II

(Acts whose publication is not obligatory)

COMMISSION

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

DECISION No 162

of 31 May 1996

concerning the interpretation of Articles 14 (1) and 14b (1) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers

(96/554/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 Decision No 128 of 17 October 1985 should be brought up to date;

Whereas, on the one hand, the provisions of Articles 14 (1) and 14b (1) of Regulation (EEC) No 1408/71 provide for an exception to the general rule laid down in Article 13 (2) (a) or (c) of the said Regulation so as to facilitate in practice the exercise by the worker of his right to free movement;

Whereas 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) 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;

Whereas Articles 14 (1) and 14b (1) of Regulation (EEC) No 1408/71 should, as exceptions, be interpreted strictly;

Whereas their scope should be delimited more precisely and, to this end, several specific cases that are likely to arise should be listed;

Whereas, notwithstanding the fact that the exceptions to the general rules provided for in Article 13 of the said Regulation should be interpreted strictly, the scope of Article 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;

Whereas, to this end, one of the decisive criteria for the application of Article 14 (1) or 14b (1) of the said Regulation is the existence of a direct relationship between the undertaking and the worker it engages;

Whereas 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 maintened throughout the period of posting; whereas the possibility provided in this case should therefore be restricted to undertakings which normally carry out their activities in the Member State to whose legislation the posted worker remains subject;

Whereas any abusive extensions of the period of posting due to repeated temporary interruptions should be avoided;

Whereas there can no longer be any guarantee of maintaining the direct relationship if the posted worker is made available to a third undertaking;

Whereas 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; whereas the purpose of Article 14 (1) would thus be disregarded; whereas the same applies, *mutatis mutandis,* to Article 14b (1);

Whereas it is necessary 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;

Whereas 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;

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 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, and to determine whether the worker remains in the employ of the undertaking which posted him, a number of elements have to be taken into account, including responsibility of recruitment, employment contract, dismissal and determination of the nature of the work.

2. Within the framework of 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 the 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) there exists a direct relationship 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.:

   — in the case of an undertaking whose activity consists in making staff temporarily available to other undertakings, that it usually makes staff available to hirers established in the territory of that State with a view to being employed there, and

   — in other cases, that the undertaking carries out substantial activities in the territory of the first Member State and usually employs its staff here.

(c) Temporary 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).

3. 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.

4. (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.

(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 2 (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 above mentioned checks and where there is any doubt concerning the applicability of Article 14 (1) (a) or (b) of Regulation (EEC) No 1408/71.

5. This Decision, which replaces Decision No 128 of 17 October 1985, shall apply from the first day of the month following its publication in the *Official Journal of the European Communities.*

G. MICCIO

Chairman of the Administrative Commission