the beginning of the posting.

In case of longer suspension of work it is up to the persons concerned either to stick to the previously programmed period of posting or to end the posting with a view to arranging a new posting by the same person, taking into account the necessary break of at least 2 months as mentioned under point 13, or another person if the relevant criteria are met.

16. NOTIFICATION OF CHANGES OCCURRING DURING THE POSTING PERIOD

The posted worker and his employer must inform the authorities in the sending State of any change occurring during the posting period, in particular;

- if the posting applied for has, in the end, not taken place or was terminated ahead of schedule.
- if the activity is interrupted other than in the case of brief interruptions arising from illness, holidays, training etc. (see under point 13 and 15)
- if the posted worker has been assigned by his employer to another undertaking in the Sending State, in particular in the event of a merger or a transfer of undertaking.

The competent institution in the Sending State should, where appropriate and upon request, inform the authorities in the State of employment in the event of any of the above occurring.

17. PROVISION OF INFORMATION AND MONITORING OF COMPLIANCE

In order to ensure proper use of the posting rules, the competent institutions in the Member State to whose legislation the workers remain subject, must ensure that appropriate information is made available to both employers and posted workers of the conditions which apply to the posting (e.g. via information leaflets, websites), alerting them to the possibility that they may be subject to direct controls designed to check that the conditions which permitted the posting continue to exist.

While providing undertakings and workers with every guarantee to avoid obstacles to the freedom of movement of workers and the free provision of services, the competent institutions of the posting and the employment States, individually or in cooperation, shall take responsibility for all initiatives designed to check the existence and the continuation of the conditions which characterise the specific nature of posting (direct relationship, substantial activities, similar activity, maintenance in the State of residence of the means to pursue self-employed activity etc.).

The procedures to be followed where competent authorities disagree on the validity of posting arrangements, or the appropriate legislation which should be applied in particular cases, are set out in Decision A1 of the Administrative Commission.

(B) PERSONS NORMALLY WORKING IN TWO OR MORE EEA STATES

1. WHICH SOCIAL SECURITY SYSTEM IS APPLICABLE TO PERSONS NORMALLY WORKING IN TWO OR MORE MEMBER STATES?

There is a special rule for persons normally working in two or more Member States. This rule is designed, as are all the rules for determining the applicable legislation, to ensure that the social security legislation of only one Member State is applicable. Accordingly, the Regulations provide that a person normally working in two or more Member States is subject to:

- (i) the legislation of the **Member State of residence** if he works for one employer in different Member States and pursues a **substantial part of his activity** in that Member State;

Example:

A person lives in the State A. S/he works for the same employer in the States: A, B, C and D. S/he works in the State A twice a week (2 days a week), and in the States B, C and D once a week (1 day a week in each country). Having analysed this person's working time, it can be concluded that s/he pursues a substantial part of his/her activity in the Member State of residence, and so is subject to the legislation of that Member State.

- (ii) the legislation of the **Member State of residence** if he is employed by **various undertakings** or **various employers** whose registered offices or places of business are in **different Member States**;
- (iii) the legislation of the **Member State in which the registered office or place of business of the undertaking employing him** is situated if he **does not pursue a substantial part of his activity in the Member State of residence**.

- (iv) If a person pursues his activity as an employed person in two or more Member States on behalf of an employer established outside the territory of the Union, and if the person resides in a Member State without pursuing substantial activity there, s/he shall be subject to the legislation of the Member State of residence²⁷.

These rules are similar in nature to those contained in Article 14 of Regulation 1408/71 but are simplified. In particular, the revised rules remove the special provisions of Regulation 1408/71 relating to travelling or flying personnel and introduce the concept of 'substantial activity'.

These rules therefore apply to a large number of workers. For example, airline staff, international truck drivers, train drivers, international couriers, computer experts and other professionals who work, for example, for 2 days in one Member State and 3 days in another Member State are all covered by these special rules.

2. WHEN CAN A PERSON BE REGARDED AS NORMALLY PURSUING AN ACTIVITY IN TWO OR MORE MEMBER STATES?²⁸

The Regulations provide that a person who 'normally pursues an activity as an employed person in two or more Member States' means in particular a person:

- Who while working in one Member State, at the same time carries out another separate activity in one or more Member States irrespective of the duration and nature of this second activity;
- Who exercises continuously alternating activities, excluding activities of a marginal extent, in two or more Member States irrespective of the frequency or the regularity or irregularity of the different activities.

3. HOW IS SUBSTANTIAL ACTIVITY DEFINED²⁹?

A 'substantial part of employed activity' pursued in a Member State means that a quantitatively substantial part of all activities of the

²⁷ Article 14(11) Implementing Regulation

²⁸ Article 14 (5) of Implementing Regulation

²⁹ Article 14(8) Implementing Regulation 987/09.

worker is pursued there, without this necessarily being the major part of these activities.

For the purposes of determining whether a substantial part of the activity of an employed person is pursued in a Member State account **must** be taken of:

- The working time; and/or
- The remuneration

If in the context of carrying out an overall assessment it emerges that **less than 25%** of the person's working time is carried out in a Member State and/or less than 25% of the person's remuneration is earned in a Member State this shall be an indicator that a **substantial part of all the activities of the worker is not pursued** in that Member State.

While it is obligatory to take account of working time and/or remuneration this is not an exhaustive list and other criteria may also be taken into account.

In addition to the above criteria, when determining which Member State's legislation is to apply, the assumed future situation in the following 12 calendar months **must** also be taken into account.

So, for example:

A is a computer consultant. He works for a company in its Member State A and Member State B branches. He lives in Member State A where a substantial part of his activity is carried out i.e. at least 25% of his work is carried out there and/or 25% of his remuneration derives from there. Since he resides in Member State A and satisfies the requirement that a substantial part of his activity is carried on in Member State A, that State's legislation is applicable. See Paragraph 1 (i) above. If, on the other hand less than 25% of his work (or remuneration earned) was in Member State A, the legislation where the firm has its registered office or business would be applicable.

B is a lawyer. She works in the Member State A for a law firm whose place of business is in Member State A, and in Member State B for a law firm whose place of business is in Member State B. She lives in Member State C. The legislation of Member State C is applicable. See Paragraph 1 (ii) above.

C is a lawyer. She works for two different law firms, one in Member State A and one in State B, which is also the State in which she lives. Most of her activity is in State A and she does not satisfy the substantial activity requirement in her State of residence. Nevertheless, the legislation of the State of residence applies because she is employed by different enterprises whose places of business are in different Member States. See Paragraph 1 (ii) above.

D is a pilot. He works for a company whose registered office is in Member State A and from where he receives his remuneration. He resides in Member State B but a substantial part of his activity is not pursued there. The legislation of Member State A applies. See paragraph 1 (iii).

E is employed by a company whose registered office is in Member State A. E has never worked in Member State A. The company provides truck drivers to various international transport companies. The employee does not work in Member State A or in Member State B where he resides. As he does not pursue any part of his activity in the Member State of residence the legislation of Member State A applies.

4. WHAT PROCEDURES MUST BE FOLLOWED BY A WORKER IN THE EVENT THAT S/HE IS WORKING IN TWO OR MORE MEMBER STATES³⁰?

A person normally employed in two or more Member States must notify this situation to the competent institution of the Member State in which s/he resides. The institution in the State of residence must determine which Member State's legislation is applicable taking account of the rules outlined above. This determination must be made without delay and shall initially be on a provisional basis. The institution in the place of residence must then inform the competent institutions of each of the Member States in which an activity is pursued of its determination.

The provisional determination becomes definitive within 2 months of the other institutions being informed unless:

³⁰ Article 16 of Regulation 987/2009

- in cases where there is uncertainty, the legislation has been already definitively determined by agreement between the Member States concerned having regard to the above rules; or
- one of the institutions informs the institution in the State of residence that it cannot yet accept the determination or it takes a different view.

Where there is a difference of views and agreement cannot be reached on the legislation to apply, the rules on provisional application of legislation and provisional granting of benefits will apply.

The competent institution of the Member State whose legislation is applicable either on a provisional basis or definitively must inform the person immediately of the decision.

A person normally employed in two or more Member States who fails to notify this situation to the competent institution of the Member State in which s/he resides is also subject to these rules as soon as the institution in the Member State of residence is made aware of the person's situation.

5. WHAT ABOUT SELF-EMPLOYED PEOPLE WHO ARE NORMALLY SELF-EMPLOYED IN TWO OR MORE MEMBER STATES³¹?

There is a special rule for persons normally self-employed in two or more Member States which provides that:

A person normally self-employed in two or more Member States is subject to:

- the legislation of the Member State of residence if he pursues a substantial part of his activity in that Member State ;
- the legislation of the Member State in which the centre of interest of his activity is situated if he does not reside in one of the Member States in which he pursues a substantial part of his activity.

³¹ Article 13(2) of Regulation 883/2004

6. WHEN CAN A PERSON BE REGARDED AS NORMALLY PURSUING AN ACTIVITY AS A SELF-EMPLOYED PERSON IN TWO OR MORE MEMBER STATES?

A person who “normally pursues an activity as a self-employed person in two or more Member States” means in particular a person who simultaneously or alternatively exercises one or more separate self-employed activities in the territories of two or more Member States. The nature of the activities does not matter when making this determination.

In this regard care needs to be taken not to confuse temporary postings, as provided for under Art 12(2), and the provisions relating to someone who pursues an activity in two or more Member States. In the former the person is performing an activity in another Member State for a finite period. In the latter activities in different Member States is a normal part of how the self-employed person conducts their business.

7. HOW IS SUBSTANTIAL PART OF SELF-EMPLOYED ACTIVITY DEFINED?³²

A 'substantial part of self-employed activity' pursued in a Member State means that a quantitatively substantial part of all activities of the worker is pursued there, without this necessarily being the major part of these activities.

For the purposes of determining whether a substantial part of the activity of a self-employed person is pursued in a Member State account **must** be taken of:

- The turnover;
- The working time;
- The number of services rendered; and/or
- The income

If in the context of carrying out an overall assessment it emerges that a share of less than 25% of the above criteria are met, this is an indicator that a substantial part of all the activities of the worker is not pursued in the relevant Member State.

While it is obligatory to take account of these criteria this is not an exhaustive list and other criteria may also be taken into account.

8. WHAT PROCEDURES MUST BE FOLLOWED BY A SELF EMPLOYED PERSON IN THE EVENT THAT S/HE IS WORKING IN TWO OR MORE MEMBER STATES?

The procedures to be followed by a self-employed person working in two or more Member States are the same as those which apply to an employed person as outlined in 4.above.

9. WHAT CRITERIA APPLY TO DETERMINE WHERE THE CENTRE OF INTEREST OF ACTIVITIES IS LOCATED³³?

If a person does not reside in one of the Member States in which he/she pursues a substantial part of his/her activity, he/she shall be subject to the legislation of the Member State in which the centre of interest of his/her activities is located.

³² Article 14 of Regulation 987/2009

³³ Article 14 (9) of Regulation 987/2009

The centre of interest of activities should be determined by taking account of all the aspects of that person's occupational activities, notably the following criteria.

- the locality in which the fixed and permanent premises from which the person concerned pursues his activities are situated;
- the habitual nature or the duration of the activities pursued;
- the number of services rendered; and
- the intention of the person concerned as revealed by all the circumstances.

In addition to the above criteria, when determining which Member State's legislation is to apply, the assumed future situation in the following 12 calendar months must also be taken into account.

So, for example:

A is self-employed. She pursues the substantial part of her activities in Member State A and also works as a self-employed person in Member State B. She resides in Member State A. The legislation of Member State A is applicable since she pursues the substantial part of her activities in this State and also resides there.

B is self-employed. She pursues part of her activity in Member State A and part in the Member State B. She lives in Member State C. Her fixed and permanent premises are in Member State B. However, most of her business is carried on in Member State A. B is subject to the legislation of Member State B since she does not reside in any of the Member States in which she works and her fixed and permanent premises are in Member State B. It does not matter that most of her business is in Member State A since she does not reside there.

C is self-employed. He pursues part of his activity in Member State A and part in Member State B. He lives in Member State C. He has no permanent and fixed premises. However, he works mostly in Member State B and earns most of his income there. It is his intention to build his business in Member State B and is in the process of acquiring permanent premises. C is subject to the legislation of Member State B since he does not reside in any of the Member States in which he works but it is his intention as supported by the circumstances, including his

future plans, to make Member State B the centre of interest of his activity.

A person normally self-employed in two or more Member States must notify this situation to the competent institution of the Member State in which he resides³⁴. The institution in the State of residence must determine which Member State's legislation is applicable taking account of the rules outlined above. This determination must be made without delay and shall initially be on a provisional basis. The institution in the place of residence must then inform the competent institutions of each of the Member States in which an activity is pursued of its determination.

The provisional determination shall become definitive within 2 months of the other institutions being informed unless:

- in cases where there is uncertainty, the legislation has been already definitively determined by agreement between the Member States concerned having regard to the above rules; or
- one of the institutions informs the institution in the State of residence that it cannot yet accept the determination or it takes a different view.

Where there is a difference of views and agreement cannot be reached on the legislation to apply, the rules on provisional application of legislation and provisional granting of benefits shall apply.

The competent institution of the Member State whose legislation is applicable either on a provisional basis or definitively must inform the person immediately of the decision.

A person normally self-employed in two or more Member States who fails to notify this situation to the competent institution of the Member State in which he resides is also subject to these rules as soon as the institution in the Member State of residence is made aware of the person's situation.

10. WHAT IS THE SITUATION IN RELATION TO A PERSON WHO IS BOTH EMPLOYED AND SELF-EMPLOYED IN DIFFERENT MEMBER STATES³⁵?

³⁴ Article 16(1) of Regulation 987/2009

³⁵ Article 13(3) of Regulation 883/2004

A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he pursues an activity as an employed person. Where, in addition to being self-employed, he pursues an activity as an employed person in more than one Member State the criteria outlined in paragraph 1 will apply.

11. ARE THERE ANY SPECIAL ARRANGEMENTS IN PLACE FOR A PERSON WORKING IN MORE THAN ONE MEMBER STATE WHERE THE LEGISLATION APPLICABLE HAS ALREADY BEEN DECIDED UNDER REGULATION 1408/71

Article 87 (8) of Regulation 883/2004 provides that if, as a result of the introduction of the new Regulation, a person would be subject to the legislation of a Member State other than the one already determined in accordance with Regulation 1408/71, then the previous decision will continue to apply provided the relevant situation remains unchanged.

If necessary, the competent Member State as lastly determined under Regulation 1408/71 and which issued the certificate on legislation applicable (form E101) shall assess if the relevant situation remains unchanged and provide a new attestation on legislation applicable (Portable Document A1).

A change of the "relevant situation" as referred to in Article 87(8) of Regulation 883/2004 means that after the entry into force of Regulation 883/2004, one of the decisive criteria/elements for the determination of legislation applicable under Title II of Regulation 1408/71 changed and this change would lead to the result that the person concerned would be subject to the legislation of a Member State other than that lastly determined in accordance with Title II of Regulation 1408/71. The following changes might be regarded as a relevant change and warrant a review of the applicable legislation.

- a) change of the employer (with exception of transfer of business according to Directive 2001/23)
- b) end of an activity; in case of simultaneous work contracts, termination of one of the activities/work contracts
- c) taking up of a new (additional) substantial activity as an employed or self-employed person
- d) change of activity in case of self-employed person
- e) change in residence to another Member State.
- f) change in the registered office or place of business of the employer to another Member State.

- g) change in centre of interest in case of self-employed person working in 2 and more Member States.

The expiry of an attestation on legislation applicable (form E101, certificate A1) is not regarded as a change in the 'relevant situation'.

12. CAN A PERSON COVERED BY THE TRANSITIONAL ARRANGEMENTS OPT TO BE ASSESSED UNDER REGULATION 883/2004?³⁶

A person whose applicable legislation was decided in accordance with Regulation 1408/71 and to whom the transitional arrangements apply can apply to have their situation assessed under Regulation 883/2004. Any such request made by the 31st July 2010 will result in the change in applicable legislation taking effect from the 1st May 2010 i.e. the date from which the new Regulations apply. A request received after the 31st July 2010 i.e. later than three months after the new Regulations became applicable, will take effect from the 1st day of the month following that in which the application is made,.

³⁶ Article 87(8) of Regulation 883/2004

III. CIVIL SERVANTS AND OTHER IN CERTAIN MISCELLANEOUS SITUATIONS

(A) CIVIL SERVANTS

General rule 2 provides that a person is subject to the legislation of the place where he is employed or self-employed. However, there is a special rule for civil servants.

Special rule for civil servants Civil servants are subject to the legislation of the EEA State to which the administration employing them is subject.³⁷

A person who is:

- employed as a civil servant in an EEA State
and
- employed and/or self employed in one or more other EEA State

is subject to the legislation of the EEA State in which he is insured as a civil servant.³⁸

There is no definition of a civil servant as such in the Regulation. Instead, this concept is defined in national legislation.

In Ireland there are no special schemes for civil servants within the scope of Regulation 883/2004. However, several other EEA States have such schemes.³⁹

(B) AUXILIARY STAFF OF THE EUROPEAN COMMUNITIES

³⁷ Article 11((3)(a) of Regulation 883/2004.

³⁸ Article 13(4) of Regulation 883/2004.

³⁹ E.g. Spain, Belgium, Denmark, Germany, France, Greece, Luxembourg, Austria, Portugal, Italy, Finland, Sweden,

As well as having permanent staff, the European Communities also employ certain persons on temporary contracts. These people are known as auxiliary staff.

Regulation 883/2004 lays down special rules for auxiliary staff of the European Communities, that is to say, staff of all institutions of the European Community as well as all staff of the institutions of certain related bodies, namely EURATOM and the European Coal and Steel Community.

Special rule for auxiliary staff of the European Communities Auxiliary staff of the European Communities may opt to be subject to the legislation of:

- the EEA State in whose territory they are employed;
- the EEA State to which they were last subject; or
- the EEA state whose nationals they are.⁴⁰

This right of option may be exercised once only at the time when the contract of employment is concluded.⁴¹ The right of option takes effect from the date of entry into employment.⁴²

The relevant European Communities institution authorised to conclude the contract of employment must inform the institution of the EEA State for whose legislation the auxiliary has opted. That EEA State must then provide the person on request with a certificate testifying that he is subject to its legislation.⁴³

(C) PERSONS RECEIVING UNEMPLOYMENT BENEFITS

Special rule for persons in receipt of Unemployment Benefit under Article 65 of Regulation 883/2004 A person receiving unemployment benefits in accordance with Article 65 of Regulation 83/2004 under the legislation of the Member State of residence is subject to the legislation of that Member State.⁴⁴

⁴⁰ Article 15 of Regulation 883/2004.

⁴¹ Article 15 of Regulation 883/2004

⁴² Article 15 of Regulation 883/2004.

⁴³ Article 19 of Regulation 987/2009.

⁴⁴ Article 11 (3) (c) of Regulation 883/2004

Article 65 of Regulation 883/2004 contains special rules for unemployed person who resided in a Member State other than the competent State. See Chapter X for more information on these rules.

This special rule whereby a person who comes within these provisions is receiving unemployment benefits from the State of residence means that the state of residence is also responsible for the other benefits, i.e. sickness and maternity benefits, invalidity benefits and family benefits and this state also has to take into account unemployment periods for the purpose of calculating pension rights.

(D) PERSONS CALLED UP FOR CIVILIAN OR MILITARY SERVICE

Special rule for persons called up for military or civilian service Persons who are called up or recalled for service in the armed forces or for civilian service by an EEA State shall be subject to the legislation of that State.⁴⁵

If the person pursues his/her activity in an EEA State other than the competent State, the employer must inform the competent institution of the EEA State whose legislation is applicable wherever possible in advance that the activity is to be pursued in an EEA State other than the competent State.⁴⁶

If the person does not pursue his/her activity as an employed person, the onus to provide this information to the competent institution rests with the person himself/herself.⁴⁷

⁴⁵ Article 11(3)(d) of Regulation 883/2004.

⁴⁶ Article 15(2) of Regulation 987/2009

⁴⁷ Article 15(2) of Regulation 987/2009

IV. MARINERS

There are two rules for Mariners.

Rule 1 for mariners A person employed on board a vessel flying the flag of an EEA State shall be subject to the legislation of that EEA State.⁴⁸

Rule 2 for mariners paid by an undertaking from an EEA State in which they are resident A person who is:

- employed on board a vessel flying the flag of an EEA State *and*
- paid for this work by an undertaking or person whose registered office or place of business is in another EEA State *and*
- is resident in that other EEA State

is subject to the law of that other EEA State.⁴⁹

e.g.1 C is an Irish national resident in France. She is employed on board a fishing vessel flying the Irish flag. However, she is paid for her work by an undertaking with registered offices in France. The special rule for mariners paid by an undertaking from an EEA State in which they are resident applies. C is therefore subject to French law.

e.g.2 D is an French national resident in France. She is employed on board a fishing vessel flying the Irish flag. She is paid for her work by an undertaking whose registered offices are in Germany. The special rules for mariners paid by an undertaking from an EEA State in which they are resident does not apply. Instead, the normal rule applies that a person employed on board a vessel flying the flag of an EEA State is subject to the law of that EEA State. Thus, Irish law applies.

The undertaking or person paying the remuneration of a person who comes within this rule is considered to be the employer.⁵⁰ The

⁴⁸ Article 11(4) of Regulation 883/2004.

⁴⁹ Article 11(4) of Regulation 883/2004

⁵⁰ Article 11(4) of Regulation 883/2004

employer must inform the competent institution of the EEA State whose legislation is applicable wherever possible in advance. This institution must make the information concerning the legislation applicable available to the competent institution of the Member State whose flag the vessel on which the worker is to pursue his activity is flying. This must be done without delay.⁵¹

⁵¹ Article 15 (3) of Regulation 987/2009

PART V. POST-ACTIVE PERSONS AND PENSIONERS

Special rule for persons who have ceased employment Any person who does not come within one of the rules in Part II to IV of this Chapter is subject to the legislation of the Member State of residence.⁵²

This rule applies to a person who has ceased his working activities (as opposed to merely ceasing employment without having decided never to work again) or who is in receipt of invalidity, old-age or survivor's pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

In order to determine if a person comes within this rule:

- it is necessary to check the legislation of the last EEA State to which he was subject before he/she ceased his working activities. That legislation may provide that he is still eligible for cash benefits because of or as a consequence of his/her working activities in that State;
- if not, he will be subject to the legislation of the EEA State in which he currently resides.⁵³

If he/she resumes employment or self-employment, then the General rules in Part I of this Chapter and the special rules in Parts II to IV will apply again to determine the legislation applicable.

So, for example:

e.g.1 A works in Newry in Northern Ireland but lives in Dundalk in the Republic of Ireland. She takes maternity leave followed by a career break. She continues to be subject to the law of her place of employment, the UK.

e.g.2 A works in Newry in Northern Ireland but lives in Dundalk in the Republic of Ireland. Upon becoming pregnant, she decides to give up all work outside the home permanently. UK legislation may provide that she is still eligible for benefits in the UK. If not, she will be subject to Irish legislation.

⁵² Article 11(3)(e) of Regulation 883/2004

⁵³ Article 11(2) & (3)(e) of Regulation 883/2004

Finally, the recipient of a pension due under the legislation of one or more EEA States who resides in the territory of another EEA State may request to be exempted from the legislation of the EEA State of residence provided that he is not subject to that legislation because of the pursuit of an occupation.⁵⁴

⁵⁴ Article 16 (2) of Regulation 883/2004.

VI. ARTICLE 16 AGREEMENTS

General rule 2 provides that the applicable legislation shall be the legislation of the place of employment or self-employment.

However, Article 16 of Regulation 883/2004 permits the competent authorities of two or more EEA States to reach agreements providing for exceptions to General rule 2 or to any of the *special rules* outlined in Parts II-IV above in the interest of certain persons or categories of persons. Thus Article 16 agreements can only be used in the interests of a person or category of persons. They cannot be used for other reasons, such as for administrative convenience.

For example, if it is known that the anticipated duration of a posting for a worker will extend beyond 24 months, an Article 16 agreement can be reached between the sending and receiving EEA States. Article 16 agreements might also be used to permit a posting retrospectively where this is in the interest of the employee concerned, e.g. where the wrong EEA State's legislation was applied.

VII. VOLUNTARY INSURANCE OR OPTIONAL CONTINUED INSURANCE

The rules in Parts II to IV do not apply to voluntary insurance or optional continued insurance, unless there exists in any EEA State only a voluntary scheme of insurance in respect of the relevant risk (old age, sickness, maternity etc.)⁵⁵

Where application of the legislations of two or more EEA States entails overlapping of insurance:⁵⁶

- under a compulsory scheme and a voluntary or optional continued scheme, then the person shall be subject exclusively to the compulsory scheme;
- under two or more voluntary or optional continued insurance schemes, the person concerned may join only the voluntary or optional continued scheme for which he has opted.

However, in the case of invalidity, old age and survivor's pensions, the person concerned may join the voluntary or optional scheme of an EEA

⁵⁵ See Article 14 of Regulation 883/2004.

⁵⁶ See Article 14(2) of Regulation 883/2004.

State, even if he is compulsorily subject to the legislation of another EEA State, provided that:

- he has, at some stage in his career, been subject to the legislation of the EEA State as an employed or self-employed person to whose voluntary or optional scheme he wishes to join; and
- if such overlapping is explicitly or implicitly admitted in this EEA State.⁵⁷

If admission to a voluntary or optional continued scheme in an EEA State is conditional on the person having being resident in that State or having been employed or self-employed in that State, residence and or employment /self-employment in another EEA State to meet this requirement can only be taken into account if the person had at some stage in his/her career been subject to the legislation of the EEA State as an employed or self-employed person to whose voluntary or optional continued scheme he/she wishes to join.⁵⁸

⁵⁷ See Article 14(3)) of Regulation 883/2004.

⁵⁸ See Article 14 (4) of Regulation 883/2004

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SEDs NUMBER + NAME	ARTICLE 883/04	ARTICLE IN 987/09	EQUIVALENT E-FORM	DESCRIPTION OF BUSINESS FLOW (meaning + purpose)
A001 - Request for application for exception	16	18	E101	Designated body of MS requests designated body of MS whose legislation should apply for exception from application articles 11-15 883/2004 giving reasoning for this
A002 - Reply to application for exception	16	18	E101	Requested designated body agrees/disagrees with the request for exception

A003 - Determination of applicable legislation	11.2, 11.3.a,b,c ,d,e;11.4; 12;13.1,1 3.2,13.3, 13.4;15;1 6.1	6.1.a,b,c;1 5,16,19	E101	CI informs other MSs about the fact that to a person applies its legislation in accordance and gives reference to a concrete article; in case of art. 13 of 883/2004 and whenever art. 6 IR applies - the determination will be on provisional basis and further clarification is needed
A011- Request for More Information	11.2;11.3 .a;11.4;1 2.1;12.2; 13.1;13.2	11;14;15;1 6	E001	Request from CI or any other institution in order to determine which legislation applies
A012 - Reply to Request for More Information	11.2;11.3 .a;11.4;1 2.1;12.2; 13.1;13.2	11;14;15;1 6	E001	Reply on the request for information
H010 - Request for Information on Residence	Title II	11	E001	Request for information in any situation where determination of residence for purposes of determination legislation is needed
H011- Reply to Request for Information on Residence	Title II	11	E001	Reply to request for information on residence

A004 - Decision on Determination Legislation Applicable	15	17	E103	EC authority informs the designated institution that its law applies
A-009 - Applicable Legislation - Request for information to establish date	11.1; 76	2.1; 2.2; 20.1; 20.2.	E001, E101, E500	Request for Information enabling to Establish the Date when Legislation begins to Apply
A010 - Reply to Request for Information to Establish Date	11.1; 76	2.1; 2.2; 20.1; 20.2.	E001, E101, E500	Information on Date when legislation of the replying MS started to apply and reference to the relevant article
A013 - Notification of Date to Last Competent Member State	11.1; 76	20.2	E001, E101, E500	CI of MS whose legislation started to apply informs CI of the previous (last) MS whose legislation applied