

DECISION No A3
of 17 December 2009

concerning the aggregation of uninterrupted posting periods completed under the Council Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004 of the European Parliament and of the Council

(Text of relevance to the EEA and to the EC/Switzerland Agreement)

(2010/C 149/04)

THE ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS,

Having regard to Article 72(a) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems ⁽¹⁾, under which the Administrative Commission is responsible for dealing with all administrative questions or questions of interpretation arising from the provisions of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council ⁽²⁾,

Having regard to Article 12 of Regulation (EC) No 883/2004,

Having regard to Articles 5 and 14 to 21 of Regulation (EC) No 987/2009,

Whereas:

(1) For the purposes of this Decision 'posting' means any period completed by employed or self-employed persons, during which a person pursues his activity in a Member State other than the competent Member State in accordance with the provisions of Article 14(1), 14a(1), 14b(1) or 14b(2) of Council Regulation (EEC) No 1408/71 ⁽³⁾ and Article 12(1) or 12(2) of Regulation (EC) No 883/2004.

(2) The provisions of Article 12 of Regulation (EC) No 883/2004, which provide for an exception to the general rule laid down in Article 11(3)(a) of the said Regulation, aim in particular to facilitate the freedom to provide services for the benefit of employers 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 to overcome the obstacles likely to impede freedom of movement of workers and to encourage economic interpenetration whilst avoiding administrative complications, especially for workers and undertakings.

(3) The decisive conditions for the application of Article 12(1) of the said Regulation are the existence of a direct relationship between the employer and the worker it engages and the existence of ties between the employer and the Member State in which it is established. The decisive condition for the application of Article 12(2) of the said Regulation is the habitual carrying out of a substantial similar activity in the Member State where the person is established.

(4) Under Regulation (EEC) No 1408/71, the anticipated duration of the posting cannot exceed 12 months, with an extension of up to 12 additional months due to unforeseeable circumstances. Under Regulation (EC) No 883/2004, the anticipated duration of the posting cannot exceed 24 months in total.

(5) Any extension of the uninterrupted posting period beyond the maximum duration provided in the Regulations requires an agreement according to Article 17 of Regulation (EEC) No 1408/71 or Article 16 of Regulation (EC) No 883/2004.

(6) Regulation (EC) No 883/2004 does not contain any explicit transitional provision on aggregation of the posting periods completed under Regulations (EEC) No 1408/71 and (EC) No 883/2004. The intention of the legislator was to extend the maximum possible anticipated period of posting from 12 months up to 24 months. The procedures and other conditions for posting did not considerably change.

(7) In the view of the legal continuity between the old and new Regulations and in order to ensure the uniform application of the posting rules during the transitional period between Regulations (EEC) No 1408/71 and (EC) No 883/2004,

⁽¹⁾ OJ L 166, 30.4.2004, p. 1.

⁽²⁾ OJ L 284, 30.10.2009, p. 1.

⁽³⁾ OJ L 149, 5.7.1971, p. 2.

HAS DECIDED AS FOLLOWS:

1. All periods of posting completed under Regulation (EEC) No 1408/71 shall be taken into consideration for the calculation of the uninterrupted posting period under the application of Regulation (EC) No 883/2004, so that the total period of the uninterrupted posting completed under the application of both Regulations cannot exceed 24 months.
2. This Decision shall be published in the *Official Journal of the European Union*. It shall apply from the date of entry into force of Regulation (EC) No 987/2009.

The Chair of the Administrative Commission

Lena MALMBERG
