

# **ADM Chapter C2: Personal Independence Payment**

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# Persons Subject to Immigration control C2005 - C2019

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## Persons subject to immigration control

C2005 Unless one of the exemptions described below applies, a PSIC is **not entitled** to PIP<sup>1</sup>.

[1 I & A Act 99, s 115\(1\)](#)

### Meaning of PSIC

C2006 [[See Memo ADM 07/21](#)] A PSIC is<sup>1</sup> a person who is not an EEA or Swiss national and who

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

[1 I & A Act 99, s 115\(9\)](#)

### Meaning of “maintenance undertaking”

C2007 A “maintenance undertaking” means<sup>1</sup> a written undertaking under the immigration rules made by one person to be responsible for the claimant’s maintenance and accommodation.

[1 I & A Act 99, s 115\(10\)](#)

### Exemptions

C2008 [[See Memo ADM 07/21](#)] For PIP, the exemption from the exclusion of PSIC applies to<sup>1</sup>

- 1.** members of the family of a national of an EEA country provided that<sup>2</sup>

**1.1** the EEA national is exercising their rights as a worker or self-employed person under the EEA

Agreement<sup>3</sup> and

**1.2** the family member has rights under the EEA Agreement as a family member

**2.** a person who is lawfully working in GB and is a national of a State with which the EU has made an Agreement under a specific Treaty<sup>4</sup> providing, in the field of social security, for equal treatment of workers and any member of their family living with them;

**3.** a sponsored immigrant regardless of the length of stay in the UK.

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

1 [SS \(I&A\) Cpl Amndt Regs, reg 2\(2\) & Sch Part II](#); **2 CDLA/708/07**;

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

## Meaning of member of the family

C2009 For the purposes of C2008 **1.** someone is a “member of the family” of a person where they are<sup>1</sup>

**1.** their spouse or civil partner

**2.** direct descendants (e.g. children, grandchildren) of the person or their spouse or civil partner who are

**2.1** under the age of 21 or

**2.2** dependent on the person or on the person’s spouse or civil partner

**3.** dependent direct relatives in the ascending line (e.g. father, grandfather) of the person or the person’s spouse or civil partner.

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

1 [Directive 2004/38/EC, art 2](#), CDLA/708/07

## Meaning of EEA Country

C2010 The European Economic Area (EEA) comprises all the Member states of the EU plus Norway, Liechtenstein and Iceland.

## Meaning of Sponsored Immigrant

C2011 A sponsored immigrant is a person (A) who has been given leave to enter or remain in the UK upon

another person (B) making a maintenance undertaking for that person (A) in accordance with the immigration rules as defined in specific legislation<sup>1</sup>.

1 [Immigration Act 1971, s 33\(1\) & 3\(2\)](#)

## **Person subject to immigration control & EU right to reside**

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

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

There are occasions where a person subject to immigration control can claim public funds. This can be, for example, where they are the family member of an EEA national (see ADM C1735) and that EEA national is exercising a freedom of movement right (for example as a worker or a self-employed person), or where they demonstrate a derivative right of residence (for example, Ibrahim/Teixeira) (see ADM C1832). The granting of leave to enter or remain (whether granted with or without recourse to public funds) is made under the Immigration Rules. Where the claimant has been granted leave to enter or remain without recourse to public funds, and that person also has a right to reside under the Imm (EEA) Regs 2016, the condition of having "no recourse to public funds" does not have effect for as long as the person has a right to reside under the Imm (EEA) Regs 2016<sup>1</sup>.

1 [Imm \(EEA\) Regs 2016, reg 43 & Sch 3, para 1](#)

## **Claimant unable to provide documentary evidence of nationality**

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

C2014 Evidence of nationality must be in the form of

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

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

C2015 The evidence in C2014 should contain information detailing

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

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

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

### **Continuation of leave**

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

[1 Immigration Act 1971, s 3C](#)

### **Deportation orders**

C2018 An EEA national (or family member of an EEA national) may be deported from the UK, where it is decided that the person's removal is justified on the grounds of public policy, public security or public health<sup>1</sup>.

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

C2019 A person exercising a right to reside under the Imm (EEA) Regs 2016 (for example, a permanent right of residence) continues to hold that status until such time as a deportation order is served<sup>1</sup>.

**Note:** DMs should note that the serving of the deportation order invalidates any leave to remain in the UK<sup>2</sup>.

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

# Domestic law – Residence and Presence conditions C2020-C2028

[Introduction](#) C2020

## Introduction

C2020 Under the Act, a person is not entitled to PIP unless they meet prescribed conditions relating to residence and presence in GB<sup>1</sup>.

1 [WRA 12, s 77\(3\)](#)

C2021 The prescribed conditions are that **on any day** the claimant<sup>1</sup>

**1.** is present in GB **and**

**2.** has been present in GB for a period of (or periods amounting in total to) 104 weeks in the 156 weeks immediately preceding that day **and**

**3.** is habitually resident in the UK, the Republic of Ireland, the Isle of Man or the Channel Islands **and**

**4.** is

**4.1** not a PSIC within the meaning of specific legislation<sup>2</sup> (see C2006) **or**

**4.2** exempt from the legislation excluding PSICs from PIP<sup>3</sup> (see C2008 et seq)

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

1 [SS \(PIP\) Regs, reg 16](#); 2 [I & A Act 99, s 115\(9\)](#); 3 [SS \(I&A\) CqI Amendts Regs, reg 2\(2\)](#)

## Meaning of “Great Britain”

C2022 GB includes

**1.** England and Wales, and Scotland

**2.** adjacent islands including, Orkney, Shetland, the Hebrides, the Isles of Scilly, the Isle of Wight and Lundy

1 Union with Scotland Act 1706 preamble & Art 1; Union with England Act 1707 (Scottish Parliament), Art

1

C2023 Northern Ireland<sup>1</sup>, the Isle of Man<sup>2</sup> and the Channel Islands<sup>3</sup> are not part of GB.

1 R(S) 5/85, para 9; 2 CSU 14/48; R(U) 8/81; 3 R(P) 2/64

## Present in GB

C2025 To be present in a place means to be physically there on the day or period in question. It is not the same as being resident in a place. A person may be resident in a place without being present there<sup>1</sup> and vice versa.

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

## Past Presence Test

C2026 [[See Memo ADM 14-21](#)] [[See Memo ADM 11/22](#)] [[See Memo ADM 01-23](#)] [[See Memo ADM 10-23](#)] [[See Memo ADM 17-23](#)] The condition is that, with regard to any particular day of potential entitlement to PIP, the claimant must have been present in GB for a period of (or periods totalling) 104 weeks in the 156 weeks immediately preceding that day<sup>1</sup>.

**Note:** See C2133 et seq for guidance on the EU rules which allow period abroad to be included as periods of presence in the UK for the purposes of the past presence test.

1 [SS \(PIP\) Regs, reg 16\(b\)](#)

### Example 1

Margery claims PIP on 2.9.14. She reports that she had been living in Australia since 2009 but returned to GB to live here permanently on 15.8.12. The DM calculated that, during the 156 weeks ending immediately before 2.9.14, Margery had been present in GB for 106 weeks and 6 days and so decided that she satisfied the past presence test.

### Example 2

Tom claims PIP on 13.10.14. He reports that he has been living with relatives in South Africa since 2008 but says that he moved back to GB permanently on 8.11.12. The DM calculated that, during the 156 weeks ending on 12.10.14, Tom had been present in GB for less than 104 weeks. The DM decided that Tom did not immediately satisfy the past presence condition. However he accepted Tom's claim as also being a claim in advance for the period beginning on 06/11/14 because on 05/11/14 Tom completed 104 weeks of presence.

C2027 From 17.3.16 PPT is no longer to be applied to claims submitted by refugees and their family members or to people with Humanitarian Protection status and their families<sup>1</sup>. All claimants must satisfy the other conditions of entitlement.

1 [2016] UKUT 149 {AAC}

## **Terminal illness**

C2028 Where a claimant is terminally ill and makes a claim for PIP expressly on that ground, the past presence test will not apply<sup>1</sup>. A person is “terminally ill”<sup>2</sup> at any time if at that time the person suffers from a progressive disease and the person’s death in consequence of that disease can reasonably be expected within 12 months.

1 [SS PIP Regs, reg 21](#); 2 [WRA 12, s 82\(4\)](#)

## Habitual residence C2029 - C2054

[Habitual residence](#) C2029 - C2031

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## Habitual residence

**[See Memo ADM 14-21]**

C2029 [\[See Memo ADM 11-22\]](#) [\[See Memo ADM 01-23\]](#) **[See Memo ADM 10-23]** **[See Memo ADM 17-23]** The condition of entitlement is that, on any day for which PIP is claimed, the claimant must be habitually resident in the UK, the Republic of Ireland, the Isle of Man or the Channel Islands (collectively known as the Common Travel Area (CTA)).

C2030 There is no definition of “habitual residence” in UK domestic or EU law. However the meaning of this phrase has been discussed in case law. Although broadly similar, there are some differences between the meaning of habitual residence in UK domestic law and the meaning that has developed in EU law.

C2031 Where EU applies the EU law meaning will take precedence, but if EU law does not apply the meaning developed in domestic law should be applied. EU law will apply if the person concerned has exercised their right<sup>1</sup> to move and reside freely in the territory of the Member States.

1 [TFEU, Art 21](#)

## Meaning in UK law

**[See Memo ADM 14-21]** **[See Memo ADM 11-22]**

C2032 [\[See Memo ADM 01-23\]](#) **[See Memo ADM 10-23]** **[See Memo ADM 17-23]** expression “habitual

residence“ should be given its ordinary and natural meaning. DMs should determine the question by considering all the facts of the case in a common sense way and applying the relevant case law.

### **Requirement to establish a residence that is habitual in nature**

C2033 To be habitually resident in a country a person must have actually taken up residence and lived there for a period. It is not sufficient that the person came to this country voluntarily and for settled purposes. He must be resident in fact for an appropriate period of time which demonstrates that his residence has become, and is likely to remain, habitual in nature<sup>1</sup>.

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

### **Settled intention to remain**

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

### **Relevant factors**

C2035 Whether and when a person’s residence has become habitual in nature is a question of fact. The period is not fixed and depends on the facts of each case. Amongst the relevant factors to be taken into account are bringing possessions so far as is practicable, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, and having durable ties with the country of residence or intended residence<sup>1</sup>. The list is not exhaustive and any facts which may indicate whether or not the residence is habitual in nature should be taken into account.

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

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

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

C2038 A person’s financial viability may be a relevant factor, but the test for habitual residence should not be applied so as to prevent access to public funds. It must be applied in a way that allows for the possibility of a claimant establishing both habitual residence and an entitlement to benefits<sup>1</sup>.

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

## **Appropriate period of time**

C2039 The appropriate period of time need not be lengthy if the facts indicate that a person's residence has become habitual in nature at an early stage<sup>1</sup>. In some circumstances the period can be as little as a month, but it must be a period which is more than momentary in a claimant's life history<sup>2</sup>. A period of between one and three months is likely to be appropriate to demonstrate that a person's residence is habitual in nature. Cogent reasons should be given where a period longer than three months is considered necessary<sup>3</sup>.

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

## **Becoming habitually resident**

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

## **Resuming a previous habitual residence**

C2041 There may be special cases where a person who has previously been habitually resident in the UK resumes that habitual residence immediately when he returns to the UK following a period living abroad<sup>1</sup>. The only element of habitual residence that is bypassed by a returning former resident is the need to be resident in the UK for an appreciable period. Factors to be considered in deciding whether the previous habitual residence has been immediately resumed include the settled intention to remain, whether the person is in a position to make an informed decision about residence in the UK, the ties and contacts with the UK retained or established by the person while abroad, the reasons why the claimant left the UK and became habitually resident elsewhere, the similarity between their residence in the UK now and when they were previously here, and the length of the period of absence<sup>2</sup>. This is a different situation to that where a person is temporarily absent from the UK and does not lose their habitual residence during that period of absence.

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

## **Meaning in EU Law**

C2042 When deciding whether a person is habitually resident for EU law DMs should consider whether a person is resuming a previous habitual residence before taking into account other factors in paragraph C2042 below.

## **Resuming previous residence**

C2043 A person with habitual residence in the CTA who exercised his right to freedom of movement under EU law and then returns to resume his residence in the CTA may be habitually resident immediately on his return<sup>1</sup>.

C2044 A PIP claimant who

1. was previously habitually resident in the CTA **and**
2. moved to live in another Member State **and**
3. returns to resume the previous habitual residence

is habitually resident immediately on arrival in the CTA.

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

### **Factors to take into account**

C2046 When deciding where a person is habitually resident for EU law, the DM should take into account the

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

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

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

### **Centre of interest**

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

### **Length and continuity of residence**

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

## **Length and purpose of absence**

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

## **Employment**

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

## **Intentions**

C2051 The fact that a person may intend to live in the UK for the foreseeable future does not, of itself, mean that habitual residence has been established. However, the claimant's intentions along with other factors, for example the purchase of a home in the UK and the disposal of property abroad may indicate that the claimant is habitually resident in the UK.

C2052 A claimant who intends to reside in the UK for only a short period, for example on holiday, to visit friends or for medical treatment, is unlikely to be habitually resident in the UK.

## **Treated as Habitually Resident**

### **Members of Her Majesty's Forces**

C2053 A claimant who is resident outside GB in their capacity of a member of Her Majesty's Forces (see the definition in C2062-3) is treated as habitually resident in the CTA<sup>1</sup>.

1 [SS \(PIP\) Regs, reg 20\(a\)](#)

### **HM Forces – Family Members**

C2054 A claimant who is living with a person who is abroad in the capacity of a member of Her Majesty's Forces (as defined in C2062-3), and who is that person's

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

**6.** step-father or step- mother

shall be treated as habitually resident in the CTA<sup>1</sup>.

1 [SS \(PIP\) Regs, reg 20\(b\)](#)

# Absence from Great Britain C2056 - 2069

[Introduction](#) C2056

[Meaning of temporary absence](#) C2057

[Members of HM forces, aircraft carriers & mariners](#) C2061

[HM forces - family members](#) C2069

## Introduction

C2056 In certain circumstances a person who is absent from GB can be treated as present. This applies to four groups

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

**Note** Periods when the claimant is treated as present under paragraphs C2056 to C2068 also count as periods of presence for the purpose of the past presence test

## Meaning of “temporarily absent”

C2057 A claimant is temporarily absent if, at the beginning of the period of absence, their absence is unlikely to exceed 52 weeks<sup>1</sup>.

1 [SS \(PIP\) Regs, reg 17\(2\)](#)

## Temporary absence - Up to 13 weeks

C2058 A claimant who is temporarily absent (see C2056) from GB shall be treated as present for the first 13 weeks of absence<sup>1</sup>. At the end of that 13 weeks, unless helped by the EU law provisions – see C2070 et seq or, exceptionally, one of the other absence rules described in C 2058 to C2069 applies, the claimant will cease to satisfy the condition of entitlement to PIP that they be present in GB.

1 [SS \(PIP\) Regs, reg 17\(1\)](#)

## Absence to Receive Medical Treatment

C2059 Where<sup>1</sup>

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

**3.1** outside GB **and**

**3.2** during the period whilst the claimant is temporarily absent from GB **and**

**3.3** by, or under the supervision of, a person appropriately qualified to carry out that treatment

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

### Example

The claimant, a British citizen, left Britain for the Czech Republic. Her absence was solely in connection with arrangements for medical treatment. The treatment was supervised by appropriately qualified doctors in the Czech Republic. Her intention at the outset was to return to GB within 52 weeks. She remained habitually resident in the UK. Although the claimant claimed whilst she was in the Czech Republic as she was still habitually resident in GB this wasn't a first claim from abroad.

At the UT Judge Ward decided that as the claimant was habitually resident in the UK and hadn't switched her habitual residence then she was therefore subject to domestic legislation. The claimant's temporary absence was for 26 weeks, and they had intended to return within 52 weeks. The claimant was entitled to both components for the remainder of the temporary absence but not beyond that period.

1 [SS \(PIP\) Regs, reg 18](#)

### Meaning of "medical treatment"

C2060 "Medical treatment" means<sup>1</sup> medical, surgical or rehabilitative treatment (including any course or diet or other regimen).

1 [SS \(PIP\) Regs, reg 2](#)

## Members of HM Forces, aircraft workers & mariners

C2061 Where<sup>1</sup> the claimant is

**1.** abroad in the capacity of

**1.1** a member of Her Majesty's forces **or**

**1.2** an aircraft worker **or**

**1.3.** a mariner **or**

**2.** in employment prescribed for the purposes of specific legislation<sup>2</sup> in connection with continental shelf operations that claimant is to be treated as present in GB.

**Note:** Persons resident outside GB in their capacity as members of Her Majesty's Forces are also treated as habitually resident in the CTA (See C2052)

1 [SS \(PIP\) Regs, reg 19\(1\)](#); 2 [SSCB Act 92, s 120](#)

### **Meaning of HM forces**

C2062 Except where C2063 applies, "a member of Her Majesty's forces" means<sup>1</sup>

**1.** a member of the regular forces<sup>2</sup>, namely the Royal Navy, the Royal Marines, the regular army or the Royal Air Force **or**

**2.** a member of the reserved forces<sup>2</sup>, namely the Royal Fleet Reserve, the Royal Naval Reserve, the Royal Marines Reserve, the Army Reserve, the Territorial Army, the Royal Air Force Reserve or the Royal Auxiliary Air Force

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

1 [SS \(PIP\) Regs, reg 19\(2\)](#); 2 [Armed Forces Act 06, s 374](#)

C2063 A person is not a member of Her Majesty's Forces if<sup>1</sup> they are serving as a member of

**1.** any naval force of Her Majesty's forces and locally entered that naval force at an overseas base, provided that the person

**1.1** has not previously been an insured person under Part 1 of the National Insurance Act 1965 **and**

**1.2** is not paying and has not previously paid primary Class 1, Class 2 or Class 3 contributions under

**1.2.a** the Social Security Act 1975 **or**

**1.2.b** the Social Security Contributions and Benefits Act 1992 **or**

**2.** any military force of Her Majesty's forces

**2.1** who entered that force or was recruited to that force outside the UK **and**

**2.2** where the depot of their unit is situated outside the UK **or**

**3.** any air force of Her Majesty's forces

**3.1** who entered that force or was recruited for that force outside the UK **and**

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

1 [SS \(PIP\) Regs, reg 19\(2\) & Sch 2](#)

### **Meaning of aircraft worker**

C2064 An "aircraft worker" means<sup>1</sup> a person who is employed under a contract of service

**1.** as a pilot, commander, navigator or other member of the crew of any aircraft **or**

**2.** in any other capacity on board any aircraft, provided the employment is for the purposes of the aircraft or its crew or any passengers, cargo or mail carried on that aircraft;

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

**Note:** the definition excludes a person who is in employment as a member of Her Majesty's forces.

1 [SS \(PIP\) Regs, reg 19\(3\)](#)

### **Meaning of "mariner"**

C2065 A "mariner" means<sup>1</sup> a person who is in employment under a contract of service as a

**1.** master or member of the crew of any ship or vessel **or**

**2.** in any other capacity on board any ship or vessel provided that the employment is for the purposes of that ship or vessel or her crew or any passengers, cargo or mails carried by the ship or vessel. Provided the contract is entered into in the UK with a view to its performance while the ship or vessel is on her voyage.

**Note:** the definition excludes a person who is in employment as a member of Her Majesty's forces.

1 [SS \(PIP\) Regs, reg 19\(3\)](#)

### **Continental Shelf Operations - Prescribed employment**

C2066 For the purposes of C2061 **2.** employment prescribed for the purposes of specific legislation in connection with continental shelf operations means<sup>1</sup> any employment, whether or not under a contract

of service, in any designated or prescribed area in connection with any activity mentioned in specific legislation<sup>2</sup>.

1 [SS Ben \(PA\) Regs, reg 11\(1\)](#); 2 [Oil and Gas \(Enterprise\) Act 1982, s 23\(2\)](#)

C2067 Designated area means<sup>1</sup> any area set out by Order in Council under specific legislation<sup>2</sup> as an area where the UK may explore the seabed, subsoil and exploit their natural resources.

1 [SS Ben \(PA\) Regs, reg 11\(1\)](#); 2 [Continental Shelf Act 1964](#)

C2068 Prescribed area means<sup>1</sup> any area over which Norway or any EU country (except the UK) exercises sovereign rights to explore the seabed and subsoil and exploit the natural resources or other named areas. This area must be outside the territorial water of

**1.** Norway **or**

**2.** any EU country (except the UK).

1 [SS Ben \(PA\) Regs, reg 11\(1\)](#)

## **HM Forces – family members**

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

**1.** spouse or civil partner

**2.** son or daughter

**3.** step-son or step-daughter

**4.** father or mother

**5.** father-in-law or mother-in-law

**6.** step-father or step- mother

shall be treated as present in GB<sup>1</sup> (including for the purposes of the past presence test).

1 [SS \(PIP\) Regs, 2 reg 19\(1\)\(c\)](#)

# The effect of EU law C2070 - C2130

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## Introduction

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

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

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

**1.** Regulation (EC) NO. 883/2004 which sets out the main rules, **and**

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

**Note:** For the EU Member States, these regulations replaced earlier regulations<sup>1</sup> with effect from 1.5.10. They applied to Switzerland from 1.4.12 and to Norway, Iceland and Liechtenstein from 1.6.12. The old regulations<sup>1</sup> continue to apply in certain transitional cases. See also C2087 to C2088 below concerning third country nationals.

[1 Reg \(EEC\) 1408/71 & Reg \(EEC\) 574/72](#)

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

- 1.** be protected against the risks covered by EU provisions **and**
- 2.** maintain rights acquired in one EEA country when moving to another country.

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

C2074 – C2079

## **Countries where EU regulations apply**

### **The EU Member States**

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

- 1.** Austria (joined the EU on 1.1.95)
- 2.** Belgium
- 3.** Bulgaria (joined the EU on 1.1.07)
- 4.** Cyprus (joined the EU on 1.5.04)
- 5.** Czech Republic (joined the EU on 1.5.04)
- 6.** Denmark (excluding the Faroe Islands and Greenland)
- 7.** Estonia (joined the EU on 1.5.04)
- 8.** Finland (including the Aaland Islands) (joined the EU on 1.1.95)
- 9.** France (including Guadeloupe, Martinique, Mayotte, Reunion, French Guiana, Saint Barthelemy and Saint Martin but excluding Monaco)

10. Germany
11. Greece
12. Hungary (joined the EU from 1.5.04)
13. Ireland
14. Italy (excluding the Vatican City and San Marino)
15. Latvia (joined the EU on 1.5.04)
16. Lithuania (joined the EU on 1.5.04)
17. Luxembourg
18. Malta (joined the EU on 1.5.04)
19. Netherlands (excluding for the purposes of this Chapter, the Dutch Antilles)
20. Poland (joined EU on 1.5.04)
21. Portugal (including Madeira and the Azores)
22. Romania (joined the EU on 1.1.07)
23. Slovakia (joined the EU on 1.5.04)
24. Slovenia (joined the EU on 1.5.04)
25. Spain (including the Balearic Islands, the Canary Islands and the Spanish enclaves of Ceuta and Melilla)
26. Sweden (joined the EU on 1.1.95)
27. United Kingdom (including Gibraltar but excluding the Isle of Man and for the purposes of this Chapter, the Channel Islands)

## **The European Economic Area**

C2081 The EEA comprises the Member States of the EU plus Iceland, Liechtenstein and Norway.

### **Meaning of “EEA State”**

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

## Personal Scope

C2085 A person is within the personal scope of EU provisions if that person<sup>1</sup>

**1.** is

**1.1** a national of a EEA State, **or**

**1.2** a stateless person or refugee residing in an EEA State

who is or has been subject to the legislation of one or more EEA States **or**

**2.** is a member of the family or a survivor of a person falling within sub-paragraph **1.**

<sup>1</sup> [Reg \(EC\) 883/04, Art 2\(1\)](#)

C2086 Also within the personal scope of EU provisions<sup>1</sup> are survivors of persons who have been subject to the legislation of one or more EEA States (regardless of the nationality of such persons – but see C2087 below), provided the survivor is

**1.** a national of an EEA State, **or**

**2.** a stateless person or refugee residing in one of the EEA States.

<sup>1</sup> [Reg \(EC\) 883/04, Art 2\(2\)](#)

## Third Country nationals

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

C2088 An amendment to EU Regulations<sup>1</sup> extended the provisions of Reg (EEC) 1408/71 to third country nationals (TCNs) from 1.6.03 provided those nationals were legally resident in the territory of a Member State, were insured workers, and were in a situation that involved more than one state. However the following states did not extend the terms of Reg (EEC) 1408/71 to TCNs:

Denmark

Iceland

Norway

Liechtenstein

Switzerland.

C2089 Therefore a TCN who has worked will be able to export an award of AA or DLA (Care) or CA if he satisfies the same conditions that apply to an EEA national (and the UK is the competent state for payment of a sickness benefit) **except** where he leaves GB to live in Denmark, Iceland, Norway, Liechtenstein, or Switzerland. Of course, the TCN must be legally residing in both the UK and then the new state of residence that they move to.

### **Meaning of “Member of the family”**

C2090 In the context of the EU regulations relating to the co-ordination of Social Security benefits “Member of the family means<sup>1</sup>

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

[1 Reg \(EC\) 883/04, Art 1\(i\)](#)

### **Meaning of dependent**

C2091 A UT Judge has analysed the EU case law on the meaning of “dependent” in the context of the EU Citizenship Directive<sup>1</sup>. He summarised that case law<sup>2</sup> as finding that<sup>3</sup>

- 1.** a person is only dependent who actually receives support from another
- 2.** there need be no right to that support and it is irrelevant that there are alternative sources of support available
- 3.** that support must be material, although not necessarily financial, and must provide for, or contribute towards the basic necessities of life.

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

C2092 – C2094

### **Deciding whether Reg 883/04 applies**

C2095 [[See Memo ADM 15-22](#)] The DM will need to decide whether the claimant comes within the personal scope of the Regulations (see C2085 et seq). They will then need to decide whether the UK is the State responsible for payment of the benefit involved (“the competent state”).

## What type of Benefit is PIP?

C2096 The EU Social Security Co-ordination Regs set out different rules depending upon the branch of social security involved (e.g. “sickness benefits”, “old-age benefits”, “family benefits”). On 18.10.07 the Court of Justice of the European Union (the CJEU) held<sup>1</sup> that the care component of DLA was a sickness benefit. However on 5.5.11 the CJEU confirmed that the mobility component of DLA was a Special Non-Contributory Benefit (SNCB)<sup>2</sup>.

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

C2097 The Daily Living Component of PIP is a “sickness benefit” for the purposes of Reg (EC) 883/04; the Mobility Component of PIP should be treated as an SNCB.

## EU Regs Apply – Effect on the Daily Living Component

C2098 [[See Memo ADM 17/20; Memo ADM 15-22](#)] and [[Memo ADM 07/24](#)] On any day where the EU regulations relating to the co-ordination of social security systems<sup>1</sup> apply to a claimant, the UK is the competent state for the payment of cash sickness benefits (see C2110 et seq) for that claimant and that claimant is habitually resident in an EEA state (other than the UK), the claimant does **not have to**

1. be present in GB **or**
2. be habitually resident in GB **or**
3. satisfy the past presence test

provided that claimant can demonstrate a **genuine and sufficient link** to the UK<sup>2</sup> (see C2130 et seq below).

1 [Reg \(EEC\) 1408/7](#); [Reg \(EC\) 883/04](#); 2 [PIP Regs, reg 23](#)

## EU Regs Apply – Effect on the Mobility Component

C2099 If the EU Regs relating to the co-ordination of social security systems<sup>1</sup> apply, **for the purposes of the Mobility Component**, the claimant is not required to satisfy the past presence test, provided that the claimant can demonstrate a **genuine and sufficient link** to the social security system of the UK<sup>2</sup> (see C2130 et seq below)

**Note:** as regards the Mobility Component of PIP, the claimant will still have to satisfy the conditions in C2021.1 & 3 i.e. they will have to be present in GB and habitually resident in the UK, the Republic of Ireland, the Isle of Man or the Channel Islands

1 [Reg \(EEC\) 1408/71](#), [Reg \(EC\) 883/04](#); 2 [PIP Regs, reg 17](#)

## Deciding if the UK is the Competent State

C2110 [[See Memo ADM 17/20; Memo ADM 15-22](#)] and [[Memo ADM 07/24](#)] The Act specifically states<sup>1</sup> that a person to whom the EU regulations concerning the co-ordination of social security apply is not entitled to the Daily Living Component of PIP for any period, unless, during that period, the UK is the competent state for the payment of sickness benefits in cash.

1 [WRA 12, s 84](#)

## Which state's legislation applies?

C2111 [[See Memo ADM 17/20; Memo ADM 15-22](#)] and [[Memo ADM 07/24](#)] The EU regulations include provisions intended to avoid situations where the legislation of more than one Member State applies. In deciding whether the UK is the competent state for the payment sickness benefits in cash, DMs will need to consider these provisions.

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

C2112 The general rules are<sup>1</sup> that

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

1 [Reg \(EC\) 883/04, Art 11](#); 2 [Art 65](#)

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

C2114 Paragraph C2113 does not apply to<sup>1</sup>

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

1 [Reg \(EC\) 883/04, Art 11\(2\)](#)

### **Meaning of “legislation”**

C2115 “Legislation” means<sup>1</sup> the laws, regulations, statutory provisions and all other implementing measures relating to the branches of social security listed in the EU co-ordination regs<sup>2</sup>.

1 [Reg \(EC\) 883/04, Art 1\(l\)](#); 2 [Art 3](#)

### **Meaning of “competent Member State”**

C2116 The “competent Member State” means<sup>1</sup> the EEA State in which the competent institution is situated.

1 [Reg \(EC\) 883/04, Art 1\(s\)](#)

### **Meaning of “competent institution”**

C2117 The “competent institution” means<sup>1</sup>

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

1 [Reg \(EC\) 883/04, art 1\(q\)](#)

C2118

### **Competency for Cash Sickness Benefits**

C2119 [[See Memo ADM 17/20](#)] [[See Memo ADM 06/21](#)] [[See Memo ADM 15-22](#)] [[See Memo ADM 07/24](#)] There are two main rules depending upon whether the claimant is an “insured person” or a

member of an “insured person’s” family (see C2090) or a person receiving a pension or a member of the family of a person receiving a pension (see C2123).

### **Insured persons** [[See Memo ADM 06/21](#)]

C2120 In relation to sickness benefits an “insured person” means<sup>1</sup> any person who satisfies the conditions of entitlement for a sickness benefit.

1 [Reg \(EC\) 883/04, Art 1\(c\)](#)

C2121 An “insured person” (and members of that person’s family – see C2090) who is residing or staying in an EEA State (A) other than the EEA State (B) in which they are insured, is entitled to sickness benefits in cash from EEA State B<sup>1</sup>.

1 [Reg \(EC\) 883/04, Art 21](#)

C2122 The following persons should be regarded as persons insured in the UK for cash sickness benefits-

- 1.** those covered by GB contributions in the relevant income tax years that would enable them to claim ESA(Cont) (RITY cover) **provided** they have not been insured for sickness benefits in an EEA State other than the UK since they worked and paid NI contributions in respect of that work in the UK
- 2.** posted workers (see C2135) and frontier workers (see C2136) who work in GB **and**
- 3.** claimants who are in receipt of JSA(CB), IBST, ESA(Cont) in the assessment phase, and MA,

**Note:** DMs are reminded of the need to consider which EEA State’s legislation applies (see C2111 to C2114). In general, where a person is living and working in an EEA State other than the UK, it is the legislation of that EEA State which will apply.

### **Pensioners**

C2123 [[See Memo ADM 17/20](#)] [[See Memo ADM 15-22](#)] [[See Memo ADM 07/24](#)] The general rule is that a person (and any member of that pensioner’s family) receiving a pension under the legislation of one or more Member States is to be paid cash sickness benefits by the EEA State responsible for the cost of sickness benefits in kind<sup>1</sup> (but see C2126 et seq below for details of how responsibility is determined).

1 [Reg \(EC\) 883/04, Art 29](#)

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

- 1.** state RP of any category (except Category D only awards with no contributory element) **or**

**2.** main phase ESA(Cont), long-term IB, SDA, **or**

**3.** a bereavement benefit, including widows' benefit and Industrial Injuries Death Benefit (but not a bereavement payment which is not a pension but a Death Grant) **or**

**4.** a pension for Industrial Injuries Disablement Benefit (including REA and RA).

**Note:** This definition of "pension" derives from the EU co-ordination regulations

### **Meaning of sickness "benefits in kind"**

C2125 For the purposes of the EU rules about sickness and maternity benefits "benefits in kind" means<sup>1</sup> benefits in kind provided for under the legislation of an EEA State which are intended to

**1.** supply

**2.** make available

**3.** pay directly to a provider for

**4.** reimburse the cost of

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

<sup>1</sup> [Reg \(EC\) 883/04, Art 1\(va\)\(i\)](#)

### **Deciding which state is responsible for sickness benefits for a pensioner or a member of their family**

#### **Entitled to sickness benefits in kind**

C2126 Where a person who receives a pension or pensions under the legislation of one or more EEA States, one of which is the EEA State of residence and the person is entitled to sickness benefits in kind under the legislation of the EEA State of residence, then that State will be responsible for payment sickness benefits (in cash and in kind)<sup>1</sup> to that pensioner and members of their family.

<sup>1</sup> [Reg \(EC\) 883/04, Art 29](#)

#### **Example**

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

C2127

## **Not entitled to sickness benefits in kind**

C2128 Where a person receives a pension or pensions under the legislation of one or more EEA States but there is no entitlement to benefits in kind under the legislation of the EEA State **of residence**, sickness benefits in cash and in kind will be provided to the pensioner and members of their family by one of the EEA States responsible for the pension(s) determined as follows<sup>1</sup>.

**1.** where the person is entitled to benefits in kind under the legislation of only one EEA State then that EEA State will bear the cost of benefits in kind and pay the cash sickness benefits.

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

[1 Reg \(EC\) 883/04, Art 24](#)

### **Example 1**

Chris resides in Spain. He is entitled to and receives a full UK Retirement Pension. He does not receive a pension from any other Member State and he is not entitled to benefits in kind under Spanish legislation. Chris claimed the Daily Living Component of PIP and the DM decided that, under EU rules the UK was the state responsible for paying sickness benefits in cash and in kind and that therefore PIP (DLC) could be paid to him in Spain

### **Example 2**

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

## **Sickness benefits in kind not dependent on insurance**

C2129 Where a person who receives a pension under the legislation of one or more EEA States (other than the EEA State of residence) resides in a EEA State where entitlement to sickness benefits in kind is not subject to conditions of insurance or activity as an employed or self-employed person then the responsible state is determined in accordance with the rule in C2128 above. The responsible State ("State A") will pay sickness benefits in cash and in kind to the pensioner and members of their family to the extent that they would be entitled to those benefits if they were resident in that State A.

### **Example**

Julie resides in Cyprus. She receives a full UK Retirement Pension and is entitled to sickness

benefits in kind under Cypriot law. She is not entitled to any Cypriot pensions or benefits, The DM decided that the UK was responsible for the payment of cash sickness benefits to Julie.

## **Deciding if there is a “Genuine and Sufficient Link”**

C2130 The phrase “genuine and sufficient link” is not defined, but EU case law gives some indications of the factors to take into account. DMs will have to make a balanced judgement based on all the facts of the case. Among the relevant factors which may be considered are<sup>1</sup>

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

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

**2. Periods of residence or work in the UK** for example

**2.1** Whether the claimant has spent a significant part of their life in the UK

**2.2** Whether the claimant has worked and paid UK NI contributions as a result of that work **and**

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

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

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

# Effect of EU Law – the Past Presence Test C2133 - C2138

[Effect of EU Law – the Past Presence Test C2133](#)

[Past presence test deemed to be met C2134 - C2136](#)

[Aggregation and the past presence test C2134 - C2136](#)

## Effect of EU Law – the Past Presence Test

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

### Past presence test deemed to be met

C2134 [[See Memo ADM 06/21](#)] The past presence test is deemed to be met for certain categories of claimant who are EEA nationals and who demonstrate a sufficient link to the UK in another way. The following groups are not required to satisfy the past presence test at the first date from which benefit could be established if on that date they are:-

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

### Meaning of “posted worker”

C2135 A posted worker<sup>1</sup> is an employed or self employed person normally working in GB but posted temporarily to work in the territory of another EEA member state, for a period which is anticipated to be no longer than 24 months.

## **Meaning of “frontier worker”**

C2136 Frontier worker<sup>1</sup> means an employed or self-employed person who works in GB but lives in another EEA member state where he returns daily, or at least once a week.

1 [Reg \(EC\) 883/04 Art 1\(f\)](#)

## **Aggregation and the past presence test**

### **Daily Living Component**

C2137 Where the claimant is within the personal scope of the EU co-ordination regs and the UK is the competent state for the payment of cash sickness benefits, for the purposes of the Daily Living Component of PIP, periods recognised as insurance whether from residence, employment or self employment can be aggregated<sup>1</sup> with presence in the UK when considering whether the past presence test is met.

1 [Reg \(EC\) 883/04 art 6 & Annex XI entry 2](#)

### **Mobility Component**

C2138 As the Mobility Component is to be treated as an SNCB, it is only payable in the UK. However, for the purpose of satisfying the past presence test, periods of insurance for social security benefits arising from periods of employment, self-employment or residence in another EEA State qualify to be aggregated with residence in the UK when considering whether the past presence test is met

C2139 - C2159

# Appendix 1 - Deciding the competent state to pay cash sickness benefits

[\[See Memo ADM 07/24\]](#) and [\[See Memo ADM 17/20\]](#)

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## **Introduction**

1 This memo expands the guidance in DMG chapter 7 for deciding the competent State to pay cash sickness benefits. It also incorporates Regulation (EC) 883/2004.

## **General rule**

2 In general a person is only subject to the legislation of one EU Member State<sup>1</sup>.

1 [Reg \(EC\) 883/04, Art 11\(1\)](#)

3 A person will not be entitled to AA<sup>1</sup>, CA<sup>2</sup>, DLA care component<sup>3</sup> or PIP daily living component<sup>4</sup> unless the UK is the competent State for payment of cash sickness benefits to that person.

1 [SS CB Act 92, s 65\(7\)](#); 2 [s 70\(4A\)](#); 3 [s 72\(7\)](#); [WR Act \(2012\), s 84](#)

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

**1. SPC and**

**2. JSA (IB) and**

**3. DLA mobility component and**

**4. PIP mobility component and**

**5. ESA (IR)**

are Special Non-Contributory Cash Benefits<sup>1</sup>.

1 [Reg \(EC\) 883/2004, Annex X](#)

## **Additional voluntary insurance**

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

**1. invalidity benefit and**

2. retirement pension **and**

3. widow's benefits<sup>1</sup>.

1 [Reg \(EC\) 883/04, Art 14\(3\)](#)

## Deciding whose legislation applies

### General rules

**[See ADM Memo 01/20]**

6 The general rules are<sup>1</sup> that

**1.** a person pursuing activity as an employed or self-employed person in an EEA Member State is subject to the legislation of that Member State

**2.** a civil servant is subject to the legislation of the Member State to which the administration employing him is subject

**3.** a person receiving unemployment benefits in accordance with a specific provision in the EU co-ordination Regulations<sup>2</sup> from the Member State of residence is subject to the legislation of that Member State

**4.** a person called up or recalled for military or civilian service by a Member State, is subject to the legislation of that Member State

any other person to whom sub-paragraphs **1.** – **4.** do not apply is subject to the legislation of the Member State of residence

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

1 [Reg \(EC\) 883/04, Art 11\(3\)](#); 2 [Art 65](#)

7 Except in relation to the benefits listed at paragraph 9, for the purposes of paragraph 6, a person receiving cash sickness benefits because of, or as a consequence of, their activity as an employed or self-employed person shall be considered to be pursuing that activity<sup>1</sup>.

1 [Reg \(EC\) 883/04, Art 11\(2\)](#)

8 The benefits to which the rule detailed in paragraph 7 do not apply are<sup>1</sup>

**1.** invalidity benefits **or**

**2.** old age or survivors' pensions **or**

**3.** pensions in respect of accidents at work or occupational diseases **or**

**4.** sickness benefits in cash which are for treatment for an unlimited period.

1 [Reg \(EC\) 883/04, Art 11\(2\)](#)

### **Meaning of “legislation”**

9 In paragraph 6 “legislation” means<sup>1</sup> the laws, regulations, statutory provisions and all other implementing measures relating to the branches of social security listed in the co-ordinating regs.

1 [Reg \(EC\) 883/04, Art 1\(l\)](#)

### **Meaning of “competent member state”**

10 The “competent Member State” means<sup>1</sup> the Member State in which the competent institution is situated.

1 [Reg \(EC\) 883/04, Art 1\(s\)](#)

### **Meaning of “competent institution”**

11 The “competent institution” means<sup>1</sup> the institution

**1.** with which the person concerned is insured at the time of the application for benefit **or**

**2.** from which the person concerned is or would be entitled to benefits if he or a member of his family resided in the Member State in which the institution is situated **or**

**3.** designated by the competent authority of the Member State concerned.

1 [Reg \(EC\) 883/04, Art 1\(q\)](#)

### **Meaning of “competent authority”**

12 “Competent authority” means<sup>1</sup> the Minister or other equivalent authority responsible for social security schemes throughout (or in any part of) the member state in question.

1 [Reg \(EC\) 883/04, Art 1\(m\)](#)

### **Posted to another EEA country**

13 An employed person who is posted by their employer to another EEA State remains subject to the legislation of the Member State where the employer is based and where that person normally works,

provided

1. the work is not expected to last more than twenty-four months, **and**
2. that person has not been sent to replace somebody who has completed a posting<sup>1</sup>.

1 [Reg \(EC\) 883/04, Art 12](#)

### **Working in More than one Member State**

14 Persons who normally pursue activity as an employed person in two or more Member States will be subject to the legislation of<sup>1</sup>

1. the Member State of residence if they
2. pursue a substantial part of their activity in that Member State **or**
3. are employed by two or more employers, at least two of which have registered offices or places of business in Member States different to that of the Member State of residence **or**
4. the Member State in which the employer's registered office or place of business is situated, if the person does not pursue a substantial part of his work in the Member State of residence, and either:
5. the person is employed by only one employer; **or**
6. the person is employed by two or more employers, all of which have their registered office or place of business in only one Member State.

1 [Reg \(EC\) 883/04, Art 13\(1\)](#)

15 A person who normally pursues activity as a self-employed person in two or more Member States shall be subject to the legislation of<sup>1</sup>

1. the Member State of residence if they pursue a substantial part of their activity in that Member State **or**
2. if the person does not reside in one of the Member States in which they pursue a substantial part of their activity, the Member State in which the centre of interest of their activities is situated.

1 [Reg \(EC\) 883/04, Art 13\(2\)](#)

16 If a person spends less than a quarter of their time on their activities as an employed or self employed person in a Member State, that shall be taken as an indication that a person is not pursuing a substantial part of their activities in that Member State<sup>1</sup>.

### **Employed on a ship**

17 Subject to paragraph 18 below, activity as an employed or self-employed person normally pursued on board a vessel at sea, flying the flag of a Member State is deemed to be an activity pursued in that Member State<sup>1</sup>

1 [Reg \(EC\) 883/04, Art 11\(4\)](#)

18 However<sup>1</sup> a person employed on board a vessel flying the flag of a Member State who is paid by an undertaking or person whose registered office or place of business is in a Member State other than that in which the vessel is registered is subject to the legislation of the latter Member State if they reside in that Member State.

1 [Reg \(EC\) 883/04, Art 11\(4\)](#)

### **Example**

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

### **Civil Servants**

19 Civil Servants, and people treated as Civil Servants, are subject to the legislation to which the administration employing them is subject<sup>1</sup>.

1 [Reg \(EC\) 883/04, Art 11\(3\)\(b\)](#)

### **Example**

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

### **Members of the armed forces**

20 A member of the armed forces is subject to the legislation of the country in whose forces that person is serving<sup>1</sup>.

1 [Reg \(EC\) 883/04, Art 11\(3\)\(d\)](#)

## **CLAIMS FROM PENSIONERS**

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

person<sup>1</sup>.

[1 Reg \(EC\) 883/04, Art 24\(2\)\(a\)](#)

### Example

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

22 Where a claimant

1. receives a pension from two or more Member States **and**
2. resides in one of those Member States **and**
3. is entitled to benefits in kind under the legislation of that Member State

the Member State of residence will be competent for payment of cash sickness benefits to that person<sup>1</sup>

[1 Reg \(EC\) 883/2004, Art 23, Article 29\(1\)](#)

### Example

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

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

23 If a claimant

1. receives a pension from two or more Member States **and**
2. is consequently entitled to benefits in kind from two or more Member States **but**
3. is not entitled to a pension from the State of residence

the competent Member State for payment of cash sickness benefits is the Member State to whose legislation the claimant has been subject for the longest period of time<sup>1</sup>.

[1 Reg \(EC\) 883/04, Art 24\(2\)\(b\)](#)

### Example

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

### **Derived rights**

#### **Family members**

24 Claimants can derive a right to payment of benefits<sup>1</sup> from their family members<sup>2</sup>. Family members are

- 1.** a spouse **or**
- 2.** a parent of a child under 18 **or**
- 3.** a parent of a child over 18 who is a dependant.

1 [Reg \(EC\) 883/04 Art 2\(1\)](#); 2 [Reg \(EC\) 883/04 Art 1\(i\)\(2\)](#)

#### **Prioritising rights**

25 Claimants may have both an independent right to benefits and a derived right to benefits at the same time. An “independent right” to benefits is a right a person has acquired independently themselves as a consequence of, for instance, their activity as an employed or self-employed person in a Member State, their residence in a Member State, or their receipt of a pension from a Member State. A derived right is a right to benefits a person can derive from a family member. Subject to paragraphs 26 and 27 below, an independent right to cash sickness benefits should take priority over a derived right to cash sickness benefits family members of those covered by the Regulation<sup>1</sup>.

1 [Reg \(EC\) 883/04 Art 32\(1\)](#)

#### **Example**

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

26 However, where a claimant has an independent right to cash sickness benefits arising purely from their residence in a Member State, any rights they derive from a family member who is, for example, receiving a pension from or who is employed in another Member State will take priority over that claimant’s independent right to benefits<sup>1</sup>.

### **Example 1**

A claimant has returned to reside in the UK, having been resident in another EU Member State. The claimant's husband lives and works in Germany but the couple are still together. The claimant is not working in the UK. The claimant has an independent right to cash sickness benefits in the UK arising solely out of their residence in the UK. The claimant also has a right to benefits in Germany derived from her husband, who is living and working in Germany. In these circumstances, Germany is the competent State for payment of cash sickness benefits to that claimant.

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

### **Example 2**

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

27 Where a claimant is employed or self employed in a Member State their independent right takes priority over a derived right even if they have a family member employed in or receiving a pension from another Member State<sup>1</sup>.

### **Example**

A claimant lives and works P/T in the UK but is financially dependent on their parent. Their parent lives and works in Germany. The UK is the competent State for cash sickness benefits for the claimant.

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

### **Exchange of claims between member states**

28 If on considering the claim the DM decides that the UK is not the competent State the DM should forward the claim without delay to the competent institution in the Member State the DM considers competent<sup>1</sup>.

29 Where the DM receives a claim from another Member State the date of claim will be the date the claim was made in the other Member State<sup>1</sup>.

1 [Reg \(EC\) 883/04 Art 81](#)

## Appendix 2 - Action to take once competency has been decided

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### INTRODUCTION

1 This appendix expands the guidance for DMs on the approach to take to cases where a decision on competency has been reached.

### THE DM DECIDES THAT THE UK IS THE COMPETENT STATE FOR THE PAYMENT OF CASH SICKNESS BENEFITS

2 Where the DM decides that the UK is the competent state to pay cash sickness benefits to a person, the DM should then go on to consider whether the relevant domestic conditions of entitlement are met.

### THE DM DECIDES THAT THE UK IS NOT THE COMPETENT STATE FOR THE PAYMENT OF CASH SICKNESS BENEFITS

**Scenario one: Where there is no acceptable evidence of a dispute regarding competence between member states**

3 Where the DM decides that the UK is not the competent state they should:

**1. refuse the claim and**

2. immediately forward the claim to the member state the DM considers is competent<sup>1</sup>

1 [Art 81 Reg \(EC\) 883/04](#); [2015] AACR 26

### **Scenario Two: Difference of opinion between member states as to competence**

4 Where there is a difference of opinion between the UK and one or more other Member States as to the identification of the State competent to provide cash benefits to a person, then either the

**1.** state where the claimant resides **or**

**2.** member state where the claim was first made (if the claimant does not reside in any of the member states concerned in the dispute)

will provide cash benefits to that person on a provisional basis, provided that person meets the relevant domestic eligibility criteria<sup>1</sup>.

1 [Reg \(EC\) 987/09 Art 6\(2\)](#)

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

5 Should a dispute regarding competence arise between the UK and another member state the DM should not await

**1.** an appeal **or**

**2.** the outcome of an appeal

before making provisional payments<sup>1</sup>.

1 [2015] AACR 26

### **Resolving the dispute**

6 Where no agreement can be reached between the member states as to who is competent the DM should refer the matter to DMA Leeds. DMA Leeds will liaise with policy and legal services to decide whether to refer to the Administrative Commission<sup>1</sup>.

1 [Reg \(EC\) 987/09 Art 6\(3\)](#)

7 The Administrative Commission will try to reconcile the dispute within 6 months<sup>1</sup>.

1 [Reg \(EC\) 987/09 Art 6\(3\)](#)

8 Where the UK has paid benefit on a provisional basis and the Administrative Commission decides another member state is competent that member state will reimburse the UK benefits paid<sup>1</sup>.

1 [Reg \(EC\) 987/09; Art 73](#)

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