

**ADMINISTRATIVE COMMISSION OF THE EUROPEAN COMMUNITIES ON SOCIAL SECURITY
FOR MIGRANT WORKERS**

DECISION No 181

of 13 December 2000

concerning the interpretation of Articles 14(1), 14a(1) and 14b(1) and (2) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State

(Text with EEA relevance)

(2001/891/EC)

THE ADMINISTRATIVE COMMISSION OF THE EUROPEAN COMMUNITIES ON SOCIAL SECURITY FOR MIGRANT WORKERS,

Having regard to Article 81(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to the members of their families moving within the Community, under which it is made responsible for dealing with all administrative questions or questions of interpretation arising from the provisions of Regulation (EEC) No 1408/71 and subsequent Regulations,

Whereas:

- (1) Decision No 162 of 31 May 1996 should be brought up to date.
- (2) The provisions of Articles 14(1), 14a(1) and 14b(1) and (2) of Regulation (EEC) No 1408/71, which provide for an exception to the general rule laid down in Article 13(2)(a), (b) or (c) of the said Regulation, aim in particular to facilitate the freedom to provide services for the benefit of undertakings which post workers to Member States other than that in which they are established, as well as the freedom of workers to move to other Member States. These provisions also aim at overcoming the obstacles likely to impede freedom of movement of workers and at encouraging economic interpenetration whilst avoiding administrative complications, especially for workers and undertakings.
- (3) The purpose of these provisions is thus to avoid, for workers, employers and social security institutions, the administrative complications which would result from the application of the general rule laid down in Article 13(2)(a), (b) or (c) of the said Regulation where the period of employment is of short duration in a Member State or on a vessel flying the flag of a Member State other than the State in which the undertaking has its registered office or a place of business or the State in which the self-employed person normally pursues his activity.
- (4) The scope of Article 14a(1)(a) should be clarified, taking account of the case-law of the Court of Justice.
- (5) The provisions of Articles 14(1), 14a(1) and 14b(1) and (2) of Regulation (EEC) No 1408/71 provide for an exception to the general rule laid down in Article 13(2)(a), (b) and (c) of the said Regulation.

- (6) The scope of these same provisions should be delimited more precisely and to this end several specific cases that are likely to arise should be listed.
- (7) The scope of Articles 14(1) or 14b(1) of the said Regulation should for the sake of simplicity be extended to cover the case of a worker who is engaged in a Member State in which the undertaking has its registered office or place of business with a view to being posted to another Member State or to a vessel flying the flag of another Member State, in order to take account of the case-law of the Court of Justice.
- (8) To this end, the first decisive condition for the application of Articles 14(1) or 14b(1) of the said Regulation is the existence of a direct relationship between the undertaking and the worker it engages.
- (9) The protection of the worker and the legal security to which he and the institution with which he is insured are entitled require full guarantees that the direct relationship be maintained throughout the period of posting.
- (10) The second decisive condition for application of Articles 14(1) or 14b(1) of the said Regulation is the existence of ties between the undertaking and the Member State in which it is established. The possibility of posting should therefore be confined solely to undertakings normally carrying on their business in the territory of the Member State whose legislation remains applicable to the posted worker; assuming therefore that the above provisions apply only to undertakings which habitually carry on significant activities in the territory of the Member State in which they are established.
- (11) Any unwarranted extension of the period of posting due to repeated brief interruptions should be avoided.
- (12) There can no longer be any guarantee of maintaining the direct relationship if the posted worker is made available to a third undertaking.
- (13) The administrative complications which Article 14(1) seeks to avoid will at any rate arise if a worker engaged by an undertaking established in a Member State with a view to being posted to another Member State had previously been subject to the legislation of a third Member State or of a non-member country and, a fortiori, if he had previously been subject to the legislation of the Member State to which he is posted. The purpose of Article 14(1) would thus be disregarded. The same applies, *mutatis mutandis*, to Article 14b(1).
- (14) It is necessary to be able to carry out, throughout the period of posting, all the checks, in particular with regard to the payment of contributions and the maintenance of the direct relationship, required to prevent wrongful use of the abovementioned provisions, and to ensure that administrative bodies, employers and workers are suitably informed.
- (15) The worker and the employer must be duly informed of the conditions under which the posted worker is allowed to remain subject to the legislation of the country from which he has been posted.
- (16) The certificate (form E 101) may have retroactive effect, although it should preferably be issued in advance.
- (17) The legal effects of the said certificate referred to in Articles 11 and 11a of Council Regulation (EEC) No 574/72 and, consequently, the institutions' duty to cooperate need to be defined precisely.
- (18) The situation of undertakings and workers should be assessed and monitored by the social security institutions with the appropriate guarantees so as not to impede the freedom to provide services and the freedom of movement of workers.
- (19) The principle of sincere cooperation, laid down in Article 10 of the EC Treaty, places a number of obligations on the competent institutions for the purpose of implementing Articles 14(1), 14a(1) and 14b(1) and (2). The role of the Administrative Commission needs to be defined more precisely in order to facilitate the application of this principle.

- (20) The role of the Administrative Commission in the reconciliation of opposing views held by the institutions concerning the applicable legislation, and the procedure for referral to it, need to be defined precisely.

Acting in accordance with the provisions of Article 80(3) of Regulation (EEC) No 1408/71,

HAS DECIDED AS FOLLOWS:

1. The provisions of Articles 14(1) and 14b(1) of Regulation (EEC) No 1408/71 shall apply to a worker subject to the legislation of a Member State (sending State) by virtue of the pursuit of an activity in the employ of an undertaking and who is sent by that undertaking to another Member State (State of employment) in order to perform work there for the said undertaking.

The work shall be regarded as being performed for the undertaking of the sending State if it has been established that this work is being performed for that undertaking and that there continues to exist a direct relationship between the worker and the undertaking that posted him.

In order to establish whether such a direct relationship continues to exist, assuming therefore that the worker continues to be under the authority of the undertaking which posted him, a number of elements have to be taken into account, including responsibility for recruitment, employment contract, dismissal, the authority to determine the nature of the work.

2. Article 14a(1) requires the worker to have been self-employed in the territory of the sending State before performing work on the territory of the State of employment. It is therefore assumed that the worker has been pursuing significant activities for a certain length of time in the territory of the State where he is established before moving to another Member State to perform work in an employed or self-employed capacity, the content and duration of which are predefined and the existence of which must be proven by the relevant contracts.

Moreover, in the course of the period during which the worker performs such work, he must continue to fulfil in the sending State the conditions enabling him to pursue his activity when he returns. To this end, he must maintain the infrastructure he needs to pursue his activity in the State in which he is established, in accordance with the legal provisions in force in that State, such as having use of office space, paying social security contributions, paying taxes, having a professional card and a VAT number or being registered with chambers of commerce or professional bodies.

3. Pursuant to the provisions of paragraph 1 of this Decision, the abovementioned Articles 14(1) and 14b(1) shall continue to apply in particular under the following conditions:

- (a) posting of regular staff:

if the worker, posted by an undertaking in the sending State to an undertaking in the State of employment, is also posted to one or more other undertakings in the same State of employment, in so far, however, as the worker continues to carry out his work for the undertaking which posted him. This may be the case, in particular, if the undertaking posted the worker to a Member State in order to perform work there successively or simultaneously in two or more undertakings situated in the same Member State;

- (b) posting of staff engaged with a view to being posted:

if the worker subject to the legislation of a Member State in accordance with the provisions of Regulation (EEC) No 1408/71 is engaged in that Member State, in which the undertaking has its registered office or place of business, with a view to being posted on behalf of that undertaking either to another Member State or to a vessel flying the flag of another Member State, provided that:

- (i) a direct relationship still exists between that undertaking and the worker during his period of posting, and
- (ii) the undertaking normally carries out its activity in the territory of the first Member State, i.e. the undertaking habitually carries out significant activities in the territory of the first Member State.

In order, where necessary and in cases of doubt, to determine whether an undertaking habitually carries on significant activities in the territory of the Member State in which it is established, the competent institution in the latter is required to examine all the criteria characterising the activities carried on by that undertaking, including the place where the undertaking has its registered office and administration, the number of administrative staff working in the Member State in which it is established and in the other Member State, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, and the turnover during an appropriately typical period in each Member State concerned. 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.

In particular, an undertaking which is established in a Member State and which posts workers to the territory of another Member State and engages in purely internal management activities in the first Member State may not invoke the provisions of Article 14(1)(a) of Regulation (EEC) No 1408/71;

- (c) brief interruption of the worker's activities with the undertaking in the State of employment shall not constitute an interruption of the posting within the meaning of Articles 14(1) and 14b(1).
- 4. The provisions of the aforementioned Articles 14(1) and 14b(1) shall not apply or shall cease to apply in particular:
 - (a) if the undertaking to which the worker has been posted places him at the disposal of another undertaking in the Member State in which it is situated;
 - (b) if the worker posted to a Member State is placed at the disposal of an undertaking situated in another Member State;
 - (c) if 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.
- 5. (a) The competent institution of the Member State to whose legislation the person concerned remains subject pursuant to the aforementioned Articles 14(1) and 14b(1), in the cases provided for by this Decision, shall duly inform the employer and the worker concerned of the conditions under which the posted worker may continue to be subject to its legislation. The employer shall thus be informed of the possibility of checks throughout the period of posting so as to ascertain that this period has not come to an end. Such checks may relate, in particular, to the payment of contributions and the maintenance of the direct relationship.

The competent institution of the Member State in which the person concerned is established, to whose legislation the self-employed person remains subject pursuant to the aforementioned Articles 14a(1) and 14b(2), shall duly inform him of the conditions under which he may continue to be subject to its legislation. The person concerned shall thus be informed of the possibility of checks throughout the period during which he pursues a temporary activity in the State in which he is active, so as to ascertain that the conditions applying to that activity have not changed. Such checks may relate, in particular, to the payment of contributions and the maintenance of the infrastructure needed to pursue his activity in the State in which he is established.

- (b) Moreover, the posted worker and his employer shall inform the competent institution of the sending State of any change occurring during the period of posting, in particular:
 - if the posting applied for has in the end not taken place or if the extension of the posting applied for has in the end not taken place,
 - if the activity is interrupted in a case other than that provided for in paragraph 3(c) of this Decision,
 - if the posted worker has been assigned by his employer to another undertaking in the sending State, in particular in the event of merger or transfer of an undertaking.
- (c) The competent institution of the sending State shall, where appropriate and upon request, provide the institution of the State of employment with the information referred to in subparagraph (b).

- (d) The competent institutions of the sending State and of the State of employment shall cooperate in carrying out the abovementioned checks and where there is any doubt concerning the applicability of Article 14(1)(a) or (b), Article 14a(1) or Article 14b(1) or (2) of Regulation (EEC) No 1408/71.
6. Form E 101 should preferably be issued before the beginning of the period concerned; it may, however, be issued during this period or even after it has expired, in which case it may have retroactive effect.
7. The duty to cooperate referred to in point 5(d) of this Decision also requires:
- (a) that the competent institution in the sending State carry out a proper assessment of the facts relevant for the application of Articles 14(1), 14a(1) and 14b(1) and (2) of Regulation (EEC) No 1408/71 and Articles 11 and 11a of Regulation (EEC) No 574/72 and consequently guarantees that the information contained in form E 101 is complete;
 - (b) that the competent institution of the State of employment and of any other Member State regard themselves as bound by the E 101 form as long as it is not withdrawn or declared invalid by the competent institution of the sending State;
 - (c) that the competent institution in the sending State reconsider the grounds for the issue of this form and, if necessary, withdraw the certificate if the institution in the State of employment expresses doubts as to the correctness of the facts on which the form is based.
8. The social security institutions shall assess and monitor the situations covered by Articles 14(1), 14a(1) and 14b(1) and (2) of Regulation (EEC) No 1408/71 and provide undertakings and workers with all appropriate guarantees so as not to impede the freedom to provide services and the freedom of movement of workers. In particular, the criteria used for assessing whether an undertaking habitually pursues significant activities in the territory of a State, whether a direct relationship exists between the undertaking and the worker, or whether a self-employed worker maintains the infrastructure needed to pursue his activity in a State, must be defined objectively, notified to the interested parties and applied consistently and evenly in the same or similar situations.
9. Where the competent institutions fail to reach an agreement, they may submit to the Administrative Commission, through their government representative, a note which will be examined at the first meeting following the 20th day after its submission with a view to reconciling the opposing views on the legislation applicable to the case.
10. The Administrative Commission shall encourage cooperation between the competent authorities in the Member States for the purpose of implementing Articles 14(1), 14a(1) and 14b(1) and (2) and shall facilitate follow-up work and the exchange of information, experience and good practice when fixing and grading the criteria for assessing the situations of undertakings and workers, and in connection with the control measures put in place. To this end, it shall draw up in stages, for the benefit of administrative authorities, undertakings and workers, a code of good practice concerning the posting of workers and the pursuit by self-employed workers of a secondary activity outside the State in which they are established.
11. This Decision, which replaces Decision No 162 of 31 May 1996, shall apply from the first day of the month following its publication in the *Official Journal of the European Communities*.

Chairman of the Administrative Commission

Jean-Claude FILLON
