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Title

UNEMPLOYMENT BENEFITS FOR PERSONS RESIDING IN A Member State other than the competent state (Article 65BR)

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References:

- **Recitals** 32 BR; 13 IR
- **BR** : Article . 65, 87 (10).
- **IR** : Articles 56, 70
- **AC Decisions:** Decision N° U2 of 12 June 2009 concerning the scope of Article 65(2) of Regulation (EC) No 883/2004 on the right to unemployment benefits of wholly unemployed persons other than frontier workers who were resident in the territory of a Member State other than the competent Member State during their last period of employment or self-employment

Decision N° U3 of 12 June 2009 concerning the scope of the concept of "partial unemployment" applicable to the unemployed persons referred to in Article 65(1) of Regulation (EC) No 883/2004
- **ECJ Case law:** Case 76/76 di Paolo, , Case 227/81 Aubin, 1/85 Miethe, C-102/91 Knoch, C-444/98 de Laat.

Comments :

- The general principle for determination of the legislation applicable is that a person pursuing a gainful activity should be affiliated to the social security scheme of the State in which territory he/she is employed or self-employed (*lex loci laboris* principle).
- Article 65 BR is the result of a compromise in negotiations. The Commission proposal to do away with the exception to the *lex loci laboris* principle formally laid down in article 71 Regulation 1408/71 was not accepted.
- For this reason special rules continue to apply which constitute, for certain categories of persons , an exception to the normal rule that the Member State of employment, being the competent State, is responsible for granting benefits. Article 65BR maintains the distinction between wholly and partially unemployed workers and between frontier workers and persons who aren't frontier workers (like seasonal workers for instance)

Rules applicable to:

- **Partially** unemployed workers : The competent Member State (the one where the person still works) is responsible for unemployment benefit
- **Wholly** unemployed workers:

Frontier workers

- A frontier worker, that is, a person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he/she returns as a rule daily or at least once a week, has to claim unemployment benefits in the Member State of residence.
- Article 65 (2) of BR stipulates that this person shall make himself/herself available to the employment services in the Member State of residence
- If the amount of unemployment benefit depends on the salary or professional income of a jobseeker, the institution granting the benefit has to base its calculation on the salary or professional income actually received by the person concerned during his/her activity in the competent State (see Article 62 (3) of BR).
- In order to enhance the prospects of finding new employment and to facilitate the search for employment in various Member States, Regulation 883/2004 introduced an additional option for those cross-border workers (most probably frontier workers) , to also register – as a supplementary step – with employment services of the Member State in which they pursued their last activity. In cases where Luxembourg was the State of last employment, this possibility of simultaneous registration is not open until 1 May 2012 (see Article 87 (10).)
- As a result, while the person concerned receives benefits from the Member State of residence, he/she can search for employment simultaneously in both Member State of residence and Member State of last activity. In such a case, the employment services of both Member States have a duty of mutual information with regard to the job-seeking activities of the person in the territory of each State.
- The person who chooses to be registered with employment services of both Member States has to comply with the control procedures and obligations applicable in each State (Article 65 (3) of BR). However, as the benefits are paid by the Member State of residence, obligations and job-seeking activities in that State have priority. On the other hand, non-fulfilment of the obligations in the Member State of last activity does not affect the benefits awarded in the State of residence (Article 56 (2) of IR).

Persons other than frontier workers (see Article 65(2) last subparagraph)

- These are persons who reside in a Member State other than the competent Member state , but the difference from frontier workers is that they return less frequently than once a week. These persons have a right of choice – they can either remain available to the employment services in the State of their last activity (i.e. register with the unemployment office in the Member State where they worked) and receive unemployment benefits there, or they can return to the Member State of their residence and claim unemployment benefits there. If they decide to return to the Member State of residence and register as jobseekers

there, the calculation of benefits is also based on the professional income they received during their last activity in the Member State where they worked.

- these persons have also the possibility to make themselves first available in the state of last employment and claim benefits there and then return to the state of residence while using the possibility of exporting the unemployment benefits in the state of last unemployment under the conditions laid down in Article 64 BR (maximum period of 3 months which may be extended to 6 months).

Which Member State is responsible for granting sickness benefits, pensions, family benefits etc to wholly unemployed workers receiving unemployment benefits from the state of residence ?

- The persons become subject to the legislation of the State of residence also with regard to other social security matters covered by Regulation 883/2004 as stipulated in Article 11 (3) (c) of BR (this specific provision in Title II of BR replaces special provisions for frontier workers in individual chapters of Title III of Regulation 1408/71 – Articles 25, 39 (6), 72a). This solution is not new but is expressed in a single general provision, rather than in several provisions for the different branches.

Reimbursements between Member States

- The mere fact that this issue is dealt with in BR rather than IR underlines the sensitivity of the compromise reached in Article 65 BR.
- The reimbursement procedure is a kind of acknowledgement that the competent State should bear at least part of the costs for all the benefits. In fact it is this State that collected contributions while under Article 65(6) and (7) of BR the State of last activity has to reimburse to the State of residence benefits which the person received during the first 3 or 5 months of unemployment. The technical details of the reimbursement procedure are laid down in Art. 70 of IR.
- The Regulation sets the ceiling of reimbursements by stipulating in Article 65(6) of BR that the amount of the reimbursement may not be higher than the amount payable under the legislation of the competent MS (ie. MS of last activity). That, however, creates a significant administrative burden for the competent State as its authorities would have to calculate this hypothetical amount of benefit in each individual case of reimbursement. Therefore, an option has been introduced for Member States to apply a single ceiling for all reimbursements which is based on the average amount of unemployment benefits provided by that State in the preceding calendar year (Article 70 of IR). This simplified method of single ceiling can be applied only in reimbursements between the Member States listed in Annex 5 of IR (BE, CZ, DE, AT, SK, FI).
- As the whole system of reimbursements might prove burdensome and it is unclear whether the results will be satisfactory, the Council in its Explanatory note invited the Administrative Commission to evaluate the reimbursement system in order to examine if it results in an equal and balanced sharing of costs between Member States. The evaluation should take place no later than five years after the entry into force of the Regulations.
- The Administrative Commission should also prepare guidelines for practical application of reimbursement procedures between Member States.

To go further:

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