



PUTTING AN END TO CROSS-BORDER SOCIAL SECURITY FRAUD AND ABUSE

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Introduction

Cross-border social security fraud and abuse are certainly not new phenomena. What is clear, however, is that these problems have been dealt with in a politically negligent manner for many years. This is probably because everyone agreed that the problem was too complex to solve and that it touches on two core principles of the European Union about which criticism is effectively not allowed.

Cross-border coordination of social security is based on the fundamental principle of 'mutual trust' between the Member States, which means that we assume that Member States do not cheat each other and do not bend the rules to give themselves an unfair advantage. This fundamental principle of mutual trust between Member States has also been repeatedly confirmed by the European Court of Justice.

In addition, the rules of cross-border coordination are based on the principle of the 'state of residence', also called the state of origin. For example, the state of residence determines the employment relationship between employer and employee (or the latter's self-employed status), who pays the social security contributions (employer or employee), the percentage of the social security contribution, and the method of calculation, and unilaterally issues official documents (the by now well-known A1 certificate). As a host Member State, you cannot change much about this. In fact, as a host state you are not allowed to question the rules and practices of a state of residence since there is mutual trust between Member States.

If we look at the temporary cross-border posting from a company perspective, we can divide the total gross labour cost into three categories:

1. Firstly, there are direct gross salary costs, including basic salary, overtime, salary supplements, etc. Partly due to the new directive 2018/957 on the posting of workers, which is based on the principle of equal pay for equal work, the direct gross salary costs for local workers and temporarily posted foreign workers are now roughly the same (although there is still considerable disagreement about this).
2. The second category consists of the costs associated with sending the worker abroad. Because there is no obligation to provide cross-border employment, the company itself chooses whether or not to pay these additional costs. They include such items as workers' travel costs and accommodation costs. In principle, these are objectively measurable additional costs.
3. In the final category are the gross social security costs that every company has to pay. This third category of labour costs is, according to the current European rules, exclusively determined by the state of residence.

Strikingly, during the political discussion about the new posting of workers directive, various politicians from different Central and Eastern European states have repeatedly insisted on maintaining the 'competitive advantage' of 'their companies' when temporarily posting workers abroad. By 'competitive advantage' they refer not to their companies' productivity, innovation and so on, but clearly to their companies' financial advantage – in other words, low labour costs.

From a company viewpoint, therefore, a competitive advantage can only be derived from lower social security contributions, which are exclusively determined by the state of residence.

In this study we have discovered various *de facto* and legal situations by means of which states offer companies a substantial financial advantage when they temporarily post their workers abroad. Unfortunately, the current European regulations are organised in such a way that these financial benefits cannot be challenged. This 'problem' has not escaped the notice of the European Court of Justice. In the Altun Judgment of 19 June 2018, the European Court opened Pandora's box and broke a European taboo. The Court acknowledged that fraudulent A1 certificates may be disregarded unilaterally by the courts of the host state. Is this the end of the fundamental principle of mutual trust between Member States? Probably not. But the principle is no longer untouchable.

On the basis of the *de facto* and legal arguments in this study, the EFBWW has reached the conclusion that there is not only competition between companies within the EU, but between Member States too. The current European system of social coordination allows Member States to systematically abuse their national social security so as to give their companies a competitive advantage when they employ their temporary workers abroad. This new form of cross-border social security fraud and abuse is a multi-headed hydra that will definitely be hard to defeat.

If we really want to build a fair European internal market, cross-border competition between companies must be based on innovation, productivity, creativity, cooperation, skills and so on, and not on a policy of low costs. Low cost competition is a dead-end street, with only losers.

As a European trade union federation, we will do battle with the new multi-headed monster and defeat it!

I would like to express my appreciation to the four experts who have written this report. My thanks also go to all those who participated in the many formal and informal contacts, who gave us a better understanding of the complexity of the problem of cross-border fraud and abuse in social security.

Werner Buelen

CHAPTER I

Fact-finding mission on cross-border social security

By Mrs Marina Mesure

1. Methodological approach of the field study

The fact-finding missions aimed to explore, describe and verify the phenomenon of cross-border social security, using semi-structured interviews, which encourage the actors to express themselves freely. In order to collect the data necessary for our research, we carried out dozens of interviews. Our open-ended questions fit into a broader style of interviewing. This type of interview is said to be "semi-structured" so that the degree of freedom is large enough to give the respondent the opportunity to develop themes not necessarily thought of at the beginning by the researcher. Several interview grids were developed to adequately conduct the interviews according to the responsibilities of each interviewee.

The selection procedure of the persons to be interviewed was guided by our research hypotheses, but also dependent on the availability of the actors concerned in line with our deadlines. We wanted to talk to persons with different responsibilities and different nationalities in order to multiply the points of view and experiences gathered.

The research therefore relies on these interviews, but also on information that we were able to gather during our discussions in an informal way.

2. Short overview of different EU Institutions dealing with social security issues

| Country | Administration delivering PD A1 | Administration collecting social contributions | Services to deliver PD A1 | Actors responsible to check PD A1 | Information related to substantial activities |
|----------|--|--|--|--|--|
| Romania | National House of Public Pensions (CNPP) | Agencia Națională de Administrare Fiscală (ANAF) | Centralized delivery in Bucharest/ Online services | Labour inspectorate/ CNPP | Agencia Națională de Administrare Fiscală (ANAF) |
| Portugal | Instituto da Segurança Social I.P | Instituto da Segurança Social I.P | Centralized delivery in Lisbon/ Online services | Labour inspectorate/ Instituto da Segurança Social | Instituto da Segurança Social I.P |

| Country | Administration delivering PD A1 | Administration collecting social contributions | Services to deliver PD A1 | Actors responsible to check PD A1 | Information related to substantial activities |
|-----------------|--|--|--|--|---|
| France | Caisse Primaire d'assurance Maladie (CPAM) | Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (URSSAF) | Decentralized delivery in centres/ Online services | ACOSS/ URSAFF/ Labour Inspection | Fiscal administration/ URSAFF |
| Bulgaria | National Revenue Agency (NRA) | National Revenue Agency (NRA) | Decentralized delivery in region/ Online services | Labour inspectorate/ NRA | National Revenue Agency (NRA) |
| Belgium | Office national de sécurité sociale (ONSS) | Office national de sécurité sociale (ONSS) | Centralized delivery in Brussels/ Online services | ONSS and labour inspection | Office national de sécurité sociale (ONSS) |
| The Netherlands | Social Insurance Bank (SVB) | Belastingdienst | Centralized delivery in Amsterdam/ Online services | Labour Inspectorate and Social Security Bank | Belastingdienst |
| Italy | Istituto Nazionale della Previdenza Sociale (INPS) | Istituto Nazionale della Previdenza Sociale (INPS) | Centralized delivery in Rome/ Online services | INPS/ Labour inspection | - |

3. Administrative issues – Requirements to establish/maintain the company registration

| COUNTRY | Administrative procedures |
|---------|---|
| Romania | <p>Requirements to establish a company in Romania:</p> <p>Based on the idea to make it as simple and fast as possible through the National Trade Register Office (http://www.onrc.ro/index.php/en/)</p> <p>The National Trade Register Office (NTRO) is a public institution which falls under the Ministry of Justice, entirely financed by the state budget¹</p> <p>The National Trade Register Office carries out the following activities:</p> <ul style="list-style-type: none"> • keeping the trade register; • providing documents and information; • archiving documents based on which the registrations in the trade register are made; • assisting legal and natural persons subject to registration in the trade register; |

¹ <https://www.onrc.ro/index.php/en/about-ntro>

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|----------|---|
| | <p>The services provided by NTRO can be grouped as follows:</p> <ul style="list-style-type: none"> • assist persons when registering in the trade register; • identification of a company (unique registration code, company name, registered office); • statistics structured on different criteria; • information on a company's evolution from its registration up to date; • confirmation of whether or not a company exists in the register or attesting that it has been struck off the list. <p>By the end of 2015, over 2,684,699 companies were registered in the NTRO database, 1,170,316 of which were active on 31.12.2015.²</p> <p><i>More information related to all companies registered by year</i> https://www.onrc.ro/index.php/en/statistics</p> <p>Registration can be done in the Office in Bucharest or Online https://portal.onrc.ro/ONRCPortalWeb/ONRCPortal.portal One shareholder, minimum capital, a headquarters, a domain of activity</p> <p>Requirements to maintain the registration: Issue the annual balance sheet. No specific checks. However, if the labour inspection does not find activities linked to the address, the National Trade Register Office is informed. (Competencies: National Agency of Fiscal Administration)</p> |
| Portugal | <p>Requirements to establish a company in Portugal: Very easy. Registration can be done at the (national and regional) offices or Online through the Instituto dos Registos e do notariado (IRN) http://www.irn.mj.pt/IRN/sections/empresas</p> <p>The Registry and Notary Institute (IRN), is a public Institute with administrative autonomy integrated in the State administration. It performs and monitors policies related to registration services in order to ensure the provision of services to citizens and enterprises in the field of civil identification/civil registration of nationality, land, commercial, movable property and people, as well as ensure the regulation, control and supervision of the notarial activities³.</p> <p>Decentralized services of IRN⁴:</p> <ul style="list-style-type: none"> • The civil registry office; • The protective measures of the land register; • The protective measures of the commercial register; • The protective measures of registration of vehicles; |

² <https://www.onrc.ro/index.php/en/about-ntro>

³ <http://www.irn.mj.pt/sections/irn>

⁴ <http://www.irn.mj.pt/IRN/sections/irn/organograma/docs-organograma/sede-e-servicos/>

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| | <ul style="list-style-type: none"> • The management services of files and documents. • Centralized Services of IRN⁵: • The Government Office of central records; • The national register of legal persons. <p>Requirements to maintain company registration: No specific checks.</p> |
| France | <p>Requirements to establish a company in France:</p> <p>Registration process online - To exist legally, a company must imperatively be registered in the Register of Commerce and Society (RCS).</p> <p>Firstly, one has to draft and sign the statutes of the organisation and deposit the share capital at the bank.</p> <p>The registration procedures also include the making of contributions, the appointment of the officer, the establishment of a statement of the acts performed in the name and on behalf of the company set up and the registration of the statutes. Also the filing of the file at the registry of the Commercial Court.</p> <p>The registration will also allow to obtain a SIRET number, an APE code and an intra-community VAT number.</p> |
| Bulgaria | <p>Requirements to establish a company in Bulgaria:</p> <p>In Bulgaria, it is very easy to set up a company. The conditions are set out in the Commerce Act. The file has to be submitted to the Registration Agency. All information about the manager and the activities need to be included. Then the agency will provide a BULSTAT number, which corresponds to a unique registration number for the firm. As soon as the firm is registered, the information is sent to NRA.</p> <p><u>Starting a business</u> in 4 steps:</p> <ul style="list-style-type: none"> - <u>Commercial registration</u> (http://www.brra.bg/Default.ra) - <u>Commercial representation</u> - <u>BULSTAT register</u> - <u>Tax registration</u> (National Revenue Agency) <p>The BULSTAT Register is a unified national administrative register, kept by the Registry Agency at the Ministry of Justice⁶.</p> <p>Upon entry of a newly registered entity in the BULSTAT Register, a unique unified identification code (UIC) is generated (the so-called BULSTAT Code), which is the unique identifier of business subjects in Bulgaria.</p> <p>Registration of persons in the BULSTAT Register is done on their own initiative at the registry offices of the Registry Agency, located at the headquarters of the district courts.</p> |

⁵ <http://www.irn.mj.pt/IRN/sections/irn/organograma/docs-organograma/sede-e-servicos/>

⁶ <http://www.psc.egov.bg/en/psc-starting-a-business-bulstat>

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| | <p>Foreign persons from a Member State of the European Union or another state, party to the Agreement on the European Economic Area, who carry out business activities in the country, temporarily or one-time, are not subject to BULSTAT registration.</p> <p>Requirements to maintain company registration: It is required to submit a tax return and provide the annual financial report to the Registry Agency - Commercial Register. As long as the company is not closed, it remains registered without specific control.</p> |
| Belgium | <p>Requirements to establish a company in Belgium: Simple registration process to obtain a VAT number Companies must register with the BCE (Banque-Carrefour des Entreprises)⁷:</p> <ul style="list-style-type: none"> • Legal persons of Belgian law; • Institutions, bodies and services of Belgian law, who carry out missions of general interest or related to public order and who demonstrate a financial and accounting autonomy separate from the legal person under Belgian law to which they belong; • Legal persons of foreign or international law which have a seat in Belgium or who must register under Belgian law; • Any physical person who, as autonomous entity in Belgium, exercises an economic activity <p>How to register:</p> <ul style="list-style-type: none"> • Establishment of personal commercial or non-commercial private law firms - an approved Business Desk. • the establishment of commercial units - an approved Business Desk • the establishment of units of non-commercial companies under private law school - a Business Desk or via My Enterprise online <p>Each company receives a business number when registering at the BCE.</p> <p>Requirements to maintain company registration: The company pursues these activities without specific administrative requirements. However, if for over 3 years the annual accounts have not been disclosed, there will be control over the activities of the company. Online procedures through the Chamber of Commerce.</p> |

⁷ <http://economie.fgov.be/fr/entreprises/BCE/inscription/#.WYmvl-SQzmQ>

4. Who is in charge of delivering the PD A1?

| COUNTRY | Institutions | Type of administration |
|-------------|--|--------------------------------|
| Romania | National House of Public Pensions (CNPP) | Social Security administration |
| Portugal | Instituto da Segurança Social I.P (ISS) | Social Security administration |
| France | Caisse Primaire d'assurance Maladie (CPAM) | Social Security administration |
| Bulgaria | National Revenue Agency (NRA) | Fiscal administration |
| Belgium | Office national de sécurité sociale (ONSS) | Social Security administration |
| Netherlands | Social Insurance Bank | Social Security administration |
| Italy | Istituto Nazionale della Previdenza Sociale (INPS) | Social Security administration |

5. Administrative issues – Issuing procedures of the portable A1 document

| COUNTRY | Administrative Issues |
|----------|---|
| Romania | <p>A1 issued by the National House of Public Pensions (CNPP).</p> <p>The issuing procedure is conducted in the head unit of the central CNPP office. 15 documents are necessary to obtain A1: https://www.cnpp.ro/documentul-portabil-a1.</p> <p>Main information requested: commercial contracts, data on workers performing activities in Romania and those posted abroad, declarations of the legal representative.</p> <p>As from November 2016 one of the components of the <i>General Registry of Employees (RGES)</i> is related to posting abroad. Before the first day of posting, the employers have to complete the electronic form of RGES and submit it (electronically) to the Labour Inspection (information related to the identity of posted worker, identity and establishment country of the beneficiary, period of posting and type of activity).</p> |
| Portugal | <p>A1 issued by the Social Security services, with the following requirements. Each posting situation is assessed on a case-by-case basis.</p> <p>Several criteria apply, namely⁸:</p> <ul style="list-style-type: none"> • Being established in Portugal; • Having a turnover in Portugal of more than approximately 25%; • Having also employees, other than the administrative staff, in Portugal; • If it is a temporary work agency, having a permit to carry out the activity; |

⁸ http://www.seg-social.pt/documents/10152/26154/destacamento_trabalhadores_portugal_outros_paises/8cc3f642-e286-4ef1-8210-d86bb3833a0b

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| | <ul style="list-style-type: none"> • Having a work accident insurance policy, with territorial extension to the country in which the activity will be. <p>For EU countries, the posting period requested cannot exceed 24 months. In exceptional and duly authorized situations it may be possible to extend it to a maximum period of 5 years;</p> <p>Documents to be posted in Portugal: http://www.seg-social.pt/documents/10152/39103/RV_1018_DGSS/d478f02b-8f85-4812-a5f5-67d8e7e9974f</p> <p>N.B. No information on the DP A1 related to the salary paid abroad.</p> |
| France | <p>A1 issued by the Social Security services (Caisse Primaire d'assurance Maladie: CPAM), MSA for agriculture and RSI for self-employed</p> <p>In France, posting and pluriactivity A1 forms are issued mainly by the CPAMs, which at the central level are under the jurisdiction of the CNAMts. The agriculture social insurance mutual funds (MSA) and the social security funds for self-employed (RSI) also issue such A1 forms for the benefit of their affiliates. The CNAMTS has just centralized the issuance of A1 forms from 16 centers to better guarantee the quality of the checks and wishes in the future to create a specific structure to manage the posting of less than 3 months. This centralization also allows to work on cross-border skills centers.</p> <p>Main information requested to obtain the A1:</p> <ul style="list-style-type: none"> • data on workers performing activities in France and those posted abroad; • declarations of the legal representative; • data regarding the company <p><i>Best practice:</i> In France, in addition to obtaining the PD A1 form, there is an obligation to complete the SIPSI form9 (see below) which is an online prior declaration of posting for the French labour inspection.</p> |
| Bulgaria | <p>A1 issued by the National Revenue Agency at territorial level.</p> <p>A procedure to issue the document is published on the website of the National Revenue Agency. A Bulgarian posting company is required to submit an application before the start of the posting, according to Art. 12 para. 1 of the Ordinance on the terms and conditions for posting and sending employees within the provision of services.</p> <p>To obtain the A1 Form (there are 4 different forms: posted with a labour contract, posted as self-employed and two forms for those who work in at least two</p> |

⁹ <https://www.sipsi.travail.gouv.fr/SipsiCasFo/login?service=https%3A%2F%2Fwww.sipsi.travail.gouv.fr%2FSipsiFO>

| | |
|------------------------|---|
| | <p>countries with a similar activity). The form is given to the territorial agencies of the NRA of the employer (there are 5 territorial NRA agencies).</p> <p>NRA has access to several databases to check if the A1 form can be issued (it checks if the employer has posted several workers, if the worker has already been posted and checks financial account of the enterprise).</p> <p>The Labour Inspectorate has been busy creating a Register of Posted Workers since January 2017 (not operational yet).</p> <p><i>Best practices:</i> the PD A1 has to be signed by the employer and the employee before being issued. The employee will have access to all the information included in the PD A1 which also mentions the remuneration abroad.</p> |
| Belgium | <p>A1 issued by the National Office of Social Security (ONSS).</p> <p>The employer makes an online application. The ONSS has access to several databases to check if the A1 form can be issued (it checks the status of the workers - student, unemployed, etc. -, it checks if the company has others workers).</p> <p>In Belgium, in addition to the A1 form there is an obligation to complete the LIMOSA form.</p> <p><i>Best practice:</i> LIMOSA System (described below) – the ONSS can check the duration of posting. If there are 2 requests by the same employer, there are several alerts in the system related, for example, to cascading posting or too long duration of posting.</p> |
| The Netherlands | <p>A1 issued by the Social Insurance Bank (SVB), but social contributions are paid to the tax services. The employer makes an online application to get the A1 form. 65 persons are in charge of delivering PD A1 forms in the Netherlands (as receiving or sending country).</p> <p>The 25% activities and the 1 month social contributions paid in the Netherlands are only indicators.</p> <p><i>Best practice:</i> On-going process to create almost the same platform as LIMOSA in Belgium</p> |
| Italy | <p>A1 issued by the Istituto Nazionale della Previdenza Sociale (INPS)¹⁰. The employer make online application.</p> |

¹⁰<https://www.inps.it/bussola/VisualizzaDoc.aspx?sVirtualURL=%2fMessaggi%2fMessaggio%20numero%202018%20del%202020-01-2016.htm>

The LIMOSA System in Belgium¹¹ has helped to reduce risks of diversion or frauds.

This scheme was created in April 2007 to identify the workers posted in Belgium, to know where and for which company they work. This tool also had a statistical aim.

The LIMOSA declaration is the first step towards legal work in Belgium. It is a legal obligation.

Any individual not subject to Belgian social security who comes to work in Belgium on a temporary and/or part-time basis must be able to present **proof of the Limosa-1 declaration**.

Failure to make this declaration can lead to criminal or administrative sanctions.

The Limosa declaration contains the following information:

- The **place** in Belgium where the work is performed
- The identification details of the **Belgian customer**
- The anticipated start and end date: **maximum 24 months per notification**
- The identification details of the **employee**
- The **work schedule**
- The identification details of the **employer**
- The identification and contact details of the **liaison officer**
- In cases of temporary agency work, the **accreditation number of the foreign temporary employment agency**. In order to be able to post staff in Belgium, a foreign temporary employment agency must have accreditation from the Belgian region.
- The **nature of the services**
- For activities in the construction sector it is requested whether the employer pays a premium which is comparable to the applicable '**fidelity stamps**' in Belgium.

The proof of the declaration should be presented before the work in Belgium begins.

SIPSI Form in France: It is an online prior declaration of posting.

All employers based outside France, with the intention of providing services in France, must submit a prior declaration of posting of its workers to the labour inspectorate branch of the place where the service is to be provided, before the posting gets underway. This declaration has to be done through the SIPSI website. At the end of this online declaration procedure, the employer will receive a confirmation email containing a copy and indicating the reference number of the declaration.

¹¹ https://www.international.socialsecurity.be/working_in_belgium/en/limosa.html

6. Who receives the social contributions?

| COUNTRY | Institutions | Type of administration |
|-------------|--|--------------------------------|
| Romania | Agenția Națională de Administrare Fiscală (ANAF) | Fiscal administration |
| Portugal | Instituto da Segurança Social I.P | Social Security administration |
| France | Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (URSSAF) | Social Security administration |
| Bulgaria | National Revenue Agency | Fiscal administration |
| Belgium | Office national de sécurité sociale (ONSS) | Social Security administration |
| Netherlands | Belastingdienst | Fiscal administration |
| Italy | Istituto Nazionale della Previdenza Sociale (INPS) | Social Security administration |

7. Administrative issues – Calculation of social contributions abroad

| COUNTRY | |
|---------|---|
| Romania | <p>Calculation:</p> <p>In case of local workers it is based on commercial contracts, data of workers performing activity in Romania, but for the calculation of social contributions paid abroad no information is available.</p> <p>Daily allowance and other posting compensations is not subject to income tax.</p> <p>There is a ceiling for limiting the social contributions on wages. For instance, until January 2017 the percentage for social security contributions (25, 31 or 36%, depending on the wages earned) was limited to wages not higher than five times the national monthly average gross income.</p> <p>The <i>national monthly average gross income</i> is 3,131 Ron - 680 Euro, which means that social contribution is related to a maximum of 3,400 Euro per month even if the wage is higher.</p> |

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| | <p><i>Bad practice:</i> The Romanian government reformed the social security system. From January 1, 2018, there will be a full transfer to employees of the responsibility for funding the social security system. This is a major violation of the ILO and UN Conventions safeguarding social security rights. Financing a social security system exclusively with contributions from employees is a clear violation of international standards and will encourage fraud/abuse of cross border social security.</p> |
| Portugal | <p>Calculation: Based on the full salary in Portugal and on full salary abroad for posted workers. There is no ceiling in Portugal for social contributions (ref. Annex).</p> <p>Daily allowance and other posting compensations is not subject to income tax.</p> <p>If the Portuguese legislation is clear to define the full salary as a basis to calculate social contributions, the practice is quite different for posted workers. According to trade unions the real situation is very different, especially in the construction sector.</p> <p>According to the collective agreement in the construction sector (“Contrato Colectivo de Trabalho Construção Civil e Obras Publicas”), clause 26 mentions that the “allocation of allowances” not submitted to social contributions can be used by the employers to pay social contributions only on the Portuguese wage and not on the wages abroad.</p> <p>There is no penalty if the employer does not pay the difference in social contributions between the salary in Portugal and the one abroad. If the worker wants the employer to pay social security contributions on the entire salary received abroad, the worker must go to Court. Therefore, sanctions are linked to the willingness of the workers to go to Court, which almost never happens in reality.</p> <p>See cases below.</p> |
| France | <p>Calculation: The social contributions are paid on the full French salary and on the full salary abroad.</p> <p>N.B there are different ceilings, especially for pensions (ref. Annex 1)</p> |
| Bulgaria | <p>Calculation: The Social Insurance Code of the Republic of Bulgaria clearly mentions that all social contributions should be calculated on an amount not less than the</p> |

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| | <p>minimum salary for the host country related to posted workers. Art 6¹² states that “Insurance payments for seconded employees or employees, sent under the order of Art. 121a, Para 1, item 1 and para 2, item 1 of the Labour Code, shall be due for received, respectively accrued and non-paid, gross monthly remunerations or non-accrued monthly remunerations, as well as for other income from labour activities in the host country or in Bulgaria, but shall not be under the minimum rates for labour remuneration in the host country and, as regards to workers and employees seconded or sent in a state where no minimum rates of pay are fixed – the minimum insurance income under Art. 6, para 2, item 3 and shall not exceed the maximum monthly amount of the insurable income under Art. 6, Para 2, Item 1”</p> <p>However, the Social Insurance Code has put in place a ceiling of 2 600 BGN per Month (around 1 300 euros). This means that above 2 600 BGN per month, no social contribution is paid.</p> |
| Belgium | <p>Calculation: In Belgium, the social contributions are calculated on the full salary and the social contributions paid abroad are based on the Minimum wage of the receiving country. No ceiling for social contributions.</p> <p><i>Best practice:</i> the ONSS will check with the foreign institutions the salary that was declared during the period of posting and if it corresponds to the minimum wage of the receiving country.</p> <p>Challenge regarding construction sector: The employers declare the wage rate only every 3 months, so the ONSS has to wait 3 months before the calculation of social contributions can be done.</p> |
| Netherlands | <p>The employer pays the Social security contributions to the Tax Administration (Belastingdienst). There is an annual ceiling of 51,976 euros. Above this amount no social contributions are paid.</p> |
| Italy | <p>No information available.</p> |

¹² <http://www.nap.bg/en/page?id=537>

Practical cases:

In France, the French Trade Union FNSCBA CGT was confronted with at least 2 cases, involving Portuguese posted workers. In each case, social contributions were paid on 500 euros or 700 euros, which corresponds to the salary usually received in Portugal. However, the wages paid in France amounted to 2,000 euros. In both cases, the difference between the Portuguese and the French salary was not submitted to social contributions because of the abusive use of allowances. Even when the French Labour Inspectorate performed a control, it was not within the prerogatives of the French labour inspectors to enforce the payment of social contributions in Portugal on the whole salary in France. This depends on the Portuguese administration, which did not intervene in these 2 specific cases.

There was a similar case in Belgium with several Portuguese posted workers, where the Belgian authorities directly intervened with their Portuguese counterparts, so that the payment of the contributions would be on the whole salary. However, again, there has been no refund of this difference of social contributions from the employer.

At the same time, in all these cases in France or Belgium, no worker went to the Court to demand the payment of social contributions on the whole salary abroad.

The Belgian authorities have often tried to obtain from Bulgaria the exact amount of social security contributions paid, in order to know if the social contributions were paid on the whole salary in Belgium. However, the Bulgarian authorities consider these data as confidential. The NRA can inform the Belgian authorities that social contributions are paid, but cannot give the amount that was paid. Therefore, in several cases involving Bulgarian posted workers, it was not possible to cross check the data between the salary received and contributions paid.

8. Checking the genuine nature of economic activities

| COUNTRY | |
|---------|---|
| Romania | <p>The National House of Public Pensions makes this evaluation on issuing A1 forms, but no other information about the checks is available.</p> <p>The Romanian Labour inspectorate is not included in the process of delivering PD A1, so the inspectorate will not check the genuine economic activities during PD A1 delivering. However, in case of questions through the IMI System, the Romanian Labour Inspection will do this evaluation and send information regarding genuine economic activities in Romania.</p> |

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| Portugal | <p>When delivering a PD A1, the Social Security Institution will automatically check the requirement regarding having 25% of activities in Portugal (there is a good relation between the social security and the fiscal administration on this issue).</p> <p>The Portuguese Labour inspectorate is not involved in the process of delivering PD A1, so the inspectorate will not check the genuine economic activities during PD A1 delivery. However, in case of questions through IMI System, the Portuguese Labour Inspection will make formal verification (accounting) and on site and send information regarding genuine economic activities in Portugal.</p> |
| France | <p>The CPAMs, which deliver the PD A1, do not have access to the financial data of a corporation, so checking genuine economic activities will mainly be done based on declarations received.</p> |
| Bulgaria | <p>At the moment of delivering the PD A1, the NRA will check automatically the 25% of activities in Bulgaria, based on declared financial turnover and all financial data available at the NRA. The NRA is a fiscal administration with direct access to the company data, which is not the case in several others countries.</p> <p>The 25% of activities are not just an indicator, but a criterion to deliver DP A1.</p> |
| Belgium | <p>When delivering the PD A1, the Social Security Institution will check automatically the 25% of activities in Belgium through the Annual accounts and on site (not systematically but in case of doubts). The 25% of activities are not just an indicator, but a criterion.</p> <p><i>Best practice:</i> Both the ONSS and the labour Inspection in Belgium can control the genuine economic activities of an enterprise. Both have a direct access to economic databases with the social balance sheet, turnover, customer list, accounting documents etc.</p> <p>Paid data, provided by private companies, are also available at the European level. These data can be viewed online, but it is very expensive (Eurodb, Graydon, Bureau Van Dijck). The Belgian Ministry used to have access to this database, but due to austerity measures, this is no longer the case.</p> |
| The Netherlands | <p>When delivering the DP A1, the Social Insurance Bank will check the activities in Netherlands through the Annual accounts. The 25% of activities are just an indicator, not a criterion.</p> <p>In case of doubts a formal control of fiscal documentation, headquarter, invoices is done. One of the main questions asked to the Netherlands is related to the substantial activities. There are especially several demands from Belgium.</p> |
| Italy | <p>Labour Inspection will not check the substantial activities, it is the competence of the INPS.</p> |

9. Cooperation when issuing the PD A1

None of the countries interviewed have a system of cooperation between Member States before issuing an A1 form. The number of PD A1 forms issued each year makes it impossible to cooperate for each A1 form.

Best practice: Belgium is the only country, from the countries interviewed, which has tried to implement a cooperation approach before issuing a PD A1. In some cases, the ONSS has cooperated before issuing a PD A1. For example, when the ONSS had doubts about a French company, they cooperated with France and refused to issue the DP A1. The ONSS has also strengthened the cooperation with Romania, to cooperate before issuing A1 by sharing information.

In Belgium, it is also easier to cooperate because of the information through LIMOSA. For example, an automatic alert will be raised in case of cascading posting.

10. Cooperation on control and verification of DP A1

| COUNTRY | |
|----------|---|
| Romania | No information available. |
| Portugal | <p>Checks made by Social Security in Portugal :</p> <ul style="list-style-type: none"> • Formal checks related to the economic activities with the help of fiscal administration; • Verification if workers have been posted several times; • No system of alert in case the duration of posting exceeds 24 months; • No systematic verification about the amount of social contributions paid abroad; • No systematic verification about wages declared abroad. |
| France | <p>Checks made by Social Security in France (no information from CPAM):</p> <p>In France, there are 4 institutions that deal with PD A1. The CPAMs deliver the A1 form at local level, but they do not have access to company related information. The URSAFFs, which receive the social contributions, can only control the social taxes. The DGT (labour inspection) is in charge of labour law and of the SIPS database with the online posting declarations, but URSAFF does not have access to this database and this database does not allow to control systematically e.g. cascading postings or social contributions. Finally, there is the CLEISS, which will coordinate with the others European institutions. The multitude of institutions can make it harder to control.</p> |

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| | <p><i>Best practice:</i> The CIRDA Database created in 2010 to collect all the DP A1 from posted workers in France. The DGT has the possibility to check the information (but not always updated).</p> |
| Bulgaria | <p>Administrative cooperation in Bulgaria: There are agreements signed between the different institutions (labour inspection, medical insurance, etc.) but there is a restrictive framework in the communication of data (because of data protection).</p> <p>Checks made by the NRA:</p> <ul style="list-style-type: none"> • Formal check related to the economic activities; • Verification if workers have been posted several times; • No system of alert in case the duration of posting exceeds 24 months; • No systematic verification about the amount of social contributions paid abroad; • No verification by NRA about wages declared in PD A1; <p><u>Problem:</u> the NRA does not check the minimum wages declared on the A1 Form because it is a competence of the labour inspection, but the labour inspection has no access to the A1 form. There is an process ongoing to create a database for the labour inspection which could perhaps resolve this issue.</p> <p>Difficulty of transnational cooperation: In case of requests, the NRA can say that contributions have been paid, but cannot give the amount of the contributions paid because of privacy policies.</p> |
| Belgium | <p>Different databases - everything is checked based on these databases, but no control on site unless there is ground for doubt.</p> <p>ONSS checks:</p> <ul style="list-style-type: none"> • Formal check related to the economic activities; • Verification if workers have been posted several times; • Alert in case the duration of posting exceeds 24 months; • Verification of social contributions paid on the minimum wages abroad • Verification of wage amount abroad • LIMOSA System allows the ONSS to check the duration of posting, if there are 2 requests for the same employer there is an alert. |
| The Netherlands | <p>In the Netherlands, the issuance of the PD A1 will be done almost automatically without too much formal control. However, after 3 months the Social Insurance Bank (SVB) will check the enterprise and withdraw the PD A1 if necessary.</p> |

| | |
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| | <p>However, there are not enough employees to check every demand. Therefore, during the delivery process, the focus will be on asking the rights questions in the different steps of the procedures.</p> <p>SVB checks:</p> <ul style="list-style-type: none"> • General check related to the economic activities; • Verification if workers have been posted several times; • No system of alert in case of exceeding 24 months duration of posting; • No verification about the amount of social contributions paid; |
|--|--|

Practical cases related to cooperation:

The Netherlands: Different cases with Hungarian companies sending posted workers in the Netherlands. There have been several cases where there was doubt about the substantial activities of the company in Hungary, resulting in communication between the tax administrations in Hungary and the Netherlands. When the information is obtained, it is communicated to the social security of both countries to be able to withdraw the A1. Therefore, for each case, 4 different institutions need to be mobilized in order to fight possible fraud. The Social Security services of the Netherlands cannot communicate directly with the Hungarian tax authorities. This is time consuming and inefficient.

Belgium: In the Netherlands, the A1 is issued by social security, but the employers pay the contributions to the tax administration. The ONSS encountered different cases, where the social security services from the Netherlands told them that the company did not have activities, but they were unable to provide evidence which depended on the tax administration. The ONSS is a centralized institution, but it remains a social security administration, which cannot request directly fiscal data from tax administrations from others EU countries. Indeed, if European legislation allows for a cooperation between social security institutions, nothing is foreseen for bilateral cooperation with the tax administrations.

Belgium: Belgian cases related to the duration of posting. For logistical reasons PD A1 is often issued for 24 months in different countries even if the posting is shorter. So, if the posting is less than 24 months, the data is not updated. For example, the ONSS got different cases where they made a control regarding Polish posted workers who had been working in Belgium for 3 years so they requested to remove the A1. But in fact it was a case of consecutive posting periods. The PD A1 had been issued for 24 months, but the workers only worked for 12 months, went back to Poland for 3 months and came back to Belgium with a new 24 months posting.

No harmonization of the institutions delivering and checking PD A1. At the same time, services can be decentralized which leads to a multiplication of actors where no one knows who to contact in case of problems.

11. Challenges of A1 withdrawal

| COUNTRY | |
|-----------------|---|
| Romania | No information available. |
| Portugal | No information available. |
| France | CLEISS centralizes requests for withdrawal from URSAFF. Challenges to ask institutions in the sending countries to withdraw the A1, but different DP A1 have been withdrawn. |
| Bulgaria | NRA got in total 4 litigation procedures for withdrawal of the A1. None has been withdrawn. |
| Belgium | Belgium obtained withdrawal of 796 PD A1 in 2015, 1016 PD A1 in 2016 and 560 PD A1 in 2017 (up until September). <i>Best practice:</i> Using Platform OSIRIS for all the procedures A1 (see below) <u>Challenges:</u> If a worker has had many medical expenses, it is difficult to know how to recalculate social security. In some cases, Belgium was able to withdraw the PD A1, but the institutions of the sending country reimbursed all the amounts to the employer. Therefore, in several cases, the employer disappears after reimbursement. In Romania, they avoid this and there is no reimbursement to the employer. |
| The Netherlands | SVB has withdrawn several DP A1 (most of them for non-genuine economic activities) but it has been very difficult to obtain withdrawal from other EU members states. |
| Italy | In the 6 litigation procedures introduced by Italy for withdrawal of the A1, not one has been successful. |

OSIRIS¹³: Through its computer-monitoring platform, the OSIRIS project helps fighting against social dumping and cross-border social fraud, helping to improve European conciliation mechanisms with regard to the posting of workers.

Objectives:

1) Optimize the dialogue between the Belgian social inspectorates and the foreign institutions in case of disagreement concerning the subjection of a worker (conciliation procedure).

¹³ <https://socialsecurity.belgium.be/fr/activites-internationales/osiris-pour-mieux-lutter-contre-le-dumping-social>

2) Propose improvements to existing procedures, such as the acceleration of the conciliation procedure, through electronic data interchange (EESSI), the strengthening of cooperation between states, the improvement of the international collection of contributions

Practical cases in Belgium:

Several cases with Slovakia in which they realized that they were rotation postings, so the Social Security of Slovakia was asked to withdraw the A1. The Slovaks agreed with the findings, but they asked not to withdraw the A1 for the whole posting period, but only from the time when the findings were made. It was seen as too complicated to recalculate if workers had used medical insurance.

12. Recovery of rights

In all the countries interviewed, there are prescription delays that hinder the recovery of rights because the juridical procedures take too long. In France, Bulgaria and Belgium there are 3-year prescription delays, in Italy it is 5 years and in Portugal 1 year.

In the meantime, the recovery of rights will also depend on the recognition of the fraud. For example, **only a few countries have introduced criminal proceedings in their country for false A1**. Thus, in some countries false A1 forms are recognized as a penal crime (Portugal or Belgium), but in Italy it is only recognized as a civil crime. If the Belgian authorities found a false PD A1 for Portuguese posted workers, it would be possible to act in Portugal to follow the case. This will not be the case for Italy as in Italy they will not recognize the sentence in Belgium.

In parallel, **sanctions do not solve the administrative problems of the persons involved**. Criminal sanctions have a **territorial dimension** and will not necessarily be recognised in the sending country.

There is also a difference between the labour inspections who condemned an employer. Even if the employer is condemned, this does not solve the administrative problem of social security. Social security is an individual administrative process so if an employer is condemned it does not mean that the worker can recover the rights related to social security. The employer takes advantage of this flaw.

Problems to recover rights in case of self-employment: the labour inspectorate requalifies the worker by showing that it is not self-employment, at the social security level the worker cannot be reclassified (because sending countries not reclassified). (Just very few cases of self-employment in Portugal and Netherlands)

13. Labour Inspection Role – Issuing A1 process and others working conditions

| COUNTRY | |
|------------------------|---|
| Romania | <p>CNPP checks social security issues.</p> <p>Labour inspectors in Romania can check regarding posting of workers, helped by an exchange of information with national or transnational authorities</p> <p>Labour inspectors can check working conditions, wages, payments, pay slips and all issues related to labour and occupational health and safety.</p> |
| Portugal | <p>Labour inspectors can check working conditions, wages, payments, pay slips and all issues related to labour and occupational health and safety.</p> <p>They can also check activities of a company.</p> |
| France | <p>Labour inspectors can check working conditions, wages, payments, pay slips and all issues related to labour and occupational health and safety.</p> |
| Bulgaria | <p>Labour inspectors can check working conditions, wages, payments, pay slips and all issues related to labour and occupational health and safety. The powers of supervisory bodies of the Labor Inspectorate are listed in art. 402 of the Labour Code</p> |
| Belgium | <p>Labour inspectors can check working conditions, wages, payments, pay slips and all issues related to labour and occupational health and safety.</p> |
| The Netherlands | <p>Targeted inspections in the construction industry.</p> <p>Control done in cooperation with the fiscal administration.</p> <p>Big issue related to temporary agencies.</p> <p>For requests via the IMI system, it is difficult to obtain the correct answers from the sending States. The IMI system does not allow asking the questions that the inspectors want to ask. The questions must be adapted to the system, which causes a loss of information and the answers obtained are insufficient. Often no answers.</p> <p>Best practice: Transnational Cooperation between labour inspectors through Eurodétachement Network. Better because the cooperation is direct.</p> |
| Italy | <p>Labour inspectors can check working conditions, wages, payments, pay slips and all issues related to labour and occupational health and safety.</p> |

GENESIS Communication Platform between labour inspectors:

It is a web based communication platform to increase the inspectors' visibility regarding all current enquiries in the country. There is a Synthetic Cadaster of all on-going and finished enquiries of 4 federal inspection services. This platform can be consulted by all Belgian inspectors.

Added value: enrichment of all files = starting from Genesis, inspectors can « jump » directly to other databases of the portal Social Security

OASIS (Organisation Anti-fraude des services d'inspection sociale) : it is a data warehouse for fraud risk analysis, on the basis of data crossed from different databases : datamining

3 databases reviewed « source »:

- Social Security
- Unemployment allowances
- VAT (tax) and lists of clients

30 alerts possible in function of the fraud aspect aimed at:

- Undeclared work
- Abuse of unemployment fees
- Sickness
- subcontractors of doubtful behaviour

Practical Italian cases:

Case 1: Italian inspectors checked an Italian company in the service sector which employed more than one hundred Romanian posted workers. These employees were all posted by a Romanian temp agency. The PD A1 of these workers could not be provided to the Italian authorities and the Italian company only asked PD A1 when the Romanian workers were all already in Italy. The secretary of the Italian company was in reality the same as the secretary of the Romanian temp agency. To get information on the temp agency in Romania (economic activities, social contributions...), the Italian inspectors went through the Romanian Embassy in Italy, which then asked the Romanian labor inspectorate. It is therefore the embassy that served as an intermediary between Italy and Romania, the inspectors at the local level having no knowledge (or use) of the IMI system. Today the case is in Court, but the Italian inspectors cannot requalify the workers and recalculate the salary. During the process, the company has changed its name, and asked for new PD A1s and as this is a new company, it is almost impossible to demonstrate cascade posting so they are able to get new PD A1. At the same time, the transposition in Italy of the 2014 directive does not allow the unions to act on behalf of the posted workers, so no contact between the workers and trade unions has been possible to recover their rights.

Case 2: The case of a Romanian textile worker who had worked and lived in Italy for 10 years, however, were only given an A1 form via a Romanian temp agency to work in Italy. After the control of the Italian authorities, employers decided to regularize the situation in terms of labour law, but no information if the A1 has been removed.

14. Trade Union Role

| COUNTRY | |
|-----------------|--|
| Romania | FGS Familia starts to inform workers on their rights abroad. They cooperate through the European REDER Network REDER and share information between the trade unions and labour inspections in Europe. Through this network they can help the Romanian workers posted abroad. |
| Portugal | FEVICOM informs posted workers and defends them when they come back in Portugal. They cooperate through the European REDER Network and share information between the trade unions and labour inspections in Europe. Through this network they can help the Portuguese workers posted abroad. |
| France | FNSCBA CGT informs posted workers and defends them. However, the lack of access to databases from the authorities control services is a problem to recover the rights of the workers. They cooperate through the European REDER Network to share information between the trade unions and labour inspections in Europe. Through this network, they can ask help from the sending countries for workers posted in France. Trade unions in France do not have access to the A1 and the workers do not know if they are covered by the social security. |
| Bulgaria | FITUB informs posted workers and every worker can receive free advice from their experts. They cooperate through the European REDER Network to share information between the trade unions and labour inspections in Europe. Through this network they can help the Bulgarian workers posted abroad. Trade unions can help inspectors only in the first step of the investigation in Bulgaria. |
| Belgium | CSC/ACV cooperates through the European REDER Network to share information between the trade unions and labour inspections in Europe. Through this network, they can ask help from the sending countries for workers posted in Belgium. Creation of a “Plan pour la concurrence loyale” between labour inspection, trade unions and employers in the construction and transport sectors. The goal is to cooperate through this agreement to solve important cases of fraud. |

Practical cases in France:

FNSCBA CGT mentioned that the number of posted workers thought “triangular posting” increases. Indeed, in different cases, the posted workers are not posted from their country of origin and residence. Different cases involved Romanian citizens with a principal residence in Romania, but posted from Spain or Italy (where they never went).

FNSCBA CGT got a case involving 14 Romanian workers posted in France through an Italian company in the construction sector. After 2 months of work in France, the Italian employer started to withdraw from all the employees sums ranging from 500 to 1500 euros, which makes that several employees received a payslip with 500 or even 0 euro in net salary. The French trade union was able to ask the Italian trade union FILLEA CGIL whether the social security contributions were paid in Italy. CGIL has access to a database on worker contributions in the construction industry so the French union quickly knew that social contributions were paid in Italy. However, during 2 years the social security contributions were paid in Italy, a country in which the workers never set foot, so after 2 years they were not able to claim their right to unemployment, nor their right to medical insurance.

CHAPTER II

Improving cross-border social security

By Prof. Dr Mijke Houwerzijl

The rules for coordination of national social security systems within the EU/EEA should contribute towards improving the standard of living and the conditions of employment of the workers and other citizens exercising the fair right to free movement.¹⁴ Hence, it would be difficult if not impossible to reconcile another approach than ‘equal treatment’ based on application of the law of the state-of-employment (*‘lex loci laboris’*) with the Treaty texts, which clearly support a ‘level playing field’ instead of a ‘free playing field’.¹⁵ Recognising the promotion of free movement of workers through securing equal treatment and ‘preventing disadvantages’ especially for employees, as underlying goals of the Basic Regulation 883/04 (hereinafter Reg. 883) and its Implementing Regulation 987/2009 (hereinafter Reg. 987), also implies that the rules must not be regarded purely as a matter of technical coordination.¹⁶

Therefore, it must be stressed that exceptions to the application of the law of the state-of-employment in Reg. 883, such as in case of posting and working in two or more Member States (hereinafter MS), are only meant for situations in which it would be either impossible or inappropriate to apply the main rule, because of the nature of the economic activity performed. To prevent misuse of the posting provision, which must ‘like all exceptions, not be too widely and improperly construed,’¹⁷ the application of this exception to the main rule was already in the early days made subject to a number of conditions.

Nevertheless, the fact-findings presented in the previous Chapter confirm¹⁸ that the posting provision is more and more used as a rule than as an exception, due to poorly monitoring the conditions and subsequent weaknesses when it comes to detecting and responding to irregularities

¹⁴ Recital 1 of the preamble of Regulation 883/04 (hereinafter Reg. 883).

¹⁵ As Däubler put it: ‘competition based on better performance’ and ‘competition based on worse working conditions,’ are two different things in reality within the meaning of the Treaty; they are not on an equal footing. The fairest one is a fundamental principle of the internal market, the second one is potentially in contradiction with legal principles of the EU and therefore a ‘revocable’ phenomenon.’ Wolfgang Däubler, ‘Posted Workers and Freedom to Supply Services’, ILJ 1998, 266.

¹⁶ When giving arguments for its interpretation of the EU coordination provisions, the Court often refers to this ultimate goal of Reg. 883 and Reg. 987.

¹⁷ See e.g. Opinion A-G in case 13/73 (Hakenberg).

¹⁸ In addition to other research from approx. 2011 onwards, which together show abundant proof of exploitative, abusive situations of posting, such as conducted by FRA, Eurofound, ETUC (letterbox project), FreSsco, Network Statistics FMSSFE, and academic research by e.g. Jorens, Lhernould, Lillie, Wagner, Berntsen, Cremers, Van Hoek & Houwerzijl. See also EP and EC documents related to COM (2016) 815 and more in general the ‘fair mobility package’ work program of the Juncker Commission: The Commission has set itself to work towards a deeper and fairer Single Market as one of the chief priorities for its mandate.

in application of the rules. Currently, there are two major ‘models’ of posting: One mainly driven by labour cost differentials,¹⁹ the other mainly driven by the shortage of and demand for skilled and highly professional workers.²⁰ In particular the model first mentioned, sits uneasy with the ultimate aims of Reg. 883, showing a huge gap between the theory, as summarized above, and the daily practice of how national stakeholders deal with situations of cross-border posting and other cross-border services movement such as working in two or more MS.

Avoiding fragmented social security biographies is in principle a win-win for both worker and employer, in particular if it goes hand in hand with aligned applicability of labour law and social security and (preferably) tax law in the same state.²¹ This will usually happen if the place of closest connection in terms of the performance of the employment activity can be determined in a similar fashion for all three legal areas. In any case, the ultimate litmus test must be whether the applicable social security law is (still) in the objective interest of the workers concerned.²² The *primary* obligation for competent institutions is therefore to serve the interest of the (posted/multi-active) worker, not the employer’s or its own interests (such as administrative convenience). Against that backdrop, a logical rule of thumb would be that ‘flexible’ interpretation/application of the rules should only be fostered with regard to workers in stable employment (if in their own interest), not for those in temporary employment.

From this angle, the following (non-exhaustive)²³ selection of issues related to Art. 12 Reg. 883 (on posting) and/or Article 13 Reg. 883 (on working in two or more MS) is discussed below, taking also into account relevant provisions of Reg. 987:

- Checking the genuine nature of the business in relation to Art. 12 Reg. 883 and Art. 13 Reg. 987.
- Strengthening the continuity of the social security status of posted workers (Art. 12 Reg. 883).
- Ensuring that social security premiums to the national social security authorities are properly calculated and paid.
- The role and reliability of the A1 certificates (e.g. validity and ways to have them withdrawn or declared invalid).
- Towards an effective and efficient cross-border cooperation, exchange of information, recovery and joint inspections

¹⁹ The difference in social protection levels between Member States has grown following the 2004, 2007 and 2013 enlargements.

²⁰ EP, Policy Department A, PE 579.001, p. 14.

²¹ Using aligned applicability of labour law and social security and tax law as an indicator would imply that all postings longer than 183 days should be closely scrutinized and that postings by temporary agencies should be scrutinized even more closely (since according to OECD Model Treaties, host state tax law might apply from day 1 for intermediaries).

²² ‘Objective’ in this regard should be interpreted in line with the ultimate purpose of Reg. 883.

²³ It is beyond the scope of this Chapter to provide an overall analysis of the relationship between the main rule in Art. 11(3)(a) Reg. 883 and the exceptions laid down in Art. 12, 13 and 16. For a more comprehensive analysis see M.S. Houwerzijl, *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part II: Letterbox strategies to avoid social security contributions. How EU social security coordination rules are misused and undermined by companies, which create artificial arrangements, 2016.

1. Checking the genuine nature of the business, which temporarily posts a worker abroad and/or assigns the worker to work in MS2+

One of the most problematic issues in establishing the genuine nature of situations that should be covered by Art. 12 and Art. 13 Reg. 883, is the concept of ‘substantial activities’. This is used to check that the employer normally carries out activities in the sending MS.²⁴ The aim of this check is to prevent classical examples of fraud where all work is carried out in MS 1, while the business is intentionally set up in MS 2 to have the contracts of the ‘posted’ workers situated there, with the purpose to remain covered under the ‘lower cost’ legislation of MS 2. To avoid manipulation of the rules from a social premium perspective, competent social insurance institutions should check if a given *employer* posting his or her employees to another MS, *normally carries out activities and is habitually active on the territory of the State in which he is established*.

1.1. How to measure substantial activities...

In this respect, Article 14(2) Reg. 987 insists on the *pursuit of substantial activities other than purely internal management activities* in the MS where the employer is established.²⁵ According to the Practical Guide (2013, p. 8), this can be checked via a series of objective factors. Checking that at least 25% of total annual turnover is in the posting State, is most often used as an indicator. Nevertheless, according to the fact-findings discussed in Chapter III, in some MS it is deemed a strict criterion, which in a few MS is even systematically and automatically checked (by interconnected registers), in others it is used rather loosely, as ‘only’ a soft indicator. Proposed amendments by MEP’s to the Commission’s proposal now aim to include the pursuit of substantial activities in Art. 14(2) Reg. 987 as the official criterion.²⁶

Moreover, the Commission’s proposal strives for a greater parity between the concepts of substantial activities used under Art. 12 Reg. 883 and Art. 13 Reg. 883. This is a good step, since there are indications based on most recent PD A1 figures that (‘creative’) use of Art. 13 Reg. 883 is on the rise, relative to the use of Art. 12 Reg. 883.²⁷

For determining the applicable legislation in cases of pursuit of activities in two or more MS (Art. 13 Reg. 883), the starting point is that the social security legislation of the MS of *residence of the workers* is applicable provided they *pursue a substantial part of Reg. 987 activities* in that MS. Working time and/or remuneration constitute indicative criteria. A share of less than 25% of these

²⁴ CJEU of 10 February 2000, C-202/97, FTS, point 30.

²⁵ CJEU of 9 November 2000, C-404/98, J Plum, point 19-22.

²⁶ Some proposed amendments (562, 564) also ask that Art 14(2) Reg. 987 integrates the criteria developed to define substantial activity in Directive 2014/67/EC (EPWD). Art. 4(2) EPWD allows for assessment of whether there is a ‘genuine establishment’, based on factual elements including place of performance of *substantial business activity*, *number of (administrative) staff*, *size of turnover*. Interesting is proposed amendment 565 which adds to Art 14(2) Reg. 987: taking into account (...) *the hours worked in the sending state where such hours worked are at least 25% of the total hours worked*.

²⁷ See Frederic De Wispelaere, presentation in Vienna, September 2018, based on Frederic De Wispelaere, Jozef Pacolet, *Coordination of social security systems at a glance, 2017 Statistical Report*, Network Statistics FMSSFE, Reg. 883 Brussels: European Commission 2018, p. 41.

criteria creates the presumption that there is no "substantial part".²⁸ When assessing these criteria, the assumed future situation for the next twelve months has to be taken into account.²⁹

However, if these workers have maintained Reg. 987 residence in MS 1, but do not pursue any activities there, they are subject to the legislation of the MS in which the registered office or place of business of the undertaking or employer is situated (Art. 13(1)(b)(i) Reg. 883). As Article 14(5)(a) Reg. 987 clarifies: "Registered office or place of business" refers to the registered office or place of business *where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out*.³⁰ As a general principle, letterbox arrangements, where the social insurance of the employees is linked to a purely administrative company without having actual decision-making powers, should not be accepted as satisfying the requirements in this respect.

1.2....in the objective interest of the posted/multi-active workers concerned?

At the same time, using the criterion 'registered office or place of business' does not guarantee that the multi-active worker will be covered by the social security system closest connected in terms of the performance of the employment activity.³¹ On the contrary, as became clear in the tax-related *Planzer* judgment,³² the criterion 'registered office or place of business' (in the meaning now used to interpret Art. 14(5) Reg. 987) prioritizes the country where the essential decisions concerning the general management of a company are adopted, above the country from which the company's operational road transport activities are actually carried out.³³ Even more worrying, when looking to the facts in *Planzer*, is that major turnover was reported in the country of registered office/place of business, despite the fact that the workers did not perform any substantial operational activities in terms of working time or remuneration in that country.³⁴ Clearly, the devil is in the detail with regard to substance criteria.

²⁸ Article 14(8) Reg. 987: the proportion of activity pursued in a MS is in no event substantial if it is less than 25 per cent of all the activities *pursued by the worker in terms of turnover, working time or remuneration or income from work*.

²⁹ Article 14(10) Reg. 987.

³⁰ Article 14(5)(a) Reg. 987, inserted by Regulation 465/2012. According to the Practical Guide (2013), p 35; this definition is derived from extensive guidance in the case law of the CJEU and from other EU regulations.

³¹ Which is however of crucial interest for his social security position, in order to create *Gleichlauf* with his labour law position.

³² Case C-73/06 *Planzer* Luxembourg.

³³ Apparently, exactly for this reason, proposed Amendment 570 favors the use of a criterion based on the *Planzer* judgment, since "treating the substantial activity as the decisive factor could affect badly fair companies, for example in the transport sector."

³⁴ Point 28 *Planzer* judgment: *The applicant did not have any equipment or other property at the registered office, nor were its officials permanently present in Luxembourg. Nor were there any storage premises or parking spaces for goods vehicles there. However, the lorry drivers were registered in Luxembourg and the goods vehicles were also registered there. In the year 1997 the claimant declared turnover in the sum of EUR 575 129.56 in Luxembourg. Both of the applicants directors were present in Luxembourg either 2 to 3 days a week (Surber) or 2 to 4 days a month (Gemple). Major management decisions (such as the purchase of goods vehicles, engagement of staff) were taken there and the administration was also located there (bookkeeping, invoicing, pay administration). Operations (arrangements and organization regarding haulage trips, contact with customers) were nevertheless carried out by P*

From the dual perspective of curbing social fraud and fostering the worker's interest, it is imperative to use coherent and aligned substance requirements in Art. 12 Reg. 883 and Art. 13 Reg. 883 situations. A step in the right direction is the Commission proposal to link the *Planzer* criterion currently used in Art 13(1)(b)(i) Reg. 883, cumulatively to the condition that 'the undertaking performs a substantial activity in that Member State'[of registered office/place of business MH].³⁵

Another loophole that needs to be closed is the apparent possibility of formal observance (as in *Planzer*) of the substantial turnover criterion without meeting the real purpose of this criterion (being the designation of the MS where real *operational* substantial activities take place).³⁶ Therefore, within an overall assessment, a key element of the 'substance requirements' for both posting and working in MS2+, to be implemented in all relevant parts of Art. 14 Reg. 987, should be linked to *operational activities* of the employer in the home/sending MS, by its *operational workforce* of at least 25 % of activities in that state. This can in most cases be assured by taking working time/number of hours (in case of Art. 12 Reg. 883 situations of the whole operational staff, in case of Art. 13 Reg. 883 situations, of the multi-active worker himself) as the key criterion. Next to that, remuneration³⁷ or income from work and annual turnover of the employer deserve to be used as additional indicators.

In this way,³⁸ 'light-touch' interpretations should be avoided, such as for example in a blog of a consultancy firm informing about new regulations from 2018 on regarding the conditions to obtain an A1 (and more in general about doing business in Slovenia), stating that an employer is deemed to 'work usually' in Slovenia if the conditions stated in the box below are fulfilled.³⁹

| |
|--|
| <p>Slovenia - Obtaining A1 form for posted workers – new regulations after 1.1.2018 -> Conditions for company:</p> <ul style="list-style-type: none"> - it has been registered for at least 2 months in the Business Register of Slovenia - has (unblocked) transaction account - has an adequate number of employees according to the size of the company and the number of posted workers (at least five to ten workers – at least one has to be involved in social insurance for at least six months. Or if the period of establishment is shorter or employs more than ten workers – at least three workers have to be included in social insurance) * Emphasis MH |
|--|

AG from Switzerland. Under those arrangements, the claimant rendered the corresponding haulage services using the aforementioned goods vehicles owned by it. *Services were supplied 100% to P AG from Switzerland and the claimant accounted to it for the services concerned from Luxembourg.*

³⁵ COM (2016) 815 re Art. 14(5)(a). Also, proposed amendments 289/290 are a clear improvement to the current rule, adding to Art 13(1)(b)(i) Reg. 883, the requirement of substantial activity of the employer, and, where this is not applicable, the place in which the employee predominantly pursues his/her activity or activities.

³⁶ In analogy to CJEU in C-110/99 (*Emsland-Staerke*), para.52.

³⁷ In situations where intermediate companies such as temporary agencies or subsidiaries play a role, this indicator must (also) include the entity which actually bears the cost of the wages.

³⁸ In combination with other measures to strengthen the continuity of the social security status of posted workers, see section 3 below.

³⁹ See: <https://data.si/en/blog/obtaining-a1-form-posted-workers> < accessed 24 October 2018> Other conditions mentioned: "- employer should performs the activity which he stated on the application; - employer should not violate the main regulation of labor law (he did not receive a fine *more than once in 3 years* in connection with labor law); - employer was sending the calculations of tax deductions for income from employment and he does not have unpaid taxes." Remark MH: positive is a check for unpaid taxes, but at the same time it begs the question why unpaid wages and unpaid social security contributions are not included as conditions?

1.3. Additional measures to safeguard posted/multi-active workers' interest

Regarding Art. 13 Reg. 883 situations, it is necessary to establish a maximum period (preferably one year, but at least not longer than the maximum posting period) after which should be assessed whether the situation of the employee working in MS2+ calls for an adjustment in the light of the applicable legislation. Adding a time-bound dimension to the criteria for real establishment of posting companies, would be helpful to distinguish genuine start-up companies from letterbox arrangements.⁴⁰ As proposed in Parliament,⁴¹ undertakings could be asked to demonstrate that they have been principally pursuing, for more than 90 days, in the territory of the MS in which they are registered, a real activity which belongs to the same sector of activity, as defined at the divisional level of NACE Rev. 2, as that assigned to the worker(s) whom it posts and/or sends to another MS for work on its behalf.⁴²

Last but not least, there is a need to include a cross-reference in Art. 14 Reg. 987 to substance requirements used in legal instruments in related areas (such as labour law, taxation, road transport, company and insolvency law). Creating such an interconnection will be useful to complete or double check in certain situations from an overall perspective on genuine establishment of the company and on a genuine posting or MS2+ situation. This is particularly useful when concrete suspicions of fraud arise,⁴³ since in other areas such as tax law as discussed in another chapter not only factual elements, but also the (genuine) intent is taken into account.

Exemplary in this respect is the list of (non-exhaustive) factual elements included in a recent proposal in the field of cross-border company mobility to determine 'whether an intended cross-border conversion/division constitutes an artificial arrangement'.⁴⁴ The factual elements 'characterizing the company in the Member State of destination', include, at least: **the intent**, the sector, the investment, the net turnover and profit or loss, *number of employees*, the composition of the balance sheet, the tax residence, the assets and their location, the *habitual place of work of the employees and of specific groups of employees*, the *place where social contributions are due*, the commercial risks assumed by the converted company in the Member State of destination and the Member State of departure.⁴⁵

⁴⁰ See proposed amendments 573 and 574.

⁴¹ See proposed Amendment 252.

⁴² But still additional criteria are necessary to avoid 'light-touch' interpretation as illustrated in the Slovenian blog cited above (see in section 3 below).

⁴³ A definition of fraud, in a new Art. 1(2)(ea) Reg. 987 is proposed by the Commission, referring (as in the judgment *Altun*) to any *intentional* act or omission to act.

⁴⁴ COM 2018 241 final. But we have critical observations as to 'group of companies'.

⁴⁵ In italics the factual elements that create (implicit) links with substance requirements in other employee related legal areas.

2. Strengthening the continuity of the social security status of posted workers

Apart from checking substantive activities in the State of the establishment, competent authorities must be able to certify that the *workers* (to be) posted were already previously attached to the social security system of the sending MS.⁴⁶ The aim here is to achieve *continuity in the affiliation of the worker to the social security system of the sending MS*.⁴⁷ This affiliation must pre-exist even though Reg. 987 has considerably eased the terms and conditions considered in its Art. 14(1) on the requirement of prior affiliation. Pursuant to said provision, this shall include a *person* who is recruited with a view to being posted to another State, provided that, immediately⁴⁸ before the start of his employment, the *person* concerned *is already subject to the legislation of the State in which his employer is established*. The decision of the administrative commission on the coordination of social security systems has however laid down certain restrictions by stating that in the case of the person concerned "*having been subject to the legislation of the MS in which the employer is established for at least one month, can be considered as meeting the requirement.*"

Undermining the exceptional character of posting even further, is the (too) broad interpretation in the Practical Guide 2013 (p. 11) of the personal scope of the criterion of previous attachment. According to this Guide, it "is also fulfilled by *students or pensioners or someone who is insured due to residence* and attached to the social security scheme of the posting State."⁴⁹ Such reading seems to be based on the broadening of the personal scope of Reg. 883 (whereas the old Reg. 883 1408/71 was limited to employees and self-employed persons). This Broadening of the personal scope does however not include provisions clearly meant for the working population only, such as Art. 11(3)(a) Reg. 883 regarding the state-of-employment principle and the exceptions to this main rule in Art. 12 and Art. 13 Reg. 883.

Stretching the scope of Art. 12 Reg. 883 to persons who were not economically active before being posted, is flagrantly in breach with the purpose of the posting provision, which aims to protect posted *workers* from an interruption of their affiliation to a social security system, since this would adversely affect their rights. Indeed, the exception to the state-of-employment principle in situations of posting is meant to guarantee that the '*wage earner or assimilated worker* (..), shall continue to be subject to the legislation of the former Member State as though he were *still*

⁴⁶ Next to these two conditions, there are three other *cumulative* conditions to prevent abuse of Art. 12 Reg. 883, namely that the posting is limited in time (max. 24 months); that the worker is sent to work on the sending employer's behalf (requirement of direct relationship) and that the worker is not sent to replace another posted worker (replacement ban). More elaborate M.S. Houwerzijl, *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part II.

⁴⁷ Practical Guide p. 10 clarifies: '*Employment with any employer* in the posting State meets this requirement. It is not necessary that during this period the person worked for the employer requesting his/her posting.'

⁴⁸ 'Immediately' is in the Practical Guide interpreted as 'at least one month' prior to the posting, p. 9-10. Shorter periods require a case by case evaluation taking account of all the factors involved.

⁴⁹ As an example, the Practical Guide, p. 11, shows how the condition of previous attachment as an employee is stretched to persons who were not socially insured as a worker before they were posted: 'b) Worker X started his employment with employer A on 1 June. *Immediately before the start of his employment he had been living in Member State A being subject to the legislation of Member State A since he attended a course at university.*'

employed in its territory (...).⁵⁰ It is submitted that a posted worker who was not previously insured for employee related risks such as for income replacement in case of sickness, disability, unemployment and (in some systems) the building up of pensions rights in the sending MS, cannot be adversely affected in employee-related social security rights by a switch to another social security system.

Hence, the term ‘person’ in Art. 14(1) Reg. 987 should not be interpreted as including persons such as (not working) students or pensioners, who were not previously affiliated to employee-bound social security insurance in the sending MS. The too extensive interpretation in the Practical Guide should therefore be deleted. To avoid any future misunderstandings, it would even be better to replace the term ‘person’ in Reg. 987 by ‘worker’, since it is clear that the posting provision is only meant to be relevant for people insured for worker-related benefits.

Strengthening the purpose of Reg. 883: continuous affiliation through time-bound criteria

In order to better operationalize and strengthen the aim of continuous affiliation to the social security system where the posted worker has his genuine (habitual) ‘centre of work’, a longer period of previous insurance in the sending state than one month is now proposed by the Commission and further elaborated upon by proposed amendments of MEP’s (3 - 6 months).⁵¹

Prescribing a longer period of previous attachment (preferably at least as long as the duration of the posting) would self-evidently strengthen the link between the posted worker and the legislation of the sending MS.⁵² Moreover, such a measure would (if systematically monitored and enforced) effectively discourage situations of “triangular posting,” in which workers are posted from a different MS than where they were previously affiliated to the social security system. In said situations, entitlements to social security are hampered even if the posting (formal) employer is in compliance with his duty to pay social security contributions in the sending MS.⁵³

Also, the Commission’s proposal to insert in Art. 12(1) Reg. 883 a cross-reference to workers posted in the meaning of the PWD,⁵⁴ creates a most welcome link between conditions for posting in the (E)PWD and in Reg. 883/Reg. 987.⁵⁵ This strengthens the message to practitioners that in reality both sets of conditions have to be complied with at the same time. Contrary to this message, the

⁵⁰ As clear from the wording of the old posting provision Article 13(1)(a) of Regulation No 3 (as referred to by the A-G in *Manpower*).

⁵¹ Regarding Art 12(2) Reg. 883 on the posting of self-employed, it is proposed that (a) the anticipated or actual duration of such activity does not exceed six months (...), and (b) for a period of at least six months immediately preceding the start of the activity, the person concerned has already been subject to the legislation of the MS in which he or she normally pursues his or her activity. See Amendment 22, report Balas, Nov. 2017. Adoption of this amendment would highly improve the ratio between prior affiliation and the duration of posting (in light of the fact that posting should be an exception to the main rule).

⁵² Indirectly, periods of 3-6 previous insurance *as a worker*, might also strengthen the requirement that the worker is sent to work on the sending employer’s behalf (requirement of direct relationship).

⁵³ See Chapter I, the French example, about a case involving 14 Romanian workers posted in France through an Italian company in the construction sector. During 2 years, the social security contributions were paid in Italy, a country where the workers never went. After these 2 years, they were not able to invoke their right to unemployment benefits, nor their rights in relation to medical insurance.

⁵⁴ But not limiting this provision to such secondments (by adding the notion of ‘sent workers’).

⁵⁵ For inspiration see Directive 2014/67 Art. 4(c) and 4(d)).

Commission's proposal does not alter the time limit to posting of 24 months.⁵⁶ Therefore, in light of the new threshold for 'long-term posting' of 12 (or exceptionally 18) months in the meanwhile adopted revised Posting Directive 2018/957, it is highly recommended to adopt MEP amendments proposing to align the anticipated or actual duration of the posting in the coordination regulations and the PWD.⁵⁷

Finally, an interesting proposed amendment aims to enhance the so-called 'escape clause' (Art. 16 Reg. 883). To the possibility for (the competent authorities/bodies of) two or more MS to conclude common agreements providing for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons, the proposal adds that *a common social security scheme for the persons referred to in Articles 12 and 13 may be established, provided that that scheme is more favourable to them*.⁵⁸ Adoption of this amendment would strengthen the aim of Art. 16 Reg. 883 as a potential corrective tool in 'the interest of the workers' concerned. This notion corresponds to the ultimate aim of Reg. 883, namely to contribute to improving the standard of living and the conditions of employment (including their level of social security protection) of the (posted and multi-active) workers and to prevent disadvantages in that respect. In contrast, in current practice administrative convenience most often prevails.⁵⁹

3. Ensuring proper calculation and payment of social security contributions to national social security authorities

A persistent finding in research, confirmed in Chapter III* of this report, which is clearly to the 'detriment of the workers' involved, concerns problems occurring in relation to the calculation of social security contributions during postings or working in MS2+. ⁶⁰ As is well-known, in certain sectors such as road transport or construction, (sometimes artificially established) 'employers' from low wage sending states systematically try to cover the gap between sending and host state wage level by the extensive use of 'per diems'. This manipulative use of national rules for business trips, is obviously in breach with the (purpose of the) PWD and Reg. 883.

⁵⁶ Despite the fact that there was no clear justification for the prolongation to 24 months in Reg. 883/04. Notably, in the old Reg. 883 1408/71, the anticipated duration of the posting was 12 months (with a narrowly construed possibility to extend for another 12 months, which was seldom used). See Paul Schoukens and Danny Pieters, 'The rules within Regulation 883/2004 for determining the applicable legislation', *EJSS*, 2009/1-2, p. 106-107.

⁵⁷ See in this regard, Ch. III section 1.4 for more elaborate suggestions on the need to align both legal instruments with regard to the duration of posting.

⁵⁸ See proposed amendment 25 to Art 16(1) Reg. 883 (report Balas) and http://www.cleiss.fr/pdf/rgt_883-2004.pdf. Flexibility is already possible to some extent under 'the escape clause' of Art. 16 Reg. 883 as well as under the old regulation 1408/71. For instance, the Dutch and Belgian authorities agreed to solve these problems by concluding Article 17 Agreements, in particular when persons work in certain marginal jobs, such as the voluntary fire brigade or voluntary army or are members of the Municipality council, so that persons who have their main activity in Belgium continue to fall under the Belgian social security system. See Tress report, 2007.

⁵⁹ More elaborate M.S. Houwerzijl, *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part II, p. 64-65.

⁶⁰ See already Tress report 2007 and Van Hoek/Houwerzijl, *Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, 2011, Executive Summary, p. 9/10.

Part of such strategies is that the base for tax and social security contributions can be effectively minimized until the level of the 'home state', since daily allowances are in most MS (fully or partially) exempt from taxes and social premiums.⁶¹ Clearly, said strategies are not in the (long-term) interest of the cross-border service workers concerned, whose substantive level of social security protection does in such cases not reflect their period of posting or working in MS2+ in host states with higher mandatory wage entitlements. Self-evidently, said strategies to lower gross wages as a base for tax and social security duties, also amount to unfair competition (social dumping) vis-à-vis local companies and workers in the host state.

Undisputed, but at the same time not explicitly stipulated and sanctioned in the legal framework of Reg. 883/Reg. 987, and/or PWD, the basis for calculation should be the minimum wage of the host MS. Hence, it is very important to repair this grey area in the interaction of both legislative frameworks.⁶² Regarding the PWD, the distinction between pay and reimbursements of costs is clarified in Directive 957/2018,⁶³ e.g. by a more 'watertight' formulation of Art. 3(1) and Art. 3(7) PWD. Regarding social security coordination, a proposed amendment to Art. 20 Reg. 987 by the rapporteur to the European Parliament deserves support. His proposal stipulates that the host state shall communicate to the competent institution of the 'home' MS the necessary information for calculating the contributions on the basis of the remuneration paid in the host state.⁶⁴ Additionally, it is recommended to oblige posting employers to provide information about the wage due in the host state during postings, when requesting a PD A1.⁶⁵

However, as reported, the sending state's legislation and/or practice sometimes facilitates calculation at a low level also in other ways than by turning a blind eye to extensive use of 'per diems'. Therefore, more needs to be done to guarantee the calculation of social security contributions on the basis of host state (minimum) wages in Art. 12 Reg. 883 and Art. 13 Reg. 883 situations (with the aim to build up a corresponding level of entitlements). What additional issues should be tackled?

Firstly, artificially low social security contributions relative to the wage level during posting, may be caused by income ceilings, which exist in many national systems as a threshold for calculation of the contributions (and corresponding benefits).⁶⁶ Apparently, in Bulgaria, these thresholds for calculation of social security contributions are 'individually set for different industries and types of

⁶¹ Several MS have a statutory duty to pay expenses and per diem allowances in the case of business trips.

⁶² See in this respect Chapter II, section 2.1 (on remuneration and calculation of social security contributions).

⁶³ The revised PWD, adopted 28 June 2018, to be implemented mid 2020.

⁶⁴ Proposed amendment 54 to Art 20(1) Reg. 987 (rapporteur Balas).

⁶⁵ This creates no extra administrative burden, since the employer is obliged to inform his employees about the wages during (most) situations of posting. See Directive 91/533 and Chapter III

⁶⁶ As reported in Ch. I: In Bulgaria there is a monthly ceiling of 2 600 BGN per Month (around 1 300 Euro), meaning that after 2 600 BGN per month, no social contributions are paid. In the Netherlands, there is an annual ceiling of 51 976 Euro. Above this amount no social contributions are paid. Until January 2017, in Romania, contribution for social security was limited to wages not higher than five times the national monthly average gross income (this relates approx. to a maximum of 3.400 Euro per month).

jobs each year, determined each year'.⁶⁷ Such yearly and differentiated individually setting of caps for the calculation of social security contributions is not transparent and creates ample room for manipulation. This is in particular true if the competent institution in the sending state refuses to provide information to host state authorities about the exact amount of social security contributions paid, based on confidentiality of the data (due to privacy concerns), which seems clearly in Breach with the spirit of 'sincere cooperation'.⁶⁸

Secondly, provisions related to the base for calculating social security contributions are sometimes interpreted differently in domestic situations than in the context of posting (resulting in lowering the 'maximum social security income' only in the latter situation). The fact-findings reported in Chapter I strongly suggest that such discriminating practice seems to take place in Portugal, based on a specific deviation of standard rules with regard to posting in the construction sector. Here (too), in reported cases, it has proven to be virtually impossible for host state authorities to check if the social contributions were based on the full salary due during the period of work in the host state, pertaining to lacunae in the prerogatives of labour inspectorates and social security bodies in both sending and receiving states.

Thirdly, a recent reform of the social security system in Romania exempts (posting) employers almost fully from duties to pay social security contributions. From 2018 onwards, the responsibility for funding the social security system is almost fully transferred to Romanian employees (the weaker party in the employment relationship), including workers in Art. 12 Reg. 883 and Art. 13 Reg. 883 situations. As a 'spillover effect', this reform therefore seems to incentivize exploitative 'export of workers', by the use of said exceptions to the state-of-employment principle laid down in Art. 11(3) Reg. 883. Moreover, regarding its content, the reform seems to violate international minimum standards of social security protection laid down in e.g. ILO Convention 102, Article 12 ESC and in the European Social Security Code. This is problematic not only for Romania,⁶⁹ but also for host states that ratified these fundamental standards.

It sits uneasy with host states' commitment to comply with said standards, if they would have to allow (due to issued PDs A1 by Romania) the performance of cross-border services by posted and multi-active workers on their territory who are affiliated to the Romanian social security system. Hence, although Reg. 883/Reg. 987 only coordinates and does not harmonize national social security systems, it merits further reflection whether a minimum level of decent national social security protection might be invoked as 'entrance criterion' to the use of Art. 12 and 13 Reg. 883.⁷⁰

⁶⁷ According to a survey of *Ius Laboris*, *Social security. Comparing rates and types of social security contributions across the world*, 2017, p. 7.

⁶⁸ See Ch. I, reported in practical cases between Belgium/France and Bulgaria.

⁶⁹ "Romania ratified the European Code of Social Security on 9/10/2009 (in force since 10/10/2010). It must comply with its provisions. These included that the cost of social protection should be borne collectively. Romania also ratified the Revised European Social Charter on 07/05/1999. Case law of the European Committee of Social Rights (ECSR) is clear on issues related to the funding of social security systems/benefits. It establishes that social security must be collectively financed. This means from contributions of employers and employees and/or by the State budget." See: <https://www.epsu.org/article/epsu-protests-unilateral-changes-social-security-system-expense-workers-romania>

⁷⁰ In this regard, it is interesting to make a comparison with e.g. the situation of TCN intracorporate transferees: they will in principle be insured from day 1 under the system of the host state and may in some situations be better

Last but not least, in predominantly sending states, there are sometimes indications of substantial non-compliance by companies to pay/withhold social premiums due in the home state.⁷¹ Such practices make workers very vulnerable and should therefore be clearly monitored in Art. 12 Reg. 883 and Art. 13 Reg. 883 cross-border situations. In this regard, it deserves consideration to allow for agreements (or experimental pilot projects) in bilateral or multilateral settings, that make host state institutions responsible for collecting social security contributions during postings on their territory and for transferring this to the competent institution in the home MS.⁷²

4. Providing reliable and trustworthy portable A1 documents

By showing that the theoretical underpinning of the binding character of PD A1's in the host state - namely mutual trust and sincere cooperation between MS - is flagrantly at odds with reality, the fact-findings reported in Chapter I complement and confirm previous research. Indeed, in many labour-cost-intensive sectors, the 'untouchable' posting certificates are popular as a means to disguise fraudulent situations.

4.1 PD A1 does not prove insurance in the sending state

The problem starts right at the beginning of the procedure, when (most often) the employer requests the competent institution in the sending state to issue a PD A1. Leaflets meant to inform the worker, strongly suggest that a PD A1 is based on checked information, on which one can rely as a 'proof' of social insurance (and paid social security contributions) in the issuing MS, both before, during and after the posting to another MS.⁷³

In reality, the system of Reg. 883/Reg. 987 is not making the applicable legislation dependent on actual insurance. On the contrary, the PD A1 is only a 'statement' of where the worker *should* be

protected regarding their level of social security than intra-EU intracorporate transferees (see Art. 18(2)(c) Directive 2014/66). Also interesting to compare with is the application of host state tax law from day 1 for temporary agency work and other labour-only situations of posting.

⁷¹ This seems to have been behind the recent radical system change in Romania: "Minister Ionut Misa explained that the Government decided on the social contribution transfer because some 158,000 companies in Romania failed to pay their employees' social contributions, which affected over 2 million employees. Companies that fail to pay the social contributions for their employees once the changes to the Fiscal Code come into force will face criminal charges." See <https://www.romania-insider.com/gross-salaries-romania-increase> (9 November 2017).

⁷² See in this regard proposed Amendment 268 to Art. 12(1)Reg. 883: 'During posting, social security contributions shall be paid to the competent public receiving institution at the rate of contributions of the home Member State; it is the responsibility of the host public institution to ensure that it is handed over to the competent home public institution'.

⁷³ It is actually a common mistake even among academic scholars: see Frederic De Wispelaere and Jozef Pacolet, *Posting of workers as stabilising mechanism. An enlarged notion of labour mobility as a prerequisite for an optimal currency area*. Working paper HIVA, KU Leuven November 2015, p 6, footnote 13, which reads: 'the Portable Document A1 is a formal statement on the applicable social security legislation *and proves that the posted worker pays social security contributions in another Member State.*'

insured.⁷⁴ It is a mere declaration without any ‘hard’ obligation for institutions to ‘know their customers’, i.e. to verify that the workers concerned are properly insured in the competent state. Issuing institutions will therefore (most often) not systematically check whether the worker involved is actually insured and/or whether his or her employer is in compliance with obligations to pay/withhold social insurance contributions. Moreover, it seems that (in many MS) the employer does not even have to declare in writing his compliance with said obligations. As a result, a striking disproportionality exists between the ‘gains’ of a PD A1 (almost absolute legal certainty of exemption from – often higher - social security contributions in the host MS) and the ‘pains’ (virtually none) to get such ‘immunity’. This discrepancy facilitates exploitative situations in high-risk sectors where the search for cheap labour sometimes seems to justify all means.⁷⁵

The situation is even worsened by the fact that there is no strict obligation to inform and engage the workers (or trade unions as their representatives) in the process of requesting, issuing or withdrawing PD A1; on the contrary, it is fully allowed and even standing practice that (only) the employer takes care of requesting and being informed about (non-)issuing the PD A1. At no point in the procedure, there is a built-in check on awareness or consent of the workers involved.⁷⁶ This may lead to situations where cross-border workers do not necessarily have any knowledge of which social security legislation applies to them. It is an understatement to note that this is not in line with the ultimate aims of Reg. 883 and its legal base, namely to protect workers exercising their right to free movement against any occurring disadvantages regarding their social security rights. Before disadvantages can be discovered, a person must first have the ability to become aware of them. Admittedly, solving the issues raised above, might lead to delay in the administrative procedure. However, administrative convenience cannot be the key decisive factor in this respect. Instead, the interests of the workers concerned must be the primary focus.⁷⁷ As part of a default procedure, employers could for instance be obliged to declare that they are in compliance and to provide *proof of transferring periodically the correct amount of due social security contributions* to the social security institutions. This could be submitted as annex to their request for a PD A1.⁷⁸ Employers could also be asked to make a declaration (to be attached to the PD A1) that and/or how they (will) inform/advise their (to be) posted or multi-active workers about their social security status.⁷⁹ Inspiration may further be drawn from developments in the field of tax law, such as the proposal

⁷⁴ The standardized model A1 form states as information for the holder: “This certificate concerns *the social security legislation which applies to you* and confirms that you have no obligations to pay contributions in another State.”

⁷⁵ See for instance https://www.theblacksea.eu/stories/article/en/long_distance_trucking_migration

⁷⁶ Directive 91/533 does not guarantee a right of information of the (cross-border) worker about his social security rights either. See also section 3.4 (‘access to justice’, Ch. III below) for a comparison with the Directive 2014/67 (EPWD).

⁷⁷ Albeit combined with the need not to complicate the exercise of the freedom to provide services by his employer. See Judgment in Joined cases C-611/10 and C-612/10, *Hudzinski and Wawrzyniak* para 82-85.

⁷⁸ Sending in employment contracts and pay slips showing the deduction of social security contributions is not enough, since there are examples of fraud where the employer has retained contributions corresponding to the part workers have to pay but not transferred these to the competent social security institutions. See FreSsco Analytical Report 2017, p. 14.

⁷⁹ See for a comparison with the obligations that can be imposed on the service provider/service recipient in the framework of the (E)PWD, section 3.2 (‘prior notification schemes’) and section 3.3 (‘joint and several liability schemes’) of Ch. III below.

for a 'certified taxpayer'.⁸⁰ Why not introduce, at least in high-risk sectors, standard obligations for employers to prove the pre-posting affiliation of their workers and introduce at the same time the possibility to become a 'certified social premiums payer' who can be lifted from 'red tape' as a reward?

4.2. Home state control implies proper assessment of PD A1 requests

Recently, 'home state control' of the PD A1 has been nuanced for cases of fraud or abuse of rights, as became clear in the beginning of 2018, in the *Altun* case.⁸¹ Here, the CJEU held that a host state court may disregard posting certificates which were obtained or invoked (both from an objective and subjective point of view) fraudulently.⁸² Another hopeful development in case-law stems from the recent judgement in *Alpenrind*, regarding the so-called non-replacement condition for posting.⁸³ Here, the CJEU ruled that the non-replacement condition for a genuine posting of an employee is an objective criterion. This implies that one merely has to consider whether there is a recurrent use of posted workers to fill the same role, or do the same job activity at the premises of the (same) host country entity. This is regardless of whether the worker involved in a replacement is posted by a different employer, located in the same Member State, and irrespectively whether there are staffing or organisational links between the employers concerned. These recent judgments will increase the pressure on issuing institutions to actively (re)examine whether all the conditions for posting or working in MS2+ have really been met.

Moreover, the Commission proposes to strengthen the obligations on the 'home' MS for proper assessment of PDs A1 requests. Actually, said proposals and further amendments for improvement are highly revealing with regard to the reluctance in some instances to sincerely issue, review and withdraw PDs A1. Tabled are the following proposed amendments for improvement:⁸⁴

- That documents shall only be valid if all sections indicated as compulsory are filled in.
- That 'incomplete documents are not required to be accepted where they have not been withdrawn due to a breach of the principle of sincere cooperation by the issuing Member State'.
- That 'the issuing institution shall, as soon possible, rectify the document or confirm that the conditions of issuing the document are not fulfilled'.
- That, 'if the *missing information* is not provided within XX working days of notification of the defect, the requesting institution may proceed as if the document had never been issued and, if it does so, shall inform the issuing institution accordingly'.

⁸⁰ COM (2017) 567.

⁸¹ Judgment of 6 February 2018 in case C-359/16 (*Altun*).

⁸² EP Amendment 547 aims to codify this case law in a new Art. 5a Reg. 987 which reads as follows: "In a situation in which a court of the host Member State or a court of the home Member State finds that documents issued were obtained or invoked fraudulently, that court may disapply that document. In order to find that there has been fraud, justifying disapplication of the document, it is necessary to establish, first, that the conditions laid down in the provisions under which the document was issued are not satisfied in the present case and, second, that the persons concerned intentionally concealed the fact that those conditions are not met."

⁸³ Judgment of 6 September 2018 in case C-527/16 (*Alpenrind*).

⁸⁴ See proposed amendments 44 till 48, report Balas to e.g. Art. 5(1) Reg. 987 and to the proposal of the Commission for Art. 5(2)point a Reg. 987 and for introducing a new Art. 5(1a) Reg. 987.

- That when receiving such a request, the issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it or rectify it, within 15 (instead of 25 proposed by EC) working days from the receipt of the request’.
- That ‘upon detection of an irrefutable case of fraud committed by the applicant of the document, the issuing institution shall withdraw or rectify the document immediately and with retroactive effect’.
- That ‘the *absence of response by the issuing institution* to the requesting institution shall constitute a breach of the principle of sincere cooperation by the issuing Member State’.

Obviously, such proposals to improve the reliability and trustworthiness of PD A1 forms show that this is not a matter of rocket science but rather of political will, combined with an eye for the devil in the details. Fitting into this necessary political endeavour, would be to make the request of a PD A1 a constitutive condition for the right to make use of the exceptions to the main rule of insurance in the state-of-employment. Currently, the request of a PD A1 is possible, but it is not a requirement and therefore, the CJEU ruled that posting certificates awarded retroactively, have binding effect as well.⁸⁵ An obligation to *ex ante* request and/or obtain a PD A1 would imply prohibition of retroactive issuing.

5. Towards effective and efficient cross-border cooperation, exchange of data, recovery and joint inspections

A crucial factor in explaining the huge gap between theory and practice with regard to posting/working in MS2+, is that issuing institutions in their role as representatives of the sending MS, largely fail in making effective, dissuasive checks and controls before issuing PD A1’s,⁸⁶ as well as in reviewing its validity and taking subsequent action for withdrawal or rectification.

5.1. Better administrative cooperation...

In case of a dispute between competent bodies of the MS on the question whether or not a PD A1 has been issued correctly, they have to contact each other and try to find a solution. This obligation and right to mutual assistance and mutual information to ensure correct application of the rules is based on Art. 76(4) Reg. 883, stating the principle of ‘sincere cooperation’.⁸⁷ It is operationalized in e.g. Art. 5(2-4) Reg. 987, stipulating a procedure for questioning the validity of documents with a

⁸⁵ CJEU, C-178/97 (*Barry Banks*).

⁸⁶ According to the findings in Ch. I, none of the countries had a system of cooperation between MS institutions *before* issuing an A1 form. The only country (of the countries examined) that has tried to implement a cooperation approach before issuing an A1 is Belgium.

⁸⁷ Good cooperation implies the exchange of information between the institutions of the Member States (some 8500), as well as the persons covered by the Coordination Regulations. Obviously, cooperation is more complicated when dealing with States that have a decentralized organization than with those which have a centralized structure where there is only one point of contact.

role for the Administrative Commission. However, such sincere cooperation is easier said than done. On top of ‘usual’ weaknesses in all MS such as budgetary issues,⁸⁸ it is unhelpful that no equal incentives exist to prioritize mutual assistance and information for MS in their sending and receiving role.⁸⁹ In recent years, (media) attention has been drawn to several cases where unwillingness and distrust prevailed instead of sincere administrative cooperation between the MS.

Nevertheless, in several cases, the Court has stressed that countries should rightly comply with the principle of sincere cooperation for issuing the portable documents which can be used as proof of a posting situation. Said procedure must be followed, even if it was established that the conditions under which the workers concerned carry out their activities, clearly do not fall within the material scope of the provision on the basis of which the A1 certificate was issued (Case C-620/15, *A-Rosa*). Also the national courts of the receiving Member State cannot disregard an A1 certificate, apart from situations of fraud, as became clear in the judgment in Case C-359/16 (*Altun*).

Now, Commission’s proposals are pending to enhance cooperation between the competent national authorities, by strengthening the principle of sincere cooperation through the laying down of shorter response times, and also by clarifying that the lack of a response should entail responsibility shifting between the competent authorities.⁹⁰ Apart from other, more common improvements,⁹¹ notably, the EP rapporteur calls for adding advisory capacity to the Administrative Commission, of a representative of Parliament and, where appropriate, *representatives of the social partners*, beneficiaries and professional bodies concerned.⁹²

5.2. ...through enhancing the exchange of information and data

Improvement is also expected from the introduction of the long awaited Electronic Exchange of Social Security Information (EESSI) system. This IT infrastructure for a structured and safe electronic exchange of data,⁹³ is intended to help the competent authorities and institutions exchange information more rapidly and more securely. However, as observed by FreSsco, for e.g. on the spot checking of A1 forms and the insurance status of posted or multi-active workers, a possibility to

⁸⁸ Resulting e.g. in shortage of staff capacity, capability and supportive infrastructure.

⁸⁹ ‘Posting as a business model’ is in some sending MS welcomed as a means of solving unemployment issues. Strict application of the conditions for posting by their social security institutions would hinder that and might therefore not be prioritized. Moreover, see Ch. III, section 3.1 for the disincentive role of the single-state-principle in Reg. 883, compared to the field of taxation, where more than one system can be applicable at the same time.

⁹⁰ See Ch III, section 3.4 for further suggestions to enhance the dialogue and conciliation procedure of Art. 5 Reg. 987.

⁹¹ With great similarity to requests for improvements to enable undeclared work to be more effectively tackled at cross-border level, which were mentioned in the 2018 European platform UDW survey report (prepared by Colin C Williams and Elbereth Puts), namely: • Improved data sharing, including: more (timely) cooperation and information exchange; being able to access each other’s information systems; having a shared information system/database at the EU level; having single point of contact for cooperation; and increasing interoperability of existing systems. • Joint operations, including joint inspections, knowledge exchanges such as workshops, staff exchanges, or generally joint procedures. • More resources, including more time and more inspectors. • Overcoming privacy or data protection legislation barriers to information exchange. • Need for common definitions.

⁹² Report Balas, Amendement 34 to Art 71(1) Reg. 883.

⁹³ Based on Art. 77 Reg. 883 in conjunction with Art. 4(2) Reg. 987.

provide access to other relevant databases including national information systems,⁹⁴ similar to Europol's European data repositories in the field of criminal law, is unfortunately not possible with EESSI.

On top of that, other aspects of the current social security coordination framework also lag way behind the frameworks for direct and indirect taxation in a cross-border context,⁹⁵ and those of Eurojust and Europol regarding proactive forms of mutual information such as spontaneous or even automatic exchange of information. Clearly, the Commission's proposal does not fill this backlog, since its proposals are not far-reaching enough. For instance, spontaneous exchange of information in Art. 75 (4) Reg. 987, is limited to situations of recovery only. The conclusion that cooperation and exchange of information in the field of social security coordination needs to catch up with similar tools in tax law is confirmed in Chapter IV below, which offers a source of inspiration from the areas of direct and indirect taxation.⁹⁶

Furthermore, broadening the direct exchange of information between competent social security institutions and labour inspectorates, immigration or tax authorities of the MS, would be very helpful, e.g. for solving issues signaled in Chapter IV, such as that European legislation does not foresee in bilateral cooperation between a social security administration in one MS with the tax administration in another MS.⁹⁷ The Commission's proposal introduces direct exchange of information, but it is (again) limited to recovery only, whereas the EP rapporteur is ambitious to extend this to other aspects in the coordination regulations as well, not only to ensure compliance with relevant legal obligations in the field of social security but also to labour law, health and safety law, immigration and taxation law.⁹⁸ Next to that, the rapporteur asks for further optimizing of the tools and electronic exchanges between the competent authorities and institutions, specifically by making EU funding available for initiatives aiming to boost a 'forgery-proof electronic social security card', as well as for the establishment of an electronic networking system of competent institutions using the Belgian Crossroads Bank for Social Security model as an example.⁹⁹

⁹⁴ Such as the Belgian tool OASIS (Organisation Anti-fraude des services d'inspection sociale): a data warehouse for fraud risk analysis, on the basis of data crossed from different databases : datamining. Se Y. Jorens (ed.), C. Garcia de Cortazar, M. Meissnitzer, S. Rogers and B. Spiegel, *FreSsco, Analytical Report 2017 on mutual assistance and sincere cooperation*, Brussels: European Commission 2017, p. 73.

⁹⁵ Also the 2018 European platform UDW survey report (prepared by Colin C Williams and Elbereth Puts), reports on p. 19 that: "Lack of suitable and/or effective tools or mechanisms for administrative cooperation was relatively more often indicated as a barrier by social security/insurance departments and less often by tax administration. 75% of social security/insurance departments agreed this was an issue, while none of the tax departments agreed this was an issue."

⁹⁶ See in particular Ch. III sections 1.2 and 1.3. Also the EPWD and the IMI system might in some respect be an example for Reg. 883 and Reg. 987. See also the FreSsco study of 2017.

⁹⁷ See example of hampering exchange of information between Belgian social security institution and Dutch tax office.

⁹⁸ Proposed amendment 53, report EP Balas to proposed recital 19 Reg. 987 by the Commission limited to recovery.

⁹⁹ See: <https://www.ksz-bcss.fgov.be/>> . In Ch. I another Belgian tool was mentioned: the DOLSIS Communication Platform between labour inspectors: It is a web based communication platform for inspectors' visibility of all current enquiries in the country. There is a Synthetic Cadaster of all on-going and finished enquiries of 4 federal inspection services. *This platform can be consulted by all Belgian inspectors*. Added value: enrichment of all files = starting from Genesis, inspectors can « jump » directly to other databases of the portal Social Security.

5.3. Recovery

A specific set of issues arising with regard to mutual assistance and exchange of information between the MS, concerns the (retroactive) recovery of social security contributions. This may cause thorny administrative problems¹⁰⁰ and often it turns out to be very hard or even impossible.¹⁰¹ The current recovery procedures laid down in Art. 75-85 Reg. 987, are based upon the procedures and rules set up in Directive 2008/55. This Directive has been superseded by Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

In order to ensure more effective recovery in the context of a smooth functioning of the coordination rules, the Commission now proposes to update the recovery procedures in Reg. 987 in a similar fashion as in Directive 2010/24, reflecting the measures in this Directive in particular with regard to its standard procedures for requesting mutual assistance and notification of instruments and measures relating to the recovery of a social security claim.¹⁰² As elaborated below, this is certainly a step in the right direction.

5.4. Joint inspections

Regarding joint inspections, the Commission's proposal for amending Reg. 987 contains a provision (new Article 85) allowing for the presence and assistance of officials from the applicant party in the MS of the requested party. It is a missed chance that this possibility is (again) only placed in the section on recovery, which implies that it cannot be used with regard to other areas of cross-border cooperation (such as in the phase of gathering evidence).¹⁰³ The desirability of a broader introduction of joint inspections in the field of social security coordination is elaborated upon in Chapter III, in relation to the Commission's proposal for an European Labour Authority.¹⁰⁴

¹⁰⁰ Ch. I mentions for almost all countries involved in the study "prescription delays" that hinder the recovery of the rights because the juridical procedures take too long, but also different ways of sanctioning: according to penal law or (only) to civil law. Moreover, it is observed that social security rights entail an individual administrative process, so an employer condemned doesn't mean that the worker recovers the rights related to social security. The employer is thought to take advantage of this flaw.

¹⁰¹ Revealing were experiences in Belgium, mentioned in Ch. I where withdrawal of the A1 in the sending state was successfully 'pushed', but the institutions of the sending country reimbursed all the amounts paid to the employer whereafter the employer disappeared.

¹⁰² See e.g. the new proposed text of Recital 19 Reg. 987.

¹⁰³ See also FreSsco, Analytical Report 2017 on mutual assistance and sincere cooperation, p. 73.

¹⁰⁴ COM(2018)131.

CHAPTER III

The correlation between cross-border Social Security and Labour Law

By Prof Dr Sylvia Borelli

In this chapter, we will analyse the main differences between labour law and social security regulation with regard to posting of workers. In general, we should notice that the latter focuses mainly on the conditions that must be fulfilled in order to benefit from the derogations established in Articles 12 and 13 Reg. 883/2004 (Reg. 883). However, social security regulation lacks several measures on enforcement and cooperation that were introduced in 2014 and recently strengthened in labour law. This can cause frictions. On one side, in some cases, Article 12 Reg. 883 does not apply to postings regulated by Directive 96/71 (PWD) (e.g. in case of rotational posting). On the other hand, a situation can be classified as bogus posting for labour law purposes, but not for social security purposes (as in *Rosa Flussschiff*); this is due to the binding value of the PD A1 and to the shortcomings of the dialogue and conciliation procedure regulated by Decision A1 and Article 5 Regulation 987/2009 (Reg. 987)¹⁰⁵. The binding value of the PD A1 is linked to the **principle of a single applicable legislation**: if, according to the Rome I Regulation, «each employment contract could be subject to applicable labour laws of several States (law of choice, non-derogable provisions of law of the Member State that would be applicable in the absence of choice, and the overriding mandatory provisions protecting public interests of the law of the forum)», «for the collection of social security contributions and social security benefits there would be only one competent Member State»¹⁰⁶.

The shortage of enforcement measures in case of illegal posting can enable companies to use “no frills workers”, i.e. workers without due social protection. The situation is even more critical for **posted third-country workers**. Many researches have noticed that illegal posting often hides serious third-country workers’ exploitation¹⁰⁷. Indeed, when a company is established in an EU country, the normative framework of posted workers applies irrespectively of the worker’s nationality, if the posting takes place within the EU. As long as third-country nationals are regularly employed in the Home State, they can be posted all over Europe, without having to respect the law on work permits

¹⁰⁵ Jorens Y., Lhernould J.P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, FreSsco, May 2014, p. 38.

¹⁰⁶ Lhernould J.P., Strban G., Van der Mai A. P., Vukorepa I., *Analytical Report 2017. The interrelation between social security coordination law and labour law*, 2017, p. 41.

¹⁰⁷ Archain S., *A case study on illegal posting by temporary work agencies. Between the use and abuse of European law*, in ADIR. L’altro diritto, 2017; Chudžíková Alena H., Bargerová Zuzana, *Victims of labour exploitation or “illegal” migrants? Ukrainian workers’ labour rights protection in Slovakia*, Centre for the Research of Ethnicity and Culture CVEK, 2018; Čaněk M., Kall K., Lillie N., Wallace A., Haidinger B., *Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers*, Technical Report, 2018, p. 29; FRA, *Severe labour exploitation: workers moving within or into the European Union*, 2015.

in the Host State (C-43/93; C-244/04; C-445/03; C-168/04; C-307/09)¹⁰⁸. In case of violation of labour and/or social security rights, third-country migrants are usually more reluctant to report to enforcement bodies because of the fear of expulsion, as well as the lack of knowledge of the institutions and of their rights, the costs of proceeding, the fear to lose their job, the difficulty in suing an employer established abroad and executing a decision against him, the length of the trial and the language barriers.

To better examine the differences between EU labour law and social security law on posting, the chapter is divided in three parts: the first one deals with definitions; the second part considers working conditions; and the third part examines enforcement measures.

1. Definitions

1.1. Worker

As clarified by the PWD, the definition of worker for labour law purposes is the one which applies in the Host State (Art. 2 § 2). In qualifying a relationship, all factual elements characterising the work and the situation of the worker shall be considered, notwithstanding how the relationship is characterised in any arrangement agreed between the parties (Art. 4 § 5 Directive 2014/67 (EPWD); see also Practice Guide, *Jurisdiction and applicable law in international disputes between employee and employer*, p. 10).

Article 1, let. a) and b) of Reg. 883 states as well the competence of the State where an activity is performed, to define it as subordinate/autonomous. However, in case of posting, it is the Home State institution who issues the PD A1 that has to verify if the person concerned is a worker or self-employed. In case of misassessment (e.g. bogus self-employment), the PD A1 is binding for all national authorities (including domestic courts), until the Home State institution withdraws it (Article 5 Reg. 987). As shown in the fact-finding report, PD A1 withdrawals are very rare and the dialogue and conciliation procedure set by Article 5 Reg. 987 is quite complex. Moreover, the fact-finding report has confirmed that often «the accuracy of the information contained in PD A1 documents cannot be guaranteed due to the lack of formal controls by the authorities in the sending countries» (Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provisions of services, SWD(2016)52, p. 8)¹⁰⁹. It should also be

¹⁰⁸ In this chapter, we indicate as “Home State” the State from which a person is posted (or is supposed to be posted), and as “Host State” the State in which a person is posted (or is supposed to be posted).

¹⁰⁹ Currently, Reg. 883 and Reg. 987 do not provide detailed rules on the process leading to the issuing of a PD. In this regard, the Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815) modifies Article 19, § 2 Reg. 987 in order to oblige institutions issuing PDs to carry out a proper assessment of the relevant facts and to guarantee that the information on the basis of which the attestation is provided is correct. Moreover, the Commission can adopt implementing acts to set the elements to verify before a document can be issued (new Articles 76a Reg. 883 and 20a Reg. 987).

noted that the Home State institution assesses what happened before issuing a PD A1¹¹⁰ but it cannot assess what will happen after its issuing¹¹¹. According to the current regulation, if a person that was self-employed in the Home State, works during the posting period «for and under the direction of another person in return for which he receives remuneration» (Lawrie-Blum, § 17), s/he can claim her/his social security rights as worker only if the Home State institution withdraws the PD A1. However, the Home State authorities do not have any competence to investigate on facts occurred in another State and no EU law obliges a Member State to recognise the legal value of evidence collected by another State.

Therefore, currently the social security regulation on posting threatens the **principle of primacy of facts** according to which the determination of the existence of an employment relationship «should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties» (ILO Recommendation No. 198, para 9)¹¹². The principle of primacy of facts is rooted in **fundamental social rights**: if contracting parties or national institutions could freely qualify a relationship as self-employment, charters of fundamental rights (as the CFREU) that guarantee rights to workers would not be imperative anymore.

1.2. Employer

Both labour law and social security regulations on posting require a direct relationship between the worker and the posting employer. The EPWD specifies that inspections are «the responsibility of the authorities of the host Member State in cooperation, where necessary, with those of the Member State of establishment» (Article 7, § 1). However, neither the PWD nor the EPWD indicate that the definition of employer is the one which applies in the Host State law. Therefore, in order to evaluate if a relationship between the posting undertaking and the worker exists, the law applicable to the contract of employment according to Article 8 Rome I Regulation should be applied. This can entail problems, for example, when the Home State provides a formal definition of employer (i.e. the employer is the person that has signed the contract of employment) and the Host State a substantial

¹¹⁰ To qualify a person as self-employed, the Home State institution shall verify if s/he has use of office space, pays taxes, has a professional card and a VAT number or is registered with chambers of commerce or professional bodies (Article 2 Decision A2; *Practical Guide on the applicable legislation in the European Union, the European Economic Area and in Switzerland* (Guide), p. 14-15). Moreover, a self-employment person should have pursued her activity for at least two months before the date of posting and, «during any period of temporary activity in another Member State, must continue to fulfil, in the Member State where he is established, the requirements for the pursuit of his activity in order to be able to pursue it on his return» (Art. 14 § 3 Reg. 987). The different amount of PD A1 for self-employed persons issued (e.g. 36% in Slovakia; 19% in the Czech Republic and Italy) can evidence the different assessment of these elements by Member States.

¹¹¹ The Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815) introduces the possibility for the competent institution to request information which enables «to identify any inaccuracy in the facts on which a document or a decision determining the rights and obligations of a person» under Reg. 883 or Reg. 987 is based (new Article 2, § 5 Reg. 987). However, nothing obliges the Home State institution to monitor compliance with EU law and the possible data requests are limited (new Article 2, § 6 Reg. 987).

¹¹² This principle shall be respected also by national institutions issuing a PD A1 (C-11/11, Format, § 45).

definition of employer (i.e. the employer is the person that directs and controls worker's activities). In this case, the Host State could be prevented from qualifying the service recipient as substantial employer when, in fact, it directs and controls the posted worker. It is true that Article 1 § 3 let. a) PWD requires posting undertakings to post workers «on their account and under their direction», and that Article 4 § 1 EPWD adds that, in order to apply the PWD, «the competent authorities shall make an overall assessment of all factual elements that are deemed to be necessary». However, it would be helpful to clarify which factual elements should be considered in order to verify if a direct relationship between the worker and the posting employer exists (see Practice Guide, *Jurisdiction and applicable law in international disputes between employee and employer*, p. 10).

Social security regulation entrusts the Home State institution with the duty to verify if a direct relationship between the worker and the posting employer exists, indicating the elements that shall be taken into account (Article 1 § 2 Decision A2; see also *Practical Guide on the applicable legislation in the European Union, the European Economic Area and in Switzerland* (Guide), p. 9). If the service recipient is the substantial employer (i.e. it exerts the power to determine the nature of the work, to impose disciplinary action, etc.), the PD A1 assessing the posting undertaking to be the employer is binding until the Home State institution withdraws it. And for this case as well, all the above-mentioned considerations on the shortcomings of the procedure to withdraw a PD A1, the shortage of *ex ante* control, the impossibility for the Home State authorities to check changes in the factual situation happened in the Host State, the non-binding value of evidences collected by the Host State authorities, are valid. Moreover, when the service recipient is the real employer, often there is no posting at all, i.e. the worker was just fictitiously hired by a company established in a different Member State (*Altun*).

As already mentioned, it would be helpful to clarify which factual elements should be considered when verifying if a direct relationship between the worker and the posting employer exists, and to harmonise labour, social security and taxation law¹¹³. Besides, it should be specified that, during the posting period, Host State authorities are responsible for the controls (in cooperation, where necessary, with those of the Home State) and that evidence collected by the Host State authorities, according to an EU common framework for carrying out controls or through joint investigations, has legal value in the Home State (see below).

1.3. Establishment

Both labour law and social security regulations on posting require the posting undertaking to be established in a Member State. According to the EPWD, «the condition that the employer is **genuinely** established in the Member State from which the posting takes place, need to be examined **by the competent authority of the host Member State** and, where necessary, **in close cooperation with the Member State of establishment**» (Recital No. 8; emphasis added). The

¹¹³ On the criteria to assess who is the employer in taxation law see OECD Model: Commentary on Article 15, 2017, § 8.13 ff.; Spiegel B. (ed.), Daxkobler K., Strban G., van der Mai A.P., *Analytical report 2014. The relationship between social security coordination and taxation law*, FreSsco, European Commission, April 2015, p. 25.

competent authority shall make an **overall assessment of all factual elements** characterising activities performed by the posting undertaking (Article 4, § 2 EPWD).

As regards social security, the Home State institution must assess all facts characterising the activities carried out by the employer and must verify if it ordinarily performs **substantial activities** in that State, before issuing a PD A1 (Art. 14 § 2 Reg. 987; Article 1 § 5 Decision A2; see also Guide, p. 8). However, in cases regulated by Article 13, § 1, let. b) Reg. 883, the employer is not required to perform substantial activities in the State where it is established (Article 14, § 5a Reg. 987; Guide, p. 35-36)¹¹⁴. The fact-finding report has demonstrated that, in many States, the institution that issues the PD A1 does not control the conditions for the establishment or considers a declaration from the employer as sufficient evidence of the genuine establishment.

According to EU law, a **letterbox company**, i.e. a company that is registered in a Member State where it does not perform any economic activity (or performs very little activity), is **lawful and can circulate all over Europe as service provider**¹¹⁵. Indeed, each Member State has the competence to determine the conditions to register a company in its territory and both the *incorporation theory* and the *real seat theory* are consistent with EU law¹¹⁶. Moreover, only in a few sectors, **conditions relating to the requirement of good repute** shall be respected to operate all over Europe¹¹⁷; consequently, in non-regulated sectors, nothing prevents persons condemned for serious infringements of EU law on posting of workers to operate through different companies. Neither are Member States obliged to record on the national company register information on disciplinary or administrative actions, criminal sanctions and decisions concerning fraudulent practices, insolvency or bankruptcy taken by competent authorities (cf. Article 33, § 1 Directive 2006/123).

Therefore, controls performed by social security institutions, as well as national inspectors, are very difficult¹¹⁸. Indeed, these institutions often do not have access to the national company register or to other information necessary to assess a company's activities¹¹⁹. Moreover, the documents that shall be compulsory disclosed in the company register according to Article 2 Directive 2009/101 are

¹¹⁴ The Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815) modifies Article 14, § 5a Reg. 987 so as to require the performance of substantial activity also for the application of Article 13 Reg. 883.

¹¹⁵ Cremers J., *The enhanced inspection of collective agreed working conditions*, 2017. This rule does not apply to the transport sector where a genuine establishment is required to be licenced (Article 5 Regulation 1071/2009; Article 8 Regulation 1072/2009). A Commission proposal (COM(2017)681) aims to clarify the provisions regarding the existence of an effective and stable establishment.

¹¹⁶ In the former, «the law governing a company is determined by the place of its incorporation, which is where the registered office is located». In the latter, the law governing a company is determined by the place where the central administration and substantial activities of that company are located» (Houwerzijl M., *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part I, 2016, p. 21). Note that, in many countries that adopt the real seat theory, companies are often registered without any effective control on their genuine establishment.

¹¹⁷ Cf. Article 6 Regulation 1071/2009. A Commission proposal (COM(2017)681) strengthens the rules on the good repute in the road transport sector.

¹¹⁸ Cremers J., Hastings T., *Developing an Approach for Tackling Letterbox Companies*, European Platform Undeclared Work, 2017, p. 7.

¹¹⁹ *Transnational posting of workers within the EU. Guidelines for administrative cooperation and mutual assistance in the light of Directive 2014/67/EU* (2018, p. 48).

often not sufficient to assess the performance of substantial activities in a State¹²⁰. Besides, this Directive allows Member States to replace the publication in the national gazette with a central electronic platform (Article 3, § 5), making it more difficult to search for information. In order to verify if the genuine establishment (e.g. a minimum turnover of 25% of total turnover in the Home State), the competent social security institution should also have access to foreign business registers (cf. Articles 6 § 7 EPWD and 28 § 7 Directive 2006/123), or – better – **business registers should be interconnected** at EU level. In this regard, the Business Registers Interconnection System (BRIS) should be improved¹²¹. Currently, the shortcomings in the interconnection among national business registers hamper the introduction of registers/lists of reliable subcontractors accessible throughout the EU, as well as the creation of a transnational due diligence system¹²². Moreover, service providers established in Member States where ‘white lists’, ‘black lists’ or quality labelling processes have been implemented¹²³, suffer from the unfair competition of foreign service providers that can be put in the list/not blacklisted/labelled without being submitted to the same controls that can be carried out on the former.

National authorities should also be required to exchange information on posting companies among them and with other foreign authorities (cf. Articles 7, § 5 EPWD and 29, § 1 and 2 Directive 2006/123; see below). It would also be helpful to use similar factual elements to assess the genuine establishment in different areas¹²⁴.

¹²⁰ On the information on the beneficial owner and on beneficial ownership regarding the trust that must be held in the company register see Article 30 and 31 Directive 2015/849. For the road transport sector, see Article 16 Regulation 1071/2009 and the Commission decision (C(2009) 9959) on minimum requirements for the data to be entered in the national electronic register of road transport undertakings; a Commission proposal (COM(2017)681) adds elements of information to be included in this national electronic registers. Note that information on the shareholdings, the direct and indirect subsidiaries, the direct and indirect ownership, the corporate ultimate owners, the corporate groups (all companies with the same ultimate owner as the subject company), the beneficial ownership, the number of employees, the company management is currently available in private (and expensive) databases (as *Orbis*).

¹²¹ Directive 2012/17/EU and Commission Implementing Regulation (EU) 2015/884. National electronic registers of road transport undertakings are linked via ERRU (European Registers of Road Transport Undertakings) where serious and very serious infringements of the EU road transport rules shall also be recorded. However, ERRU is a data exchange (not a data sharing) system. The lack of data sharing in the road transport sector and fighting against letterbox companies is underlined in the Staff Working Document accompanying the ELA proposal (SWD(2018)68, p. 11 and 16).

¹²² Houwerzijl M., Peters S., *Liability in subcontracting processes in the European construction sector*, European Foundation for the Improvement of Living and Working Conditions, 2008, p. 47; Heinen A., Müller A., Kessler B., *Liability in Subcontracting Chains: National Rules and the Need for a European Framework*, study for the JURI committee, EP, 2017, p. 117. A Commission proposal on VAT (COM(2017)569) introduces the concept of the **certified taxable person** which would allow for an attestation that a particular business can globally be considered to be a reliable taxpayer, and applies certain simplification rules only where a certified taxable person is involved in the relevant transaction.

¹²³ These systems are adopted as a means of endorsing companies which maintain compliance with labour, social security and tax obligations.

¹²⁴ Houwerzijl M., *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part I, 2016, p. 44.

1.4. Duration of posting

Directive 2018/957 has established a maximum duration for posting of workers: 12 months that can be extended to 18 months (Article 3 § 1a PWD)¹²⁵. This directive clarifies also that, after 12 (+ 6) months, any provision applicable to posted workers must be compatible with the freedom to provide services (Recital 10)¹²⁶. The problem is that Directive 2018/957, as well as social security regulation, does not set a maximum **duration of a service provision** and the ECJ has blurred the distinction between freedom to provide services and freedom of establishment¹²⁷.

Differently, the OECD Model Convention on the Taxation of Income and Capital rules that, if the employer has a permanent establishment in another State, the 183-days rule does not apply and taxes are paid in the Host State from the first day. A permanent establishment exists when there is «a fixed place of business through which the business of an enterprise is wholly carried out» (Article 5 § 1). A permanent establishment can be a branch, an office, a person acting on behalf of an enterprise; a building site constitutes a permanent establishment if it lasts more than twelve months (Article 5 § 3)¹²⁸. Moreover, in case of intragroup posting, taxation law of the Host State is applicable if: a) the worker's activities «are an integral part of the business activities carried out» by the company that receives him/her (OECD Model Convention, Commentary on Article 15, § 8.13 and 8.21); b) the company that receives the worker is closely related to the posting company (i.e. «one has control of the other or both are under the control of the same persons or enterprises»), and performs its activity in spaces at the disposal of the parent company or undertakes activity for the parent company (OECD Model Convention, Article 5 § 8; Commentary on Article 5 § 115 ff.). Both these cases fit in the scope of Article 1 § 3 let. b) PWD; thus only the overriding mandatory labour rules listed in Article 3 § 1 PWD must be respected in the country where the worker is posted. And it is at least doubtful that, in these cases, the application of the Host State law creates an unproportioned obstacle to service providers.

The main difference between labour law and social security regulations is the **posting duration**: 24 months is the current threshold for posting in Reg. 883. Besides, the calculation of the posting period follows different rules. According to Directive 2018/957, in case of **rotational posting**¹²⁹, the duration of the posting shall «be the cumulative duration of the posting periods of the individual

¹²⁵ This threshold is much longer than the posting average duration (101 days in 2016; De Wispelaere F., Pacolet J., *Posting of workers. Report on A1 Portable Documents issued in 2016*, HIVA - KU Leuven, 2017). Directive 2018/957 is not applicable to road transport sector.

¹²⁶ During the trilogue, the double legal basis for Directive 2018/957 (Articles 56 and 153 TFEU) was rejected.

¹²⁷ The ECJ has never established a limitation in time of a service provision (GEBHARD p. 27 SCHNITZER p. 30). Activities carried out on a permanent basis or without any foreseeable limit cannot be considered a service within the meaning of Article 56 TFEU (Trojani). According to Article 4 no. 5) Directive 2006/123, 'establishment' means the pursuit of an economic activity «for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out». See Maslauskaitė K., *Posted Workers in the EU: State of Play and Regulatory Evolution*, Policy Paper n. 107/2014, Notre Europe, Jacques Delors Institute.

¹²⁸ On the calculation of the twelve-month threshold see OECD Commentary on Article 5 § 52 ff.

¹²⁹ Rotational posting occurs when «the employees are repeatedly recruited by an undertaking with the sole purpose of being posted to another Member State, in order to carry out the same job» (Voss E., *Posting of Workers Directive – current situation and challenges*, Study for the EMPL Committee, 2016, p. 28).

posted workers concerned» (Article 1). Instead, Article 12 of Reg. 883/2004 does not apply when the posted person is sent to replace another person¹³⁰. The Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815) strengthens this rule, applying it also in case of replacement of a self-employed person and when a posted self-employed person replaces another posted employee or self-employed person (new Article 12 Reg. 883).

Another difference concerns the **period spent in the Home State before posting**. Labour regulation requires that posted workers habitually carry out their activities in a Member State. However, no previous working period in that State is necessary (C-19/67). Differently, EU social security law demands the posted worker to have been subject to the Home State law for at least one month before the posting (Article 1 § 4 Decision A2; EU Institutions are currently discussing a possible extension of the previous affiliation period)¹³¹. The Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815) modifies Article 14, § 1 Reg. 987 so as to require a posted worker to be subject to the law of the State where the employer is established, in accordance with Title II of Reg. 883, before the posting period.

Moreover, social security regulation sets a **compulsory waiting period of two months** between posting periods for the same worker, the same undertaking and the same Member State (Article 1 § 4 Decision A2; EU Institutions are currently discussing a possible extension of the waiting period)¹³². Labour regulation states that, in the assessment of the temporary duration of posting, it should be considered if the posted worker «returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted» (Art. 4 § 3 EPWD). However, no compulsory waiting period is imposed.

It should be reminded that, if the Home State institution before issuing the PD A1 does not fulfil proper controls and then refuses to withdraw the PD A1, the abovementioned rules become a toothless instrument against bogus posting.

Neither labour regulation nor social security regulation establish rules for calculating the posting period in case a worker is posted several times by the same employer or by employers belonging to

¹³⁰ The Guide adds that a posted worker cannot be replaced by a newly posted worker, engaged by the same posting employer or by a different one, from any State (p. 13). See *Alpenrind*

¹³¹ Directive 2014/66 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer requires posted workers to prove that they have worked within the same undertaking or group of undertakings, from at least three up to six/twelve uninterrupted months immediately preceding the date of the intra-corporate transfer (Article 5 § 1 b).

¹³² Directive 2014/66 allows Member States «to require a certain period of time to elapse between the end of the maximum duration of one transfer and another application concerning the same third-country national» in the same Member State (Recital 18). Moreover, it shall be proved that «the third-country national will be able to transfer back to an entity belonging to that undertaking or group of undertakings and established in a third country at the end of the intra-corporate transfer» (Article 5, § 1, let. c)).

the same group. In order to avoid abuse, it should be established that the posting periods should be added¹³³.

2. Chain posting

A chain posting happens when a worker is posted in a country and then posted again by the service recipient in the same country or in a different one. Directive 2018/957 clarifies that, when a worker is hired by a temporary work agency (TWA), hired out to a user and then posted by the user in a Member State other than where the worker normally works for the TWA or for the user, the worker shall be considered to be posted to the territory of the latter State by the TWA with which the worker is in an employment relationship (Art. 1, § 3, let. c) PWD). Differently, Article 4 Decision A2 rules out the application of Article 12 Reg. 883 when «the undertaking to which the worker has been posted places him/her at the disposal of another undertaking in the Member State in which it is situated» or in another Member State (see also the Guide p. 12). Therefore, in case of chain posting the Host State social security law must be applied. However, if a PD A1 is issued by the Home State institution, the application of the Host State law depends on its withdrawal.

Chain posting is, in some cases, forbidden by Member States (e.g. Italy; Germany). The reason for prohibiting chain posting is that it emphasises problems generated by the separation between substantial and formal employer: the fragmentation of workers' communities that weakens trade union power; the separation between the employer responsible for paying salaries and social contributions and the person that benefits from worker's activities, i.e. the possibility to exploit worker's activities without being liable for obligations deriving from the employment contract; the possibility not to apply labour law and social security regulation that should have been applied in case of direct employment relationship, i.e. the possibility to save labour costs, benefiting from the lower labour cost in some Member States; the difficulty for tax, labour and social security inspectors to control situations in which several entities are involved; the workers' uncertainty on who their employer is¹³⁴. Moreover, in case of chain posting involving a TWA, it is extremely difficult to verify the TWA's substantial establishment in the Home State and currently national licensing schemes for TWAs are very different (see below).

For all these reasons, chain posting should be limited. First of all, it should be clarified which factual elements should be present for a direct relationship between the worker and the posting employer to exist, so as to limit the possibility of chain posting (see Guide, p. 13). Second, Directive 2018/957 regulates only the first level of chain posting, but nothing – at the moment - forbids to have a multi-

¹³³ Directive 2014/66 states that «the maximum duration of the transfer should encompass the cumulated durations of consecutively issued intra-corporate transferee permits» (recital n. 17).

¹³⁴ Because of these reasons, Austria has limited the possibility to subcontract in public procurement of construction works, forbidding to subcontract specific core tasks and obliging the main contractor to announce subcontractors in its bid (Čaněk M., Kall K., Lillie N., Wallace A., Haidinger B., *Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers*, Technical Report, 2018, p. 23).

level chain posting. Third, it should be specified that a user can post its temporary agency workers only if it continues to be a user according to Directive 2008/104¹³⁵. This Directive allows TWA to conclude «contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily **under their supervision and direction**» (Article 3; emphasis added). Therefore, chain posting between TWAs should be forbidden according to EU law.

Chain posting endangers social security regulation: the TWA that hires workers and posts them, asks for a PD A1 according to Article 12 Reg. 883; if the worker is then posted in a third Member State by the user, Art. 13 Reg. 883 could be applicable; in this case, the user should communicate to the TWA the posting in a different State and the TWA should ask for a new PD A1 according to Article 13 Reg. 883. The problem, again, is that until its withdrawal, the first PD A1 is binding for all Member States. The shortcomings of the procedure to withdraw a PD A1 combined with the complexity of chain posting threatens workers' rights to a due social protection. As stated by the Guide, the complexity of this situation «contrasts starkly with the objective of avoiding administrative complications and fragmentation of the existing insurance history which is the *raison d'être* of the provisions governing posting. It is also necessary to prevent wrongful use of the posting provisions» (p. 13).

3. Group of companies

The PWD applies also when a worker is posted «to an establishment or to an undertaking owned by the group in the territory of a Member State» (Article 1, § 3, let. b)). However, the links existing between the posting undertaking and the service recipient have practically no relevance in ECJ case law on posting (*Laval, Rüffert, Altun*)¹³⁶. Furthermore, the group is not mentioned in the EPWD (not even in Article 12 on joint liability), in Directive 2018/957 (not even for applying the user's duty to inform on terms and conditions of employment: Art. 1, § 1, let. b) PWD), in Reg. 883 and Reg. 987¹³⁷.

On the contrary, the links between companies are very relevant in taxation law. In order to **fight fraudulent arrangements**, Directive 2016/1164 establishes a general anti-abuse rule (Article 6)¹³⁸ and obliges Member States to introduce rules on controlled foreign companies to include their

¹³⁵ «'user undertaking' means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily» (Art. 3, § 1, let. d) Directive 2008/104).

¹³⁶ See *Laval, AG*, § 107. See also the Danish Crown, the Vos Transport and the Pilgrim Sp. z o.o. cases analysed by McGauran K., *The impact of letterbox-type practices on labour rights and public revenue*, 2016, p. 23ff. Cremers (*The enhanced inspection of collective agreed working conditions*, 2017) has also discovered cases in which foreign artificial entities turn out to be initiated by Dutch user firms or headquarters.

¹³⁷ The group is instead defined by Directive 2014/66 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

¹³⁸ «For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances». «An arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality» (Article 6 § 1 and 2).

income in the parent company's tax base (Article 7)¹³⁹. Moreover, Directive 2015/121 forbids to grant the benefit provided for by the parent–subsidiary directive to arrangements «which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances» (i.e. «are not put into place for valid commercial reasons which reflect economic reality»; Article 1 § 2 and 3 Directive 2011/96)¹⁴⁰. Besides, Directive 2016/2258 authorises tax authorities to access anti-money-laundering information, in particular information on the beneficial owner and on beneficial ownership regarding the trust, and to exchange this information with other national tax authorities (Article 30 and 31 Directive 2015/849). In order to **monitor groups' activities**, Directive 2016/881 introduces an obligation, for the parent company of big multinational groups, to file a country-by-country report (CBCR) where each entity of the group is identified and information on its jurisdiction of tax residence and, where different, the jurisdiction under which it is organised, the nature of its main business activity, the amount of revenue, profit (loss) before income tax, income tax paid, number of employees, and tangible assets, is disclosed (Article 8 aa § 3 Directive 2011/16 introduced by Directive 2016/881). Moreover, in 2016 the Commission submitted a proposal on Common Consolidated Corporate Tax Base (COM(2016)683) that aims to provide a single EU system for companies to calculate their taxable income, allocating the global profits of a group on a consolidated basis among the associated companies in different countries where they operate¹⁴¹. The group is also relevant to determine if an enterprise has a permanent establishment in a country and thus has to pay taxes there (see above).

The fragmentation of the enterprise and the dematerialisation of its organisation are very well known phenomena, facilitated by the extreme easiness to register new companies and by the presence of business consultants able to advise on arrangements to save labour costs¹⁴². EU law is currently supporting this trend (see Company Package). The fragmentation of the enterprise needs to be regulated in order to reduce the consequences entailed by the separation of the power to organise an economic activity (usually held by the holding) from the related risks and responsibilities (held by each single subsidiary that often, in case of workers' claims or inspections, disappears or goes bankrupt). Therefore, it is recommended: to introduce a duty to disclose the group's belonging in the company register; to extend the rule on joint liability to intragroup posting; to establish a presumption of fraud in case of intragroup posting, when the objective elements are fulfilled; to facilitate cross-border information exchange on groups of companies, improving the interconnection among national business registers and their content.

¹³⁹ This rule does not apply «where the controlled foreign company carries out a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances» (Article 7 § 2 let. a).

¹⁴⁰ Traversa E., *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part III, 2016, p. 104.

¹⁴¹ This rule should replace the arm's-length method regulated by Article 9 OECD Model Tax Convention that includes in the profits of a company, profits that would have accrued if commercial or financial relations between it and affiliated companies would have been carried out under normal market condition. The OECD report *Addressing Base Erosion and Profit Sharing (BEPS)* highlights the flaws of systems that treat groups as separate entity rather than a single one.

¹⁴² Cremers J., *The enhanced inspection of collective agreed working conditions*, 2017.

4. Temporary agency work

In order to avoid unfair competition between posted temporary agency workers and workers directly hired in the Host State, the PWD allows Member States to require posting undertakings to respect the terms and conditions which apply to temporary agency workers in the Member State where the work is carried out (Article 3, § 9)¹⁴³. Directive 2018/957 has then obliged posting TWAs to respect the principle of equal treatment regulated in Article 5 Directive 2008/104, as implemented in the Host State.

On the contrary, temporary agency workers can remain covered by the social security system of the Home State (i.e. the State where the TWA is based: Article 12 and 13 Reg. 883/2004) or of the State where they reside (Art. 13 Reg. 883/2004). This creates a huge competitive advantage for TWAs established in Member States where social contributions are low. In order to avoid unfair competition, Article 14 Reg. 987 demands posting employer to «ordinarily perform substantial activities, other than purely internal management activities», in the Home State. However, it is not clear which elements should be checked by the social security institution before issuing a PD A1 to a TWA¹⁴⁴. Moreover, this institution could not have the competences to perform the controls necessary to verify the real establishment (e.g. national TVA database) and to access information on TWA activities in the different Member States. Furthermore, the performance of substantial activities is not (yet) required for cases regulated by Article 13, § 1, b) Reg. 883¹⁴⁵. It should be also considered that the performance of substantial activities in the Home State is not required by EU law to licence a TWA. Indeed, EU law neither establishes any requirements for TWA licencing, nor obliges Member States to have a licencing system for TWAs (cf. Article 4 Directive 2008/104).

Finally, we should notice that, without a clear indication of the elements that shall be taken into account to define the employer, EU legislation on TAW can be circumvented by other forms of triangular employment relationships¹⁴⁶.

5. Working conditions

5.1. Remuneration and calculation of social security contributions

Directive 2018/957 has modified the rule on remuneration in the PWD, stating that posting undertakings shall guarantee to posted workers all the constituent elements of the remuneration

¹⁴³ As underlined by the Advocate general in *Vicoplus*, in case of TAW the distinction between ‘active mobility’ and ‘passive mobility’ of a worker is fictitious (*Webb* C-279/80; *FTS* C-202/97; *C-53/13*; *Martin Meat* C-586/13; *Vicoplus* C-307/09; *Essent* C-91/13; *Van der Elst* C-43/93).

¹⁴⁴ An implementing act that the Commission can adopt to set the elements to be verified before the PD A1 can be issued, according to the Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815), could clarify this point (new Articles 76a Reg. 883 and 20a Reg. 987).

¹⁴⁵ Commission proposal for a Regulation amending Reg. 883 and Reg. 987 (COM(2016)815) modifies Article 14, § 5a Reg. 987 so as to require the performance of substantial activity also for the application of Article 13 Reg. 883.

¹⁴⁶ See Eurofound, *New forms of employment: Developing the potential of strategic employee sharing*, 2016.

rendered mandatory by law, regulation, administrative provision, *erga omnes* collective agreements or collective agreements concluded by the most representative employers' and labour organisations at national level, in the Host State (Article 3, § 1, al. 3)¹⁴⁷. Notwithstanding the importance of this amendment, many problems remain: for States that do not have *erga omnes* collective agreements; because the real remuneration is more and more determined in collective agreements at company level (and EU law boosts the decentralisation of collective agreements)¹⁴⁸; because Directive 2018/957 subordinates the possibility to sanction infractions to the fulfilment of the obligation, for the Host State, to publish information on the remuneration on the website¹⁴⁹; because allowances specific to the posting are paid in accordance with the national law applicable to the employment relationship.

We should also underline that, for the purpose of the PWD, remuneration does not include supplementary occupational retirement pension schemes (Article 3, § 1). Analogously, other **supplementary social security benefits**¹⁵⁰ usually do not enter in the scope of remuneration. This is particularly problematic due to the growing importance of the so-called occupational welfare that pretends to compensate the continuous decreasing role of the Welfare State¹⁵¹.

The fact-finding report has highlighted that some Member States establish **thresholds** above which social contributions must not be paid anymore. These thresholds generate disadvantages for posted workers since they often receive higher salaries than workers performing their activities in the Home State only. These thresholds boost unfair competition and social dumping, reducing the amount of social contributions that posting employers have to pay. Therefore, thresholds on social contributions should be forbidden in case of posting.

Another problem detected by the fact-finding report is that posting employers often pay social contributions on the remuneration established in the Home State, instead of on the higher remuneration ensured in the Host State. To remedy this problem, the Home State social security institutions should be obliged to monitor the correct payment of social contributions, checking also the information on remuneration published on the website of the Host State. Moreover, Host State

¹⁴⁷ A Commission proposal (COM(2017)278) aims to forbid the application of this rule to drivers that perform international carriage operations when the posting period is shorter than or equal to 3 days. Directive 2014/66 on intra-corporate transfer of third-country workers posted by an undertaking established outside the EU territory requires the remuneration granted during the transfer not to be «less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established» (Article 5, § 4, let. b).

¹⁴⁸ *Multi-employer bargaining under pressure. Decentralisation trends in five European countries*, eds. Leonardi S., Pedersini R., ETUI, Brussels, 2018.

¹⁴⁹ In particular, the directive does not establish a duty for the company that receives the service to inform the provider on terms and conditions of employment, as established for TAW (Article 3, § 1b, PWD).

¹⁵⁰ Usually, statutory rules, as well as collective agreements, exclude occupational social security advantages from the scope of the pay. However, in some countries (e.g. Denmark), various occupational social security coverages (maternity, sickness) can result in an additional amount to the minimum rates of pay (*Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors*, coordinated by Lhernould J.P., p. 108-110).

¹⁵¹ Natali D., Pavolini E., Vanhercke D., *Occupational Welfare in Europe: Risks, opportunities and social partner involvement*, ETUI, Brussels, OSE, Brussels, 2018.

authorities, trade unions and workers shall have access to the social security database in the Home State to control if social contributions have been correctly paid. The posting employer shall also be obliged to communicate to posted workers, in the form of written document, the remuneration (indicating its different constituent elements) and social contributions paid¹⁵². This document, as well as other documents on remuneration and working time, must be kept during the posting period in an accessible and clearly identified place in the Host State (Article 9, § 1, let. b) EPDW). Finally, the Host State should collaborate with the Home State in checking these documents (Article 7, § 6 EPDW).

A further problem can be derived from the current **competence of the Home State to determine which elements of remuneration are considered when calculating social contributions**. Directive 2018/957 demands to compare the gross amount of remuneration (Recital no. 18); the posting employer could thus respect the principle of equal pay for equal work but still benefit from the social security regulation in the Home State that leaves out certain components of the remuneration from the calculation of social contributions. This happens also when a Member State shifts social contributions from the employer to the worker¹⁵³.

Finally, we should underline that EU labour law on posting has provided posted workers with several means to enforce their right to fair remuneration (see below). All these measures are missing in social security regulation. In case of illegal posting, this means that, in order to enforce his/her rights, a worker first has to ask the competent court in the Home State to withdraw the PD A1 and then s/he has to claim social benefits in the Host State. This lengthy and complex procedure does not seem to respect the fundamental right to effective judicial protection guaranteed by Article 47 CFEU (see below).

6. Enforcement measures

6.1. Cross-border cooperation and exchange of information

The EPDW establishes several rules on cross-border cooperation. Some rules on cross-border cooperation have been adopted also in social security regulation on posting. However, many studies have pointed out the ineffectiveness of these rules, especially if compared to other fields, such as taxation¹⁵⁴. First, it should be noted that cross-border cooperation among Member States works

¹⁵² Currently, Directive 91/533 sets only a duty, for the employer, to inform the worker on the remuneration (Article 2, § 2, let. h). This directive does not apply to postings that last one month or less (Article 4, § 3).

¹⁵³ E.g. in 2017, in Romania, employer's contributions have been lowered from 22,75% to 2,25% while worker's contributions have been increased from 16,5% to 35%. This reform hardly complies with Article 71 § 2 ILO Convention n. 102 (ratified by Romania).

¹⁵⁴ *Transnational posting of workers within the EU. Guidelines for administrative cooperation and mutual assistance in the light of Directive 2014/67/EU* (2018, p. 29); Fernandes S., *What Is Our Ambition For The European Labour Authority?*, Jacques Delors Institute, Policy Paper No.219, 2018, p. 5-7; Jorens Y., Lhernould J.P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, FreSsco, May 2014, p. 38; van Hoek A., Houwerzijl M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, 2011, p. 161 ff. Giubboni S., Iudicone F., Mancini M., Faioli M., *Coordination of Social Security Systems*

well in the context of taxation law because **the problem of double (or multiple) taxation does exist**¹⁵⁵. Instead, the EU regulation on coordination of national social security systems eliminates (or reduces) the problem of double social contribution. However, currently, this regulation «is incapable of sufficiently persuading Member States to cooperate with due diligence, as there are no satisfactory responses when they refrain from doing so»¹⁵⁶. Indeed, the State that issues the PD A1 receives social contributions; if it is required to withdraw the PD A1, it has to investigate (i.e. to use resources) in order not to receive social contributions anymore; and Member States are aware that, in case of violation of the duty to cooperate, sanctions are very rare.

It is thus necessary to strengthen the duty of sincere cooperation among Member States (Article 4 § 3 TEU). First of all, **information exchange** among different national authorities and with foreign authorities should be strengthened (see Articles 6 and 7 EPWD; Article 4, § PWD). Many researches have underlined the need to improve the IMI system, denouncing: the incomprehensiveness of the information provided; the fact that some information is kept by authorities that are not IMI members; the fact that information is provided without proper investigation/evaluation; rules on protection of privacy and confidentiality that prohibit information exchange (cf. Articles 13-17 Regulation 2008/49; see C-201/14); rules on penal secrecy that hamper information exchange; the lack of legal value for information gathered from foreign authorities and shared via IMI; the lack of an alert mechanism in case of letterbox companies or human trafficking; the lack of interaction with other information exchange tools¹⁵⁷. Notwithstanding the shortages of the IMI system, it is recommendable to enforce **electronic means for information exchange** (such as the Electronic Exchange of Social Security Information - EESSI) also for social security coordination purposes, establishing as well: short terms to fulfil requests of other Member States (cf. Article 6, § 6 EPWD)¹⁵⁸; an *ex officio* obligation to inform the concerned Member States and the European Labour Authority (ELA) in case of suspected irregularities (cf. Article 7, § 4 EPWD; Articles 29, § 3 and 32 Directive 2006/123; Article 16, § 1 and 26 Regulation 2017/2394 on consumer protection)¹⁵⁹; other forms of

in Europe, study for the European Parliament's Committee on Employment and Social Affairs, 2017, p. 67ff.. The Commission proposal on ELA (COM(2018)131, p. 2) remarks: the insufficient access to and sharing of information between national authorities; the insufficient capacity of national authorities to organise cooperation with authorities across borders; the weak or absent mechanisms for joint cross-border enforcement activities.

¹⁵⁵ Spiegel B. (ed.), Daxkobler K., Strban G., van der Mai A.P., *Analytical report 2014. The relationship between social security coordination and taxation law*, FreSsco, European Commission, April 2015, p. 20; Traversa E., *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part III, 2016, p. 94.

¹⁵⁶ Jorens Y., Lhernould J.P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, FreSsco, May 2014, p. 39.

¹⁵⁷ SWD(2018)68, p. 11. *Transnational posting of workers within the EU. Guidelines for administrative cooperation and mutual assistance in the light of Directive 2014/67/EU*, 2018, p. 40-44; Čaněk M., Kall K., Lillie N., Wallace A., Haidinger B., *Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers*, Technical Report, 2018, p. 15 ff.

¹⁵⁸ The Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815) sets new terms for fulfilling requests in case there is doubt about the validity of the PD A1 or the accuracy of the facts on which it is based (new Article 5, § 2 Reg. 987). In the road transport sector, see the new Article 18 § 3 and 6 Regulation 1071/2009 and the new § 1a Article 8 Directive 2006/22 proposed by the Commission (respectively, COM(2017)681 and COM(2017)278).

¹⁵⁹ The Commission has rejected to establish mandatory requirements on information exchange in the ELA proposal (SWD(2018)68, p. 27).

automatic exchange of information among national authorities (cf. Articles 8, 8a, 8aa and 9 Directive 2011/16 on the automatic and spontaneous exchange of information in the field of taxation; Article 13 Regulation 2010/904 on the automatic and spontaneous exchange of information in the field of VAT); the duty for the requested authority to obtain the information from other authorities in the Member State (cf. Article 4, § 2 PWD); the duty for the requested authority to undertake the necessary investigations or to take any other appropriate measures in order to gather the required information (cf. Article 11, § 2 Regulation 2017/2394; Article 29, § 2 Directive 2006/123; Article 6 § 1 Directive 2011/16 on administrative cooperation in field of taxation; Article 7 § 1 Regulation 2010/904 on administrative cooperation in the field of VAT¹⁶⁰); the possibility to use the information exchanged for the purposes other than the one that justified the request (cf. Article 16 § 1 al. 3 Directive 2011/16 on administrative cooperation in the field of taxation)¹⁶¹ and to invoke them as evidence on the same basis as similar information provided by national authorities (Article 16 § 5 Directive 2011/16 on administrative cooperation in the field of taxation)¹⁶². Rules on information exchange between national authorities and the ELA should also be inserted in the ELA regulation (cf. Articles 13 and 13a Decision 2002/187/JHA on Eurojust; Articles 7 § 6 and 7, and 8 § 3 and 4 Regulation 2016/794 on Europol). Moreover, the ELA should enhance the current information exchange tools and their interoperability, recognising also the legal value of the information exchanged (see Article 8, § 3 and 4, and Article 16 of the Commission proposal on ELA (COM(2018)131)¹⁶³. The ELA should also develop data sharing mechanisms¹⁶⁴. In this regard, the creation of a digital European Social Security Card, where social security records are traced, can be helpful¹⁶⁵. And trade unions should also have access both to information exchange and data sharing tools.

As regards **inspections**, the main difference between labour law and social security regulation on posting is that the EPWD expressly recognises the competence of Host State authorities, in cooperation where necessary with those of the Home State, for inspections during the posting period (Article 7, § 1; cf. Article 31, § 1 and 4 Directive 2006/123). A similar rule should be applied in social security regulation. To this purpose, a duty for the Home State institution to communicate information to the Host State institution should be inserted (currently, this duty exists toward the

¹⁶⁰ A Commission proposal (COM(2017)706) strengthens the rule in Regulation 2010/904. See also the new Article 18 § 3 and 6 Regulation 1071/2009 proposed by the Commission (COM(2017)681).

¹⁶¹ Article 16 § 1 al. 2 Directive 2011/16 authorises to use information exchange for taxation purposes, also for the assessment and enforcement of compulsory social security contributions.

¹⁶² The Commission proposal for a Regulation amending Reg. 883 and Reg. 987 (COM(2016)815) states that «Where necessary for the exercise of legislative powers at national or Union level, relevant information regarding the social security rights and obligations of the persons concerned shall be exchanged directly between the competent institutions and the labour inspectorates, immigration or tax authorities of the States concerned this may include the processing of personal data for purposes other than the exercise or enforcement of rights and obligations under the basic Regulation and this Regulation in particular to ensure compliance with relevant legal obligations in the fields of labour, health and safety, immigration and taxation law» (new Article 19, § 4 eg. 987; see also new Article 75, § 3 Reg. 987).

¹⁶³ Vos E., *The proposed European Labour Authority: Profile and Governance*, EP briefing, May 2018, p. 8. The Commission proposal to strengthen administrative cooperation in the field of VAT (COM(2017)706) regulates information exchange between Eurofisc, Europol and Olaf.

¹⁶⁴ Data sharing mechanisms are not considered in the Commission proposal on ELA.

¹⁶⁵ Giubboni S., *The European Labour Authority (ELA) and social security coordination*, EP briefing, May 2018, p. 4.

competent institution of the Member State whose legislation is applicable: Article 2 and 20 Reg. 987)¹⁶⁶.

The Commission proposal on ELA has also regulated **joint inspections**. On this point, the Commission proposal should be strengthened, establishing: the possibility, for ELA, to launch joint inspections on its own initiatives (cf. Articles 6 and 7 Decision 2002/187/JHA on Eurojust; Article 5 § 5 Regulation 2016/794 on Europol) and on European trade unions and employer organisations' request¹⁶⁷; the power, for the inspectors participating to the joint inspection, to investigate and to adopt the necessary enforcement measures (cf. Articles 9, 19 and 21 Regulation 2017/2394; Articles 9, 9a, 9b, 9c and 9d Decision 2002/187/JHA on Eurojust)¹⁶⁸; a duty for a Member State to participate in a joint investigation or allow joint investigations on its territory¹⁶⁹; a specific EU fund to support the cost of joint investigations (e.g. for translations).

The ELA Regulation should as well rule on: the possibility, for national trade unions and employer organisations, to issue an alert of suspected infringement to the competent national authorities and to the ELA (cf. Article 27 Regulation 2017/2394 on consumer protection)¹⁷⁰; a **common framework for carrying out controls and inspections involving several Member States**¹⁷¹; an obligation for national authorities to **recognise legal value to the findings** resulting from such investigation and joint investigations, on the same basis as similar findings collected in their own State (cf. Article 34 Regulation 2017/2394)¹⁷²; the ELA competence to monitor national authorities and to communicate to the Commission cases of suspected violation of the duty of cooperation; the possibility for national authorities to report to the ELA on infringements of the duty of cooperation by a Member State (cf. Article 28, § 8 Directive 2006/123); sanctions for Member States that infringe their duty of cooperation (e.g. a temporary suspension of European Funds). ETUC has also suggested to entrust the ELA with the power to investigate on the breach of EU law on its own initiative or on trade unions or employer organisations' request (see new Article 10 ter; cf. Article 17 of Regulation 1093/2010 on the European Banking Authority)¹⁷³. It would also be recommendable to grant the

¹⁶⁶ In case of changes occurring in the posting period, the Home State institution shall provide the related information to the Host State institution, where appropriate and upon request (Article 5 let. c) Decision A2).

¹⁶⁷ The Commission proposal on ELA entrusts the Authority only with the power to suggest to perform joint inspections to Member States (Article 9, § 1).

¹⁶⁸ See also the Commission proposal to strengthen administrative cooperation in the field of VAT (COM(2017)706).

¹⁶⁹ The Commission proposal on ELA allows Member States to refuse to take part in joint inspections and this prevents participating States to carry out inspections in the refusing State (Article 9, § 2 and 3). On the contrary, Regulation 2017/2394 establishes a limited set of reasons for declining to take part in coordinated actions (Article 18).

¹⁷⁰ Cremers J., *The European Labour Authority and Enhanced Enforcement*, EP briefing, May 2018, p. 9.

¹⁷¹ Directive 2011/16 on administrative cooperation in the field of taxation introduces the possibility for an official to participate in enquiries carried out in another Member States (Article 11; similarly, Article 7 Directive 2010/24 on mutual assistance for the recovery of claims relating to taxes, duties and other measures and Article 28 § 2 Regulation 2010/904 on administrative cooperation in the field of VAT) and to perform simultaneous controls (Article 12; similarly, Articles 29 and 30 Regulation 2010/904 on administrative cooperation in the field of VAT).

¹⁷² According to the Commission proposal (COM(2018)131), the ELA can adopt guidance for cross-border inspections (Article 12, let. a). However, nothing in the Commission proposal obliges Member States to recognise legal value to the evidence collected.

¹⁷³ The Commission proposal establishes a duty for ELA to report to the Commission and national authorities concerned, on suspected irregularities it becomes aware of in the course of its activities (Article 10, § 7).

ELA the power to request the competent national authorities to initiate, conduct or coordinate an investigation (cf. Articles 6 § 1 let. a) and 7 § 1 let. a) Decision 2002/187/JHA on Eurojust; Article 6 Regulation 2016/794 on Europol).

It is also necessary to revise the rules on economic governance that impose cuts on public expenditure so as to allow Member States to adopt the necessary measures to ensure appropriate and effective controls on posting (e.g. engaging more inspectors, potentiating their means, improving their skills, creating specific taskforce; Article 10, § 1 EPWD)¹⁷⁴. In order to strengthen the power of national inspectors, it would also be recommendable to grant them the investigation and enforcement powers necessary for the application of EU law on posting of workers (cf. Article 9, § 3 and 4 Reg. 2017/2394; Articles 9, 9a, 9b, 9c and 9d Decision 2002/187/JHA on Eurojust)¹⁷⁵. Finally, it should be specified that national inspectors that participate in joint investigations or other forms of cross-border cooperation, or investigate on transnational cases, should receive a positive evaluation according to national system of evaluation in public administration.

6.2. Prior notification schemes

According to the EPWD, Member States can impose to foreign service providers to make a «declaration to the responsible national competent authorities at the latest at the commencement of the service provision [...] containing the relevant information necessary in order to allow factual controls at the workplace» (Article 9, § 1, let. a)¹⁷⁶. Differently, a PD A1 shall not be provided in advance (Decision n. 181) and, once it has been released, it has a retroactive effect (ECJ, Bank, § 49-57). Moreover, posting employers are not obliged to inform the social security institutions in the Home State in advance (Article 15, § 1 Reg. 987). As underlined in the fact-finding report, these rules undermine the effectiveness of the Host State's controls¹⁷⁷. The retroactive issuing of a PD A1 can also create a conflict of law in case an authority of a different State has already released a document attesting the application of its national law (Art. 19 § 2 Reg. 987). It is therefore necessary to extend

¹⁷⁴ The cross-country differences in staff and resources on national enforcement authorities and their lack of knowledge to deal with cross-border cases is underlined in the Staff Working Document accompanying the ELA proposal (SWD(2018)58, p. 13). See also van Hoek A., Houwerzijl M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, 2011, p. 154 ff.; Heyes and Hastings 2017, p. 56; Kall K., Lillie N., *Protection of Posted Workers in the European Union: Findings and Policy Recommendations based on existing research*, PROMO briefing paper, 2017, p. 27; Čaněk M., Kall K., Lillie N., Wallace A., Haidinger B., *Transnational Cooperation among Labour Regulation Enforcement Agencies in Europe: Challenges and Opportunities Related to the Posting of Workers*, Technical Report, 2018, p. 10. On the duty for Member States to carry out a minimum amount of checks of compliance with the cabotage provisions see new Article 10a Regulation 1072/2009 proposed by the Commission (COM(2017)681).

¹⁷⁵ A recent study has pointed out the inspectorate's competences are limited (especially in road transport); no country has introduced an enforcement and compliance office with integral and horizontal competence; few countries have established a minimum of structural cooperation between the different authorities (Cremers J., *The enhanced inspection of collective agreed working conditions*, 2017).

¹⁷⁶ A Commission proposal (COM(2017)278) aims to limit administrative requirements and control measures that can be imposed in the road transport sector.

¹⁷⁷ Muller F., *La révision des règles en matière de détachement: l'heure des choix en droit du travail et droit de la sécurité sociale*, in *Revue trimestrielle de droit européen*, 2018, p. 93 ; Houwerzijl M., *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part II, 2016, p. 85.

the employer's obligation to prior notification to the PD A1 and to exclude its retroactive effect¹⁷⁸. A derogation can be established in case of urgency. Besides, the obligation to keep and retain copies of documents (Article 9, § 1, let. b) EPWD) should be applied also to PD A1s. Some authors have suggested to create an **EU-wide social security register of the issued PD A1s**, accessible by all competent national authorities¹⁷⁹.

It is also necessary to apply **effective and dissuasive sanctions** in case of infringement of the obligation to prior notification. Some researchers have shown that employers fulfilling the obligation to prior notification are more exposed to controls; consequently, if sanctions for the lack of notification are not severe, posting employers could 'forget' to notify¹⁸⁰. It could also be introduced a duty, for the service recipient, to check if the service provider has complied with its notification duty and to report the non-compliance to the competent national authority¹⁸¹. Finally, it should be noticed that neither posting employers nor public authorities shall **communicate to trade unions the information included in the prior notification**. Similarly, users, clients or contractors do not have a duty to inform trade unions on the presence of posted workers in the workplace. The absence of information hampers trade unions' capacity to monitor the respect of legislation on posting of workers and to assist posted workers in enforcing their rights (Articles 10 and 11 EPWD).

6.3. Joint and several liability schemes

The EPWD states that Member States **may** take measures in order to ensure that in subcontracting chains the contractor of which the service provider is a **direct subcontractor can**, «in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or **contributions due to common funds** or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC» (Article 12, § 1)¹⁸². Member States may provide for **more stringent liability rules** with regard to the scope and range of subcontracting liability (Article 12, § 4), or may provide that a contractor that has undertaken **due diligence obligations** shall not be liable (Article 12, § 5). Notwithstanding the shortages demonstrated by some studies (e.g. the fact that Article 12 § 1 is not compulsory, does not introduce a full chain liability, does not define what due diligence means, does not apply to

¹⁷⁸ This can be established in an implementing act that the Commission can adopt to set procedures for the PD A1 issuance, according to the Commission proposal for a Regulation amending Reg. 883 and Reg. 987 (COM(2016)815) (new Articles 76a Reg. 883 and 20a Reg. 987).

¹⁷⁹ Jorens Y., Lhernould J.P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, FreSsco, May 2014, p. 45; Muller F., *La révision des règles en matière de détachement: l'heure des choix en droit du travail et droit de la sécurité sociale*, in *Revue trimestrielle de droit européen*, 2018, p. 93.

¹⁸⁰ van Hoek A., Houwerzijl M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, 2011, p. 155.

¹⁸¹ van Hoek A., Houwerzijl M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, 2011, p. 125; Kall K., Lillie N., *Protection of Posted Workers in the European Union: Findings and Policy Recommendations based on existing research*, PROMO briefing paper, 2017, p. 27.

¹⁸² An obligation to introduce a joint liability is established for building work only (Article 12, § 2 EPWD).

groups of companies, does not oblige to reveal the subcontractors' identity)¹⁸³, EU Institutions decided not to strengthen the rules on joint liability.

The rules on joint liability fulfil three important objectives: first, they force clients, users and/or contractors to better select their subcontractors and to verify that they comply with their obligations (*preventive effect*); second, these rules punish the person(s) that benefits from activities performed by posted workers, without respecting labour law (*deterrent effect*); third, they enable workers to address clients, contractors and/or users, in case their employer does not fulfil its obligation (*guaranteeing effect*). In social security regulation, a rule on joint liability is missing. Consequently, a service recipient can benefit from low cost services provided by cheap workforce (because social contributions are not paid or are paid in the wrong State), without being liable for any violation of social security legislation. It is therefore recommendable to introduce rules on joint liability also in the social security regulation, as already happens in several Member States¹⁸⁴. Note that, currently, service providers established in States where joint liability rules apply to social contributions, suffer from the unfair competition of service providers established where such rules do not apply: indeed, if the latter do not pay social contributions in the Home State, the service recipient cannot be held jointly liable.

7. Access to justice

Many researches have highlighted that posted workers often do not take legal actions, notwithstanding the numerous and severe infringements detected¹⁸⁵. The EPDW introduces several rules to enforce the right to an effective remedy and to a fair trial as guaranteed by **Article 47 CFREU** (expressly mentioned in Recital no. 48 EPDW). In particular, Article 11 EPDW obliges Member States to: ensure that there are effective mechanisms for posted workers to lodge complaints against their employers, also in the Member State where they are or were posted¹⁸⁶; ensure that trade unions and other third parties which have a legitimate interest may engage, on behalf or in support of the posted workers, and with their approval, in any judicial or administrative proceedings; protect posted workers against any unfavourable treatment by their employer; ensure that the posted workers are able to receive remuneration, back-payments or refund of taxes, social security contributions, excessive costs or contributions to common funds or institutions of social partners unduly withheld from their salaries. Directive 2018/957 adds that Member States shall «ensure that adequate procedures are available to workers and/or workers' representatives for the enforcement

¹⁸³ *Transnational posting of workers within the EU. Guidelines for administrative cooperation and mutual assistance in the light of Directive 2014/67/EU* (2018, p. 70 ff.); Heinen A., Müller A., Kessler B., *Liability in Subcontracting Chains: National Rules and the Need for a European Framework*, study for the JURI committee, EP, 2017.

¹⁸⁴ Heinen A., Müller A., Kessler B., *Liability in Subcontracting Chains: National Rules and the Need for a European Framework*, study for the JURI committee, EP, 2017; van Hoek A., Houwerzijl M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, 2011, p. 125-134.

¹⁸⁵ Heinen A., Müller A., Kessler B., *Liability in Subcontracting Chains: National Rules and the Need for a European Framework*, study for the JURI committee, EP, 2017, p. 70; van Hoek A., Houwerzijl M., *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, 2011, p. 140-145.

¹⁸⁶ Posted worker can also sue the employer at its domicile, where the worker habitually carries out his/her work, or where the business which engaged the worker is situated (Article 21 Brussels I (recast) Regulation).

of obligations» under PWD (Article 5 PWD). To further guarantee the right to an effective remedy, part of the ELA funds could be used to provide legal aids to support workers' complaints (cf. Article 47 § 3 CFREU).

In social security regulation, judicial jurisdiction shall coincide with legislative jurisdiction (Council, *Report on the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters*, 27 September 1968, so-called *Jenard Report*)¹⁸⁷. This rule, that **was established before the implementation of the PD A1 system**¹⁸⁸, creates several problem to posted workers in cases of violation of EU law. Indeed, when a PD A1 has been issued by a social security institution without the necessary conditions to be present or when these conditions have then changed, in order to claim the due social benefits, a posted worker has first to contest the PD A1 before the competent court of the State where it has been issued. Note that, in cases of serious infringement, posted workers often do not have any connection with this State. Moreover, when the conditions to issue a PD A1 have changed, the Home State authorities do not have any power to investigate on facts that have happened in another country. Finally, a posted worker cannot force any authority in the Host State or in the Home State to fulfil the obligation to cooperate for the withdrawal of the PD A1.

Consequently, in case of violation of EU law on posting, a posted worker can claim his/her labour rights in the Host State but s/he cannot claim his/her social benefits until the withdrawal of the PD A1 (*Rosa Flussschiff*). Some authors have thus claimed that EU social security regulation does not respect neither the right to an effective remedy and to a fair trial (Article 47 CFREU)¹⁸⁹, nor the right to social security benefits (Article 34 CFREU)¹⁹⁰. Indeed, «the effectiveness of the rights conferred to individuals by EU law necessary implies that, in case of violation, those individuals have appropriate remedies and means for redress before a court or a tribunal capable of guaranteeing such rights»¹⁹¹. In particular, Article 47 CFREU forbids that the exercise of rights recognised by EU law turns out to be impossible or overly difficult, for the procedural conditions concretely applicable¹⁹². According to ECJ case law, Article 47 «is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they

¹⁸⁷ Brussels I (Recast) Regulation is not applicable to disputes relating to social security (Article 1, § 2, let. c)).

¹⁸⁸ The E101 PD system was first implemented by ECJ in FTS.

¹⁸⁹ Juall-Seseke F. et Robin-Olivier S., *Contradiction dans le régime du détachement ? Une comparaison des arrêts Sähköalojen ammattiliitto et A-Rosa*, in RDT 2017, p. 562.

¹⁹⁰ Article 12 and 13 Reg. 883 were introduced to protect the interests of posted workers and workers active in two or more States to remain affiliated to the social security system of one country to avoid that an interruption of their affiliation would adversely affect their rights. Indeed, Reg. 883 has been adopted on the basis of Article 48 TFEU which aims to prevent that mobile workers would be penalised in the field of social security. In order to assure an adequate social security coverage for intra-corporate transferees, Directive 2014/66 applies the equal treatment principle to social security, except when national law and/or bilateral agreements provide for the application of the social security legislation of the country of origin (Recital 38 and Article 18, § 2, let. c)).

¹⁹¹ Giubboni S., Robin Olivier S., *Analytical Report 2016. Effective judicial protection in the framework of Directive 2014/54/EU*, FreSsco, European Commission, 2016, p. 7.

¹⁹² Giubboni S., Robin Olivier S., *Analytical Report 2016. Effective judicial protection in the framework of Directive 2014/54/EU*, FreSsco, European Commission, 2016, p. 12.

may rely on as such» (Egenberger, C-414/16, § 78). Consequently, any contrary provision of national law shall be disapplied and any contrary EU secondary rule shall be void¹⁹³.

Other authors defend the current PD A1 system, claiming for the respect of the principle of single applicable legislation (Article 11, § 1 Reg. 883)¹⁹⁴. This opinion can be criticised for several reasons. First, according to ECJ case law, a Member State other than the competent one designated by Reg. 883 is allowed to grant benefits to mobile workers under its own national law and to guarantee a broader social protection than that arising from the application of the EU legislation (C-352/06, Bosmann, § 29; Joined cases C-611/10 and 612/10, Hudzinski and Wawrzyniak, § 56; C-382/13, Franzen)¹⁹⁵. Second, the principle of single applicable law is often overlapped to the necessity to avoid double contribution; instead, these two aspects should be separated: the necessity to avoid double contribution concerns the relationship between the State and the person(s) obliged to pay social contributions (it does not affect the relationship between the competent institution and the beneficiary of the social protection). Therefore, a Member State can (shall) recognise a social benefit to a posted worker (e.g. an indemnity in case of industrial accident), and then cooperate with the State that issued the PD A1 to obtain its withdrawal and the payment of the social contributions.

In order to avoid threatening the sustainability of national social security systems, **the dialogue and conciliation procedure set by Article 5 Reg. 987 should be made more efficient**, establishing that: when Host State authorities, according to the common framework for controls set by ELA or through joint investigations, demonstrate that the conditions to issue a PD A1 were not present, the form is void (*Altun*)¹⁹⁶; when a Host State authority, according to the common framework for controls set by ELA or through joint investigations, discovers that the factual conditions to issue a PD A1 have changed, the form is not binding anymore¹⁹⁷. The Home State institution could also be obliged to prove that the conditions to release a PD A1 are/were present, establishing that the PD A1 is void in case the proof is not provided (*reversal of burden of proof*). In this way, Member States would be

¹⁹³ See also Articles 13 and 14 ILO Convention n. 157 on maintenance of Social Security Rights (ratified, in EU, only by Spain and Sweden).

¹⁹⁴ These authors often claim for an improvement of the conciliation procedure regulated by Article 5 Reg. 987. However, this procedure concerns Member States only and does not affect the individual right to an effective remedy and a fair trial (see Recital no. 17 of the Commission proposal on ELA).

¹⁹⁵ As observed by Cornelissen R. (*Conflicting Rules of Conflict: Social Security and Labour Law, in Residence, employment and social rights of mobile persons. On how EU Law Defines Where They belong*, ed. By Verschueren H., Intersentia, 2016, p. 258), the principle of single applicable law was not present in Regulation no. 3/1958 and the ECJ ruled that this Regulation did not prohibit Member States, other than the one whose legislation was applicable by virtue of the Regulation, «from applying their social security legislation to migrant workers, if that simultaneous application led to a ‘supplementary protection’ of the worker concerned» (see Case 92/63, § 40; Case 19/67, § 49).

¹⁹⁶ The Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815) establishes only that «upon detection of an Reg. irrefutable case of fraud committed by the applicant of the document, the issuing institution shall withdraw or rectify the document immediately and with retroactive effect» (new Article 5, § 2 let. a) Reg. 987).

¹⁹⁷ This could be established in an implementing act that the Commission can adopt to set procedures for the PD A1 withdrawal, according to the Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815) (new Articles 76a Reg. 883 and 20a Reg. 987). Giubboni (*The European Labour Authority (ELA) and social security coordination*, EP briefing, May 2018, p. 9) has suggested to enable ELA to suspend the validity of PD in case of breach of the duty of cooperation by the institutions issuing it or when there are concrete evidences that the document was obtained fraudulently. In case of A1 suspension, the ELA may require the payment of social contributions and of sanctions into an EU fund, which will then refund the competent authority.

forced to provide to the competent social security institution all the means to check if the conditions to release a PD A1 are present. Moreover, the terms of the dialogue and conciliation procedures should be shortened¹⁹⁸ and precautionary measures should be allowed in order to avoid the so-called “disappearing subcontractor”, i.e. the fact that often employers go bankrupt and disappear without paying the due social contributions¹⁹⁹. Finally, decisions of the conciliating body should be legally binding for the Member States involved (cf. Article 19, § 3 and 4 Regulation 1093/2010 on the European Banking Authority; Article 15 § 4 Directive 2017/1852 on tax dispute resolution mechanisms in the European Union)²⁰⁰.

8. Sanctions

Besides the general principle of effective, proportionate and dissuasive sanctions (cf. Article 20, § 1 EPDW), Directive 2018/957 states that, «where, following an overall assessment made pursuant to Article 4 of Directive 2014/67/EU by a Member State, it is established that an undertaking is improperly or fraudulently creating the impression that the situation of a worker falls within the scope of this Directive, that Member State shall ensure that the worker benefits from relevant law and practice» (Article 5 PWD). This rule strengthens Recital no. 11 EPWD according to which where there is no genuine posting situation, due regard should be given to the provisions of Rome I Regulation, and «Member States should ensure that provisions are in place to adequately protect workers who are not genuinely posted». However, **Member States are still free to choose the sanctioning mechanism** and to decide who is to be sanctioned²⁰¹. Penal sanctions are often more effective and dissuasive than civil or administrative sanctions. Indeed, in case of suspicion of a crime, public authorities are obliged to investigate, so that the employer can be prosecuted even if the concerned workers do not sue it.

The EPWD has also established some rules on cross-border enforcement of financial administrative penalties and/or fines (Article 13-19)²⁰². Rules on recovery of unduly paid benefits, including fines

¹⁹⁸ See the Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815) (new Articles 5, § 2 Reg. 987) and the Commission proposal on ELA (COM(2018)131; new Article 5, § 4 Reg. 987).

¹⁹⁹ McGauran K., *The impact of letterbox-type practices on labour rights and public revenue*, 2016, p. 22. The Commission proposal to amend Reg. 883 and Reg. 987 (COM(2016)815) allows to take precautionary measures «to ensure recovery where a claim or the instrument permitting enforcement in the Member State of the applicant party is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the Member State of the applicant party» (new Articles 84 Reg. 987).

²⁰⁰ The Commission proposal on ELA introduces only the obligation for the Member States to report on measures taken to follow-up or on the reasons for not taking any action (Article 13, § 5). On the opportunity to split the functions currently performed by the Administrative Commission and to shift the operational tasks to the ELA see Giubboni 2018, p. 8.

²⁰¹ Directive 2014/24 obliges Member States to exclude an economic operator «from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions» (Article 57 § 2). A Commission proposal (COM(2017)681) inserts a new Article 14a in Regulation 1072/2009 to sanction consignors, freight forwarders, contractors and subcontractors where they knowingly commission transport services which involve infringements of the Regulation.

²⁰² Article 15 obliged the authority requested to recover an administrative penalty and/or fine to recognise it without any further formality being required and to take all the necessary measures for its execution; the requested authority

and penalties, are also established by Reg. 987 (Article 75-86) and strengthened by the Commission proposal to amend Reg. 883 and Reg. 987 (new Article 75, 76, 77 and 79)²⁰³. Moreover, the Commission proposal sets a general procedure to transfer contributions from the institution that has unduly received them to the competent institution (new Article 73, § 3 Reg. 987).

To improve the rules on cross-border enforcement procedures of penalties and fines, it is recommended: to introduce the possibility, for a national authority, to demand to competent authorities of other Member States to take all necessary enforcement measures to bring about the cessation or prohibition of an infringement, including **precautionary measures** (cf. Article 11 Reg. 2017/2394; Article 16 Directive 2010/24; Articles 22 and 23 Regulation 655/2016 on a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters)²⁰⁴; to grant to the ELA the power to adopt enforcement measures in case of serious cross-border infringements (Cremers J. 2018, p. 8).

Finally, we should remark that **social dumping** (i.e. any practice that exploits low labour conditions with the aim of gaining competitive advantage) includes both legal and illegal behaviours²⁰⁵. Social dumping is boosted whenever companies are allowed to decide where to establish and then to operate all over Europe, exploiting differences in national labour and social security law ('regime shopping')²⁰⁶. This entails also a regime competition, i.e. the reduction of labour and social standards by Member States to attract and retain companies within their jurisdiction²⁰⁷. Harmonisation of national labour and social security law is the best remedy to social dumping. But until then, EU law should promote solidarity among Member States and their citizens, avoiding (or at least, limiting) any form of unfair competition among enterprises and regime competition among Member States. To that end, a mainstreaming approach to fight against social dumping should be adopted, i.e. this perspective should be considered in any policy and regulation on single market²⁰⁸.

shall act in accordance with the national laws, regulations and administrative practices in force in the requested State applying to the same or a similar infringement or decision (principle of equivalence).

²⁰³ See also Article 8, § 1 let. d) of the Commission proposal on ELA.

²⁰⁴ A Preservation Order can be issued when «there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult» (Article 7 § 1 Regulation 655/2014). The creditor may also request the competent court to request that the authority of the Member State of enforcement obtain the information necessary to allow the bank(s) and the debtor's account(s) to be identified (Article 14 § 1). The Preservation Order «shall be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement» (Article 23 § 1). Regulation 655/2014 does not apply to social security.

²⁰⁵ In the first case practices aimed at gaining a competitive advantage exploiting lower labour standards are lawful while in the second case there is a breach of national and/or EU law (Kiss M., Understanding social dumping in the European Union, EP briefing, 2017). On social dumping see Bernaciak M.

²⁰⁶ E.g. when EU law allows registration of letterbox companies, blurs the distinction between freedom to provide services and freedom of establishment, or when EU social security regulation on posting makes it very difficult to contest the application of Home State law.

²⁰⁷ Usunier L., *La concurrence normative, un mode de représentation des rapports entre les systèmes juridiques en vogue*, in *La concurrence normative. Mythes et réalités*, eds. Sefton-Green R. and Usunier L., collection de l'UMR de droit comparé de Paris, p. 19.

²⁰⁸ E.g. the real seat theory should be implemented at EU level in all legal areas (Houwervijl M., *A Hunters Game: How Policy can change to spot and sink Letterbox-type Practices*, ETUC Project on Letterbox Companies, Part I, 2016, p. 26).

CHAPTER IV

Transferable cross-border tax rules to cross-border social security

by Prof dr Edoardo Traversa,

Fraudulent companies operating cross-border could conceive different arrangements to reduce their tax liabilities and to avoid social security contributions. One of the most significant examples is the use of the so-called letterbox companies, a phenomenon that started decades ago to avoid corporate taxes and that recently began undermining also social security, in particular in the case of posting of workers. The legal instruments conceived in the domain of taxation, to tackle the spread of such entities – as well as other fraudulent arrangements and behaviours – could be transposed, or in any case could serve as a model, in the field of social security. The opacity of certain taxpayers' situations, due to the possibility to allocate assets abroad, has made it complicated for national Administrations to efficiently combat tax fraud and avoidance; therefore, to date, the main measures adopted at the European Union ("EU") level to fight them are focused on the administrative cooperation between the EU Members. Indeed, in 2010 the Council Regulation 2010/904/EU of 7 October 2010 on administrative cooperation and combating fraud in the field of VAT entered into force and, as regards direct taxation, the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation adopted in 2011 has been recently repeatedly amended (in 2014, 2015 as well as in 2016) introducing, *inter alia*, the mandatory automatic exchange of information concerning the income from employment. The aforesaid approach has thus material relevance in tackling circumvention of social security contributions.

1. Letter-box companies and the principle of tax abuse

The OECD Glossary of Tax Terms defines a so-called "letter-box company" as «*a paper company, shell company²⁰⁹ or money box company, i.e. a company which has compiled only with the bare essentials for organization and registration in a particular country*» and whose «*actual commercial activities are carried out in another country*»²¹⁰. Nevertheless, there are various reasons grounding the creation of such entities, thus encumbering the possibilities to use a single definition. For example, there are legal entities that – without carrying out any operational activity in the country of incorporation – merely receive income from affiliated companies located in other countries, but also legal entities used to avoid compliance with their tax and/or social security obligations.

²⁰⁹ «A company set up by fraudulent operators as a front to conceal tax evasion schemes», as defined in OCDE, *Glossary of Tax Terms*, available on the OECD website <http://www.oecd.org/ctp/glossaryoftaxterms.htm>.

²¹⁰ OCDE, *Glossary of Tax Terms*, available on the OECD website <http://www.oecd.org/ctp/glossaryoftaxterms.htm>.

It is material to point out that setting up a letterbox company is not illegal *per se*. On the territory on which the EU internal market extends, the companies benefit from the right of the establishment and the freedom to provide services under, respectively, articles 49 and 54 of the Treaty on the Functioning of the European Union (“TFEU”), which include the faculty to operate in other Member States through an agency, branch or subsidiary – even a letterbox company, if the domestic regulations allows its setting-up. Indeed, many Member States do not require companies to have a “substantial” link to the state of incorporation and the EU Court of Justice (“ECJ”) held that «*the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment*» and that «*the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty*»²¹¹. This also applies to the setting up of a company aimed at obtaining a tax advantage, as, according to the ECJ, «*the fact that a Community national, whether a natural or a legal person, sought to profit from tax advantages in force in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty*»²¹².

Thus, establishing a company or a subsidiary in a Member State for benefiting from more advantageous (tax) regulations does not constitute in itself an abuse of the freedom of establishment. The taxpayers have the right to «*choose to structure their business so as to limit their tax liability*»²¹³ and even to apply for a VAT identification number without proving to be in possession of the «material, technical and financial resources» to carry out the relevant economic activity²¹⁴.

On the other hand, European Union law «*cannot be relied on for abusive or fraudulent ends*»²¹⁵ and a Member States national regulation restricting the freedom of establishment and to provide services may be justified in that case²¹⁶, if aimed at preventing tax evasion, avoidance and abuse²¹⁷ and if compliant with the proportionality principle²¹⁸. In this regards, it should be taken into account

²¹¹ ECJ, 9 March 1999, C-212/97, *Centros*, para. 27. The same principle has been recently reaffirmed by the ECJ in ECJ, 25 October 2017, C-106/16, *Polbud – Wykonawstwo*, para. 40, in which the ECJ states that «the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse».

²¹² ECJ, 12 September 2006, C-196/04, *Cadbury Schweppes*, para. 36; ECJ, 11 December 2003, C-363/01, *Barbier*, para. 71.

²¹³ ECJ, 21 February 2006, C-255/02, *Halifax and Others*, para. 73.

²¹⁴ ECJ, 14 March 2013, C-527/11, *Ablesio*, paras. 26 and 36.

²¹⁵ ECJ, 23 March 2000, C-373/97, *Dionisios Diamantis*, para. 33; ECJ, 12 May 1998, C-367/96, *Kefalas and Others*, para. 20. The principle of prohibiting abusive practices applies both to the direct taxes area and to the sphere of VAT, see ECJ, 21 February 2006, C-255/02, *Halifax and Others*, para. 70.

²¹⁶ ECJ, 9 March 1999, C-212/97, *Centros*, para. 24.

²¹⁷ ECJ, 9 November 2006, C-433/04, *Commission vs. Belgium*, para. 35 and case law quoted therein. The ECJ also acknowledges that «the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112», i.e. the VAT Directive, see ECJ, 14 March 2013, C-527/11, *Ablesio*, para. 28; ECJ, 21 February 2006, C-255/02, *Halifax and Others*, para. 71.

²¹⁸ A provision restricting the freedom to provide services must be «appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it», ECJ, 9 November 2006, C-

that the concept of establishment under the Treaty provisions implies the fixed establishment of the company concerned in the host Member State and the actual pursuit of a genuine economic activity in the territory of the latter²¹⁹.

In the light of the above, it is important to briefly analyse which is the borderline between the use and the abuse of the freedom of establishment is, from a tax perspective, as outlined by the ECJ.

Since the appearance of the abuse notion in the *Van Binsbergen*²²⁰ case and the first actual delineation of the relevant identification criteria with the *Emsland-Stärke* case²²¹, the formulation of the two elements required by the ECJ to pinpoint an abusive practice in tax sector have slightly varied from case to case, even it has been remarked that the “two-prong test” has been consistently applied²²².

According to the ECJ case law, a behaviour can be qualified as abusive if the following tests are fulfilled:

- A. the *objective test*, which requires «a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved»²²³;
- B. the *subjective element* described as «the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it»²²⁴.

The description of the objective and subjective tests in the *Emsland-Stärke* case quoted above can be considered as a guideline, even if over the course of time the relevant formulation has been differently nuanced by the ECJ²²⁵.

433/04, *Commission vs. Belgium*, para. 33; ECJ, 25 July 1991, C-76/90, *Säger*, para. 15. As regards the freedom of establishment, see ECJ, 14 March 2013, C-527/11, *Ablesio*, paras. 30 and 34.

²¹⁹ ECJ, 12 September 2006, C-196/04, *Cadbury Schweppes*, paras. 54 and 68.

²²⁰ ECJ, 3 December 1974, C-33/74, *Van Binsbergen*, para. 13.

²²¹ ECJ, 14 December 2000, C-110/99, *Emsland-Stärke*, paras. 52-53.

²²² DE BROE L., BECKERS D., “The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: an analysis against the wider perspective of the European Court of Justice's case law on abuse of EU law”, EC tax review, Alphen aan den Rijn, 2017, Vol. 26, No. 3, p. 135; MARTIN JIMENEZ A., “Towards a Homogeneous Theory of Abuse in EU (Direct) Tax Law”, Bulletin for International Taxation, 2012, Vol. 66, p. 284.

²²³ ECJ, 14 December 2000, C-110/99, *Emsland-Stärke*, para. 52.

²²⁴ ECJ, 14 December 2000, C-110/99, *Emsland-Stärke*, para. 53.

²²⁵ *Ex multis* DE BROE L., BECKERS D., “The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: an analysis against the wider perspective of the European Court of Justice's case law on abuse of EU law”, *op. cit.*, p. 134; PIAVAVIGNA P., “Tax abuse and aggressive tax planning in the BEPS era: how EU law and the OECD are establishing a unifying conceptual framework in international tax law, despite linguistic discrepancies”, World Tax Journal, Amsterdam, 2017, Vol. 9, No. 1, pp. 47-98; WEBER D., “Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ – Part 1”, European Taxation, 2013, Vol. 53, No. 6, pp. 251-262.

Recently, the tax abuse concept developed by the ECJ case law has been transposed in the Anti-Tax Avoidance Directive of 12 July 2016 (“ATAD”)²²⁶ which sets forth the general anti-abuse rule (“GAAR”) in article 6 that reads as follows:

1. *For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.*
2. *For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.*
3. *Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.*

Here again, a reference is made to the aim of obtaining an advantage in setting up the arrangements, to the relevant artificiality (or non-genuineness) and to their inconsistency with the object of the applicable tax law.

Article 4 of the so-called Enforcement of Posting of Workers Directive²²⁷, stipulates that for the purposes of the identification of a “genuine posting” and the “substantiality” of the activities carried out by the posting employers, only refers to the assessment «factual elements that are deemed to be necessary» as those listed in the same article, although it specifies that such facts «shall not be considered in isolation».

In our opinion, in developing a stronger synergy with the Enforcement of Posting of Workers Directive, the Regulation 883/2004 should take into account the alignment of the relevant provisions preventing the abuse behaviours with the abuse concept developed in tax sector – briefly outlined above – in order to identify more effectively such practices and to improve coordination between the tax and social security administrations.

²²⁶ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, as amended in 2017 by the Council Directive (EU) 2017/952 of 29 May 2017 as regards hybrid mismatches with third countries.

²²⁷ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’).

2. Enforcement – Exchange of tax information and cross-border administrative cooperation

Another instrument – and maybe even more efficient – to tackle the setting up of letterbox companies and, in general, the abuse in cross-border social security could be the development of information exchange mechanisms. Tax law could provide inspiration in this regards.

In that context, the OECD has acted as a driver. It developed the “Common Reporting Standard” (“CRS”), an international standard for automatic exchange of tax and financial information on a global level aimed at fight against tax evasion, approved by the OECD Council in 2014. The CRS includes provisions on the content of the data to be forwarded, as well as the illustration of the principle and procedures with which the financial institutions have to comply for the identification of the reportable accounts and the communications.

At the EU level, in the last years, several initiatives have been undertaken in order to strengthen the ways to tackle abuse phenomena and to refine the tool of the information exchange.

The Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation adopted in 2011 – as amended in 2014²²⁸, 2015²²⁹ and 2016²³⁰ – (“DAC”) lays down the rules and procedures under which the Member States shall cooperate with each other in exchanging information that are «*foreseeably relevant to the administration and enforcement of the domestic laws of the Member States*»²³¹ on direct tax matters.

The DAC sets forth three types of exchange of information:

- A. Exchange of information on request, on the basis of which the requested authority of a Member State – upon the request of the requesting authority of another Member State – shall communicate to the latter any information (as defined above) that it has in its possession or obtained as a result of administrative enquiries carried out for that purpose²³²;
- B. Spontaneous exchange of information, *i.e.* a «non-systematic communication»²³³ – without prior request – by the authority of a Member State to the competent authority of any other Member State of: (a) the information mentioned above in case of the occurrence of the circumstances listed at article 9(1) DAC (*e.g.* supposition of a loss of tax in the other Member

²²⁸ Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

²²⁹ Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

²³⁰ Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation and Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities.

²³¹ Article 1(1) DAC.

²³² Articles 5 and 6(1) DAC.

²³³ Article 3(10) DAC.

State or hypothesis of tax saving resulting from artificial transfer of profits within groups of companies); (b) any information that may be useful to the other Member State;

- C. Mandatory automatic exchange of information that, instead, consists in the systematic and frequent communication – without prior request – to another Member State of «*predefined information*»²³⁴. These predefined information consist of a wide range of information on income²³⁵. The first version of the DAC (“DAC1”) originally referred to five categories of income and assets: employment income, pension income, director’s fees, ownership and income of immovable property as well as life insurance products – information that must be communicated within six months after the end of the relevant tax year. The scope has later been extended to financial account information²³⁶ (to be communicated within nine months after the end of the relevant calendar year), as well as to advance cross-border rulings and country-by-country report²³⁷. The exchanges of information, as provided in the DAC1, started in 2015 regarding the taxable period of 2014 and, in the first two years, Member States focused in particular on employment income «as it has most typically been available» for the automatic exchange of information²³⁸. The quality of data has a strong impact on the efficiency of the mentioned mechanism. Indeed, during the period 2015-2016, the quality of exchanged of data relating to the income from employment has progressed and that improvement has entailed a simplification of the matching among the Member State and of the identification of the taxpayer²³⁹.

Of significance importance is the provision of article 2(2) of the DAC under which the DAC «*shall also not apply to compulsory social security contributions payable to the Member State or a subdivision of the Member State or to social security institutions established under public law*». Nevertheless, article 16(1) of the same DAC explicitly allows that the information communicated in any way between the Member States under the DAC are used for the assessment and enforcement of compulsory social security contributions. That is only a point of departure to put in contact taxation with social security. A step forward is needed, also taking into account that fraud/abuse is usually a multifaceted phenomenon and that cases of evasion may include simultaneously both taxes and social security contributions.

As regards indirect taxes, the Council Regulation 2010/904/EU of 7 October 2010 on administrative cooperation and combating fraud in the field of VAT lays down rules and procedures to enable the competent authorities in the Member States in charge of the application of VAT regulations to

²³⁴ Article 3(9) DAC.

²³⁵ See articles 8, 8a and 8aa DAC.

²³⁶ Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (“DAC2”).

²³⁷ Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (“DAC3”).

²³⁸ Commission Staff Working Document on the application of Council Directive (EU) no 2011/16/EU on administrative cooperation in the field of direct taxation *accompanying the document* Report from the Commission to the European Parliament and the Council on the application of Council Directive (EU) no 2011/16/EU on administrative cooperation in the field of direct taxation, p. 7.

²³⁹ *Ibidem*.

cooperate and to exchange with each other any information – also by electronic means – in order to ensure the compliance with such laws. The information falling within the scope of said regulation are «*any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions, and combat VAT fraud*»²⁴⁰.

The mentioned VAT administrative cooperation Regulation governs exchange of information mechanisms, simultaneous controls and especially the role of Eurofisc – an administrative network to promote and facilitate multilateral cooperation.

The typology of the exchanges of information laid down in the VAT administrative cooperation Regulation is subdivided in exchange of information on request and exchange of information without prior request. The former provides that the requested authority of a Member State – upon the request of the requesting authority of another Member State that may also contain a request for administrative enquiry – shall communicate to the latter the information (as defined in article 1(1) referred to above) and shall perform the administrative enquiries necessary for that purpose. The second type of exchange of information – to be carried out in case of the occurrence of the circumstances listed at article 13(1) of the Regulation²⁴¹ and by means of standard forms – may be automatic or spontaneous. The Commission Implementing Regulation No. 79/2012 of 31 January 2012²⁴² lays down the categories (and subcategories) of information subject to the automatic exchange, as the allocation of VAT identification numbers and the information on VAT refunds to persons established in another Member State (“non-established traders”).

Both the DAC and the Council Regulation 2010/904/EU allow the presence of the requesting authority in the administrative offices of the requested authority and the participation in administrative enquiries carried out in the requested EU country, under agreement between the authorities²⁴³.

We point out that the EU Commission has forwarded to the Parliament and the Council a proposal amending the Council Regulation 2010/904/EU aimed at strengthening the administrative cooperation²⁴⁴. It provides, *inter alia*, the spontaneous exchange of data between tax administrations and EU law enforcement authorities as the European Anti-Fraud Office (“OLAF”) and EPPO, allowing the cross-checking of the relevant databases so as to shorten the latency of data and optimize their action in tackling fraud.

²⁴⁰ Article 1 (1) Council Regulation 2010/904/EU of 7 October 2010.

²⁴¹ *I.e.* «(a) where taxation is deemed to take place in the Member State of destination and the information provided by the Member State of origin is necessary for the effectiveness of the control system of the Member State of destination; (b) where a Member State has grounds to believe that a breach of VAT legislation has been committed or is likely to have been committed in the other Member State; (c) where there is a risk of tax loss in the other Member State».

²⁴² Commission Implementing Regulation (EU) No. 79/2012 of 31 January 2012 laying down detailed rules for implementing certain provisions of Council Regulation (EU) No 904/2010 concerning administrative cooperation and combating fraud in the field of value added tax.

²⁴³ Article 11 DAC and article 28 Council Regulation 2010/904/EU.

²⁴⁴ Amended proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax of 30 November 2017, COM/2017/706.

Quite apart from the fact that improving administrative cooperation in the social security field would be fully consistent with other EU policies as those outlined above, we should take into account that the more the information rapidly flows, the more the schemes of abuses/frauds can be quickly and easily detected or – even better – prevented.

Finally, it is important to underline that, in addition to the mechanisms aimed to detect and prevent fraudulent arrangements, Member States also need to put in place measures to dissuade such practices, providing sanctions to tackle them. Lacking specific EU regulations in this regards in tax sector, the Member States are allowed to determine the sanctions ensuring the compliance with the EU law, the scope of this procedural autonomy being in any case limited by the principles of equivalence²⁴⁵ and effectiveness²⁴⁶, as outlined by the ECJ²⁴⁷. A sanction generally implemented by the Members States relates to the possibility to refuse the right of deduction in case of fraud, practice acknowledged by the ECJ as complying with the EU law. Indeed, the ECJ has held that *«it is therefore for the national courts and judicial authorities to refuse the right of deduction if it is shown, in the light of objective factors, that that right is being relied on for fraudulent or abusive ends»*²⁴⁸ and *«even in the absence of provisions of national law providing for such refusal, if it is established, in the light of objective factors, that that taxable person knew, or should have known, that, by the transaction relied on as a basis for the right concerned, it was participating in VAT evasion»*²⁴⁹. It is the ECJ that actually monitors how Member States prosecutes tax frauds.

In the light of the above, we may state that a coordination of enforcement measures is likewise essential, as also stressed by the EU Commission, according to which *«common offences in all Member States would reduce the risks of divergent practice, as they would ensure a uniform interpretation and a homogeneous way to meet all the necessary prosecution requirements. They would also strengthen the deterrent effect and enforcement potential of relevant provisions, and reduce the incentive for potential perpetrators to move to more lenient jurisdictions within the Union to exercise their intentional illegal activities»*²⁵⁰.

²⁴⁵ On the basis of this principle, «in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter», ECJ, 16 December 1976, C-45/76, *Comet*, para. 13.

²⁴⁶ Such principle implies that the national procedures should not «made it impossible in practice to exercise rights which the national courts have a duty to protect», see ECJ 16 December 1976, C-45/76, *Comet*, para. 16.

²⁴⁷ ECJ, 16 December 1976, C-33/76, *Rewe*, para. 5; ECJ, 16 December 1976, C-45/76, *Comet*, paras. 13 and 16.

²⁴⁸ ECJ, 13 March 2014, C-107/13, *Firin*, para. 40. See also ECJ, 18 December 2014, joined cases C- 131/13, C- 163/13 and C- 164/13, *Italmoda*, paras. 42-49.

²⁴⁹ ECJ, 18 December 2014, joined cases C- 131/13, C- 163/13 and C- 164/13, *Italmoda*, para. 62.

²⁵⁰ Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law of 11 July 2012, COM/2012/0363.

3. Preventive early alert mechanisms, risk avoidance and risk assessment.

3.1. Eurofisc

As anticipated above, the Council Regulation 2010/904/EU also established the Eurofisc network²⁵¹. The Eurofisc has been launched officially on 10 November 2010 and it is composed of EUROFISC GROUP – the policy level – and of the different areas in which it operates (*i.e.* working fields, “WF”) – the operational level – where the Member States exchange information. The WFs are the following:

- a) Missing Trader Intra Community fraud (WF1), concerning entities that deliberately fail to comply with their tax obligations;
- b) fraud concerning the means of transport (WF2), as cars, boats and planes;
- c) fraud related to abuse of customs procedure 42²⁵² (WF3), *e.g.* undervalued invoices, falsification of documents accompanying the customs declaration, incorrect information about the goods origin and status;
- d) e-commerce (WF5);
- e) VAT observatory (W4) – where the Member States exchange best practices and information about the trends on fraud; and
- f) transaction network analysis, or “TNA” (W6), a software for information exchange and VAT data processing which is being developed.

The WF1, WF2, WF3 and W5 concerns exchange of data, whereas the W4 relates to trends. Member States may choose in which WF their liaison officials participate and when terminate their participation. The liaison officials of a particular WF designate a Eurofisc working field coordinator who collates and disseminates the collected information. The participating Member States shall «actively participate in the multilateral exchange of targeted information»²⁵³, therefore they have to share data in the network and provide feedbacks on the received information. Feedbacks allow assessing the usefulness of the information communicated.

In practice, once analysed the domestic data and identified the targeted transaction, the relevant information are upload in the corresponding WF by the liaison official and the WF coordinator, then they are downloaded by the other Member States’ liaison officials. Finally, actions are taken by the competent authorities on the basis of the received warning and a feedback is provided.

From our standpoint, the described mechanism could be implemented in the social security sector in order to allow a coordinated *swift* exchange of *targeted* information between Member States.

²⁵¹ See articles 33-37 of the Council Regulation 2010/904/EU.

²⁵² It is the customs regime used by an importer to obtain a VAT exemption.

²⁵³ Article 34(2) of the Council Regulation 2010/904/EU.

3.2. Certified taxable person, authorized economic operator and certificate in case of transfer of registered office

Recently, in the context of the regulations package aimed at developing a definitive VAT system for intra-Union cross-border transactions, the Commission has proposed the introduction of the possibility to grant to determined taxpayers the status of “certified taxable person”²⁵⁴ and such proposal is still under discussion.

The concept of the certified taxable person allows for an attestation according to which a business can be considered as a reliable taxpayer. Said status should be granted – upon request of the taxpayer – on the basis of the following *harmonised* and *objective* criteria²⁵⁵:

- A. regular payment of taxes, i.e. *«absence of any serious infringement or repeated infringements of taxation rules and customs legislation»*²⁵⁶;
- B. presence of high level of internal controls on transactions;
- C. proof of solvency.

In addition to the aspect that the mentioned status should allow a gradual transition towards the definitive system of intra-Union transactions – being an essential component of that new regime –, the certified taxable person status is important because certain simplification rules considered as fraud-sensitive will apply only in the event that such reliable taxpayer is involved.

Since the certified taxable person status is relevant in cross-border situations, it is essential that the criteria and the procedure to granting it are standardised and harmonised at the EU level so that the uniform application is ensured and a certification provided by a Member State is valid in the whole EU. To that purpose and to allow the tax administration to easily collect, to immediately access information, to verify and obtain confirmation of the certified taxable person status by electronic means, a common framework is outlined at the EU level and the integration of said status in the VAT Information Exchange System (“VIES”) – the IT infrastructure already in place to verify the validity of the VAT identification number – is envisaged.

The criteria set forth to grant the status of certified taxable person are similar – even partially identical – to those applied to the authorized economic operator (“AEO”), as defined in the Union Customs Code (“UCC”)²⁵⁷. The UCC provides that an economic operator²⁵⁸ may be qualified as

²⁵⁴ Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards the certified taxable person (COM/2017/567) of 4 October 2017 and Proposal for a Council Directive amending Directive 2006/112/EC as regards harmonizing and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States (COM/2017/569) of 4 October 2017.

²⁵⁵ Article 1 of the Commission proposal COM/2017/569 introducing article 13a in the Directive 2006/112/EC.

²⁵⁶ *Ibidem*.

²⁵⁷ Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, as recently amended by Regulation (EU) 2016/2339 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EU) No. 952/2013 laying down the Union Customs Code, as regards goods that have temporarily left the customs territory of the Union by sea or air.

²⁵⁸ Article 5(5) UCC defines an economic operator as «a person who, in the course of his or her business, is involved in activities covered by the customs legislation».

“authorized” in two different sectors: (i) the customs simplifications – to benefit from certain rules simplifications – and (ii) the security and safety, for facilitations in these fields²⁵⁹. The two types of authorization can be combined and, therefore, can be held simultaneously, enabling the holder to benefit from both of them. In order to obtain the AEO status, the economic operator not only must give evidence of fulfilling the three conditions listed above with respect to the certified taxable person – that are required for both the authorizations – but also he must demonstrate: (i) expertise and qualifications relating to the activity carried out, in case of request of customs simplifications, or (ii) appropriate standards as regards security and safety²⁶⁰.

Both the certified taxable person status and the AEO status have relevance because, enabling the economic operators to benefit from direct or indirect advantages and facilitation in carrying out the relevant activity, they may foster good practices.

A similar impact could be entailed by another recent Commission proposal: the draft Directive on the new company law rules concerning cross-border mobility of companies, *i.e.* the Proposal for a Directive of the European Parliament and of the Council amending Directive(EU) 2017/1132 as regards cross-border conversions, mergers and divisions (COM/2018/241). The proposal COM/2018/241 introduces, *inter alia*, common EU procedures for cross-border conversions²⁶¹ and divisions²⁶² in order to assess the legality of these transactions by the competent authorities of both the departure and destination Member States. In particular, it requires the drafting of the transaction project and, for medium and large companies, an independent expert report evaluating the project. In his analysis, the expert has also to take into account the «tax residence» and «the place where social contributions are due»²⁶³. The competent authority of the Member State of departure verifies the legality of the cross-border transaction and, if it has no objections, it issues a preliminary certificate attesting the compliance with all the relevant requirements. If, instead, it has serious concerns that the cross-border transaction constitutes an abuse – namely an artificial arrangement «*aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members*»²⁶⁴ –, it may carry out an in-depth assessment. In the event that this assessment shows the artificiality of the arrangement, the authority blocks the operation. Should the preliminary certificate be issued, it is transmitted to the competent authorities of the destination Member State that carry out a scrutiny as regards the legality of the transactions and, in particular, the compliance with the provisions of its national laws. Once the legality check has been performed, the company may be registered in the Member State

²⁵⁹ Article 38 UCC.

²⁶⁰ Article 39 UCC.

²⁶¹ According to article 86b of the Commission proposal COM/2018/241, a cross-border conversions is «an operation whereby a company, without being dissolved, wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of a company of a destination Member State and transfers at least its registered office into the destination Member State whilst retaining its legal personality».

²⁶² Article 160b(3) of the Commission proposal COM/2018/241 states that a division occurs when either «a company being divided, which has been wound up without going into liquidation, transfers all its assets and liabilities to two or more newly formed companies» or «a company being divided transfers part of its assets and liabilities to one or more newly formed companies».

²⁶³ Article 86g(3)(b) of the Commission proposal COM/2018/241.

²⁶⁴ Article 86c(3) of the Commission proposal COM/2018/241.

of destination. The Directive is currently under discussion, therefore the final provisions might be different, than proposed by the European Commission.

Said regulations initiative aims, therefore, to prevent those companies whose transactions seem to breach tax rules and/or to undermine workers' rights to establish other companies, enabling Member States to block in advance such transactions. It is part of the Commission push in creating a deeper and fairer Single Market, as its main goals are

- a) on one hand, the promotion of cross-border mobility – also by the digitalization of companies registration²⁶⁵ – and
- b) on the other hand, the protection of the stakeholders (including employees) interests together with the prevention of setting up of artificial arrangements to obtain undue tax advantages.

This is actually a good example of connection between protection of workers' rights and fight against tax evasion and fraud to be taken into account in the revision of the Regulation 883/2004.

4. Administrative assistance for the recovery

The Council Directive 2010/24/EU of 16 March 2010²⁶⁶ – together with the relevant implementing regulation²⁶⁷ – sets out a uniform system of mutual assistance for recovery of claims relating to customs duties and taxes (including administrative penalties, fines, fees and surcharges) in order to improve the functioning of the internal market and to ensure fiscal neutrality. As in the DAC, the compulsory social security contributions are expressly excluded from the scope of the Council Directive 2010/24/EU²⁶⁸, but the information communicated under the Directive provisions may be used for «assessment and enforcement» of such contributions²⁶⁹.

In particular, the Council Directive 2010/24/EU regulates the exchange of information between the Member States for the recovery of claims, the claims recovery itself and the relevant precautionary measures and it provides the creation of national central liaison offices – which are the point of reference for the mutual assistance for the recovery action.

²⁶⁵ In this regard, on 25 April 2018 the Commission has published the Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law (COM/2018/239).

²⁶⁶ Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

²⁶⁷ Commission Implementing Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, as lastly modified by Commission Implementing Regulation (EU) 2017/1966 of 27 October 2017.

²⁶⁸ Article 2(3)(a) of the Council Directive 2010/24/EU.

²⁶⁹ Article 23(1) of the Council Directive 2010/24/EU.

The exchange of information concerns «*any information which is foreseeably relevant to the applicant authority in the recovery of its claims*»²⁷⁰, even the information held by entities operating in the banking sector. As regards persons residing or established in another Member State, the Member State which should refund duties or taxes (other than VAT) may inform the Member State of residence or establishment of the upcoming refund.

The requested authority, upon the request of the applicant authority, provides the latter with the information needed for the recovery claims arising in the applicant Member State and may carry out administrative enquiries for that purpose. The applicant authority may also allow the requested authority to recover the claims arising in the applicant Member State or to take precautionary measures – under the legislation of the requested State – in order to ensure the recovery of such claims.

The mentioned directive introduced the “*standard form*” accompanying the request for the notification of documents relating to claims that facilitates the implementation of the mutual assistance procedures and which should contain the identification of the addressee, the purpose of the notification as well as the claim amount. The standard form may be used for the exchange of information purposes. Moreover, the directive regulates the “*uniform instrument*” allowing the enforcement of the recovery and accompanying the relevant request of recovery. It has the “*substantial content*” of the initial instrument for the enforcement and, especially, it is not subject to any form of recognition nor replacement, thus decreasing the recognition related issues slowing down the assistance system.

The interested party may appeal the claim before the competent authority of the requesting country and, in that case, the liaison offices shall suspend the enforcement procedure until the decision, unless requested otherwise by the applicant authority.

The mechanism described above is aimed to facilitate the mutual assistance and to make it more effective and the actual impact may be deemed positive. Indeed, it has been observed that the number of requests made under the mentioned directive has consistently increased in the period 2011-2016²⁷¹ as the amount of Euro collected via the request to another Member State, after an initial regression in 2012²⁷². Another example of regulation fostering a wider information exchange between Member States administrations.

²⁷⁰ Article 5(1) of the Council Directive 2010/24/EU.

²⁷¹ In 2011, the number of requests received was 9,566 and in 2016 it was equal to 16,403. See Report from the Commission to the European Parliament and the Council on the operation of the arrangements established by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, COM/2017/778, p. 2.

²⁷² Ivi, p. 3. The amount collected was equal to € 62,475,879 in 2011, € 32,076,738 in 2012, € 41,115,223 in 2013, € 46,395,481 in 2014, € 65,711,419 in 2015 and € 67,019,250 in 2016.

5. Joint audits

Joint tax audits are still in an emerging phase by they may be useful to enhance international coordination and collaboration in the social security sector too. The term “*joint audit*” has been used in tax practice to describe the idea of two tax authorities working together. In the OECD’s Joint Audit Report, the “*joint audit*” is defined as the situation in which two or more countries join together to establish «*a single audit team*» to verify issues and/or transactions of taxable persons with «*cross-border business activities*» and «*in which the countries have a common or complementary interest*»²⁷³. Both the taxpayers and the competent authorities representing the relevant countries are involved.

The OECD also provides a structured framework on the basis of which countries could carry out their joint tax audits, outlining three steps to be followed: the planning, the execution activities and the forming of a judgement. Each tax authority designate its Joint Audit Coordinator (JAC) – in charge of the coordination of the joint audit activities – and it provides to the latter an informal draft joint audit proposal. The JAC, having appointed the Joint Audit Team Leader, carries out a risk assessment «*to determine whether a joint audit will improve issue development and resolution*»²⁷⁴. If the joint audit is deemed as an effective resolution, a formal joint audit proposal is submitted to the JAC of the other participating tax authority(ies). Then, an initial meeting is held by the JACs in order to verify the existence of a shared interest in conducting a joint audit. In this case, the examination starts – the JACs maintaining regular contact among them and exchanging information – keeping informed the taxpayer, even scheduling meetings deemed necessary. Lastly, the final audit report(s) is(are) drafted and presented by each participating country to the taxpayer on the occasion of the final closing meeting, at the end of which is concluded the joint audit agreement.

In carrying out joint tax audits, practical issues are observed, as differences in legal obligations for taxpayers and third parties to provide information, different record-keeping requirements, differences of legal provisions interpretations, logistical issues, language barriers, mainly due to the lack of a specific legal framework²⁷⁵. Joint audits could have more efficient and effective results in tackling fraud with respect to traditional assistance, if the procedures are well defined and if a legislative framework is drawn up. The strong suit of the joint audits is that they may reduce compliance costs of both taxpayers and tax administrations – through the resolution of tax issues in a timely way – and that they could encourage the taxpayers to cooperate more effectively with tax authorities. They should not be limited to tax issues, since they could be also useful in social security sector.

²⁷³ OCDE, *Joint Audit Report*, 2010, p. 7, available on the OECD website <http://www.oecd.org/tax/administration/45988932.pdf>.

²⁷⁴ *Ivi*, p. 34.

²⁷⁵ *Ivi*, pp. 49 *et seq.*

Annexes

Overview of the organisations interviewed in the targeted countries

FRANCE

CLEISS (Centre of European and International Liaisons for Social Security): The Cleiss is the liaison body between the French social security institutions and their foreign counterparts for the implementation of European Regulations and bilateral or multilateral social security agreements²⁷⁶. Since 1959, the CLEISS has been France's single help-desk for international mobility and social security. It is the relevant body for the examination of all exemption agreements or exceptional agreements for workers posted abroad²⁷⁷.

ACOSS (Central Agency of Social Security Organizations): ACOSS manages the treasury of each branch of Social Security and manages the URSSAF (Union for the recovery of social security contributions and family allowances) network. National public administrative institution, the primary purpose of ACOSS, having justified its creation in 1967, is of a financial nature: to ensure the common and centralized management of the resources and cash flow of the general social security system²⁷⁸.

Direction Générale du Travail (DGT): prepares, leads and coordinates labor policy to improve collective and individual relations and working conditions in companies and the quality and effectiveness of the law that governs them.

The public policies promoted by the General Directorate of Labor (DGT) are relayed on the national territory by the action of the regional directorates for business, competition, consumption, labor and employment (DIRECCTE)

FNSCBA CGT (Fédération Nationale des Salariés de la Construction-Bois-Ameublement): French Trade Union for Construction and Woodworkers.

France's Social Security system **collects the following personal contributions:**

- Health-maternity insurance,
- daily benefits,
- basic and supplementary retirement pensions,
- disability-death benefits,
- family benefits (which are then paid by France's Family Benefits Funds (Caisses d'allocations familiales/ CAF),
- CSG-CRDS, which are national solidarity contributions to social security financing,
- professional training contributions

²⁷⁶ http://www.cleiss.fr/index_en.html

²⁷⁷ http://www.cleiss.fr/presentation/index_en.html

²⁷⁸ <http://www.acoss.fr/home/lacoss-et-les-urssaf/qui-sommes-nous/lacoss-caisse-nationale-du-resea.html>

ISS: The **Institute of Social Security**²⁷⁹, I. P. (ISS), is a public institute of special regime, created in January 2001, integrated in the indirect administration of the State, endowed with administrative and financial autonomy. The ISS carries out tasks of the Ministry of Labor, Solidarity and Social Security (MTSSS).

Some ISS attributions are²⁸⁰:

- To manage the benefits of the Social Security system and its subsystems;
- Guarantee the realization of the rights and promote compliance with the obligations of the beneficiaries of the Social Security system;
- Collect the revenues of the Social Security system, ensuring compliance with the tax obligations;
- To conclude agreements that provide for exceptions to the rules regarding the determination of the applicable legislation
- Ensure the allocation of benefits due under the international social security instruments in respect of accidents at work and occupational diseases;
- To develop and implement social action policies, as well as to develop measures to combat poverty and promote social inclusion;
- To develop and support initiatives aimed at improving the living conditions of families and promoting equal opportunities
- To conclude cooperation agreements or protocols;
- Exercising the sanctioning powers in the scope of illegals of mere social ordinance related to social support institutions, beneficiaries and taxpayers, under the legal terms;
- To promote the dissemination of information and the appropriate actions to exercise the right to information and to claim the interested parties

ACT (Autoridade para as condições do trabalho): mission is to promote the development and implementation of systems and methodologies for innovation, prevention and inspection, aiming the improvement of working conditions. ACT headquarter is in Lisbon and throughout the continental territory through 32 decentralized services.

ACT Role²⁸¹:

- Prevention of occupational risks
- Development of labour relations
- Prevention of labour disputes
- Prevention of socio-economic deregulation
- Promotion of socio-organizational innovation processes
- Verification and monitoring of working conditions

²⁷⁹ <http://www.seg-social.pt/quem-somos3>

²⁸⁰ <http://www.seg-social.pt/quem-somos3>

²⁸¹ [http://www.act.gov.pt/\(pt-PT\)/SobreACT/QuemSomos/Documents/Folheto_ACT_EN.pdf](http://www.act.gov.pt/(pt-PT)/SobreACT/QuemSomos/Documents/Folheto_ACT_EN.pdf)

ACT Range of Intervention²⁸²:

- Development: methodologies, study and diagnosis
- Technical support
- Animation and dissemination
- Systems management
- Design and development of projects
- certification and accreditation
- inspection
- Cooperation with national and foreign counterparts

FEVICCOM (Federação Portuguesa dos sindicatos da construção, ceramic e vidro) is the federation of construction and ceramic of the General Confederation of the Portuguese Workers (CGTP) which is the largest trade union in Portugal. It was founded in 1970.

BULGARIA

National Revenue Agency (NRA) is under the Bulgarian Ministry of Finance: As of 1 January 2006 the National Revenue Agency incorporated the collection and administering of state taxes (income tax, patent taxes, VAT, corporate taxes) and obligatory social security contributions (health insurance contributions, pension insurance contributions, contributions for additional mandatory pension insurance, etc.).

There are 9000 people in Bulgaria working for the NRA. Each regional agency has a department to make controls on companies.

What taxes does NRA administer²⁸³:

- [Value Added Tax](#)
- [Personal income tax](#)
- [Tax on natural persons' income from employment relations \(Labour contract\)](#)
- [Corporate tax on the annual taxable profit](#)
- [Income tax \(for public enterprises\)](#)
- [Withholding taxes](#)
- [Tax on the activity from ships operation](#)

What social contributions does NRA collect²⁸⁴:

- [Social insurance contributions for the State Social Insurance \(SSI\)](#)
- [Supplementary Compulsory Pension Insurance \(SCPI\)](#)
- [Pension Fund for Teachers \(PFT\)](#)
- [Health insurance contributions](#)
- [Contributions to the Guaranteed Receivables of Workers and Employees \(GRWE\) Fund](#)

²⁸² [http://www.act.gov.pt/\(pt-PT\)/SobreACT/QuemSomos/Documents/Folheto_ACT_EN.pdf](http://www.act.gov.pt/(pt-PT)/SobreACT/QuemSomos/Documents/Folheto_ACT_EN.pdf)

²⁸³ <http://www.nap.bg/en/>

²⁸⁴ <http://www.nap.bg/en/>

One of the roles of the NRA is to determine the applicable social security legislation. NRA receive all labour contracts. The NRA is also in charge to deliver the A1 forms for Bulgarian workers who will be posted to another EU country. If they are posted workers who come to Bulgaria, the NRA will collect the A1 forms that have been sent from abroad.

CITUB: The **Confederation of Independent Trade Unions of Bulgaria** (KNSB/CITUB) is a [trade union](#) confederation in [Bulgaria](#). It was formed in February 1990. They have around 290 000 members and are present in almost all sectors²⁸⁵.

FITUC: The **Federation of Transport Trade Unions in Construction** which represent the Construction workers in Bulgaria and is part of CITUB.

ROMANIA

Guvernul Romaniei labour inspection-is specialized body of the central public administration, subordinated to the Ministry of labor and Social Justice based in Bucharest. The institution has legal personality and preside the State authority through which provide control in the areas of labour relations, occupational health and safety and market surveillance.

FGS FAMILIA is a Romanian trade union in the construction sector part of the Confederal trade union BNS (Blocul National Sindical)²⁸⁶

N.B, the administration in charge of delivering PD A1 is the **National House of Public Pensions** (*Casa Națională de Pensii Publice*) is an autonomous public institution. It administers and operates the public system of pensions, as well as the accidents at work and occupational diseases' scheme. However, we could not interview them.

BELGIUM

The **National Social Security Office (ONSS)** ²⁸⁷has above all a social role. He is the first guarantor of good financing and modernized administration of social security for workers.

Three priority responsibilities: Collection and distribution of social contributions, Collection and transmission of administrative basic data and Statistical support.

With the help of attestations, the NSSO can provide official proof of certain data: Information identifying a business, Personal data of the worker (employment relationship, salary data and benefit data), Number of people serving with a company at the end of a quarter and Payment data of a company.

²⁸⁵ https://en.wikipedia.org/wiki/Confederation_of_Independent_Trade_Unions_of_Bulgaria

²⁸⁶ <http://www.bns.ro/adera-la-bns>

²⁸⁷ <http://www.onssrszls.fgov.be/fr/propos-de-lonss/identite>

The **labour inspectorate in Belgium**²⁸⁸ depends on the Federal Public Service Employment, Labour and Social Dialogue (FPS) Division and comprises several federal departments. Labour inspection in Belgium is divided into two main areas of competences: the control of social laws and the control of welfare at work. The first directorate has particular responsibility for the enforcement of labour laws and social security legislation, problems related to employment, the application of collective agreement, industrial relations and individual employment relationship. The Welfare Control Directorate (CBE) mainly checks workers' welfare at the workplace.

CSC BIE (CSC Bâtiment, Industrie& Energie): is now one of the largest sectoral federation of the Belgian Trade Union CSC (Confédération des Syndicats Chrétiens) with near 265,000 affiliates.

NETHERLANDS

Social Insurance Bank (SVB): The SVB has a Governing Board, which is appointed by the Minister of Social Affairs and Employment, but it performs its tasks independently, it is an independent administrative body. This body is in charge of delivering PD A1.

Arbeidsinspectie²⁸⁹ :The Labour Inspectorate in Netherlands (Arbeidsinspectie, AI is part of the Ministry of Social Affairs and Employment and is comprised of 3 departments: (i) Participation and Income Security, (ii) Employment, and (iii) Administration, Enforcement and Operations, under which labour inspection falls.

The Transport Inspectorate enforces occupational safety and health and working hours legislation in transport (road, air traffic, railroad, river and maritime transport).

FNV: The Netherlands Trade Union Confederation (FNV) has 1.1 million members²⁹⁰.

ITALY

Italian Labour Inspection depends on the Ministry of Labour and Social Policy. Its structure includes an authority at the central level, a regional labour directorate (Direzione Regionale del Lavoro) for each region and a provincial labour directorate (Direzione Provinciale del Lavoro) for each province. The Regional Labour Inspection Directorate has the main function of coordinating and supervising the work done by the labour inspectors under the provincial directorates. They deal with question such as illegal work, forced and trafficking labour, including child labour.

²⁸⁸ http://www.ilo.org/labadmin/info/WCMS_150912/lang--en/index.htm

²⁸⁹ http://www.ilo.org/labadmin/info/WCMS_156052/lang--en/index.htm

²⁹⁰ <https://www.fnv.nl/over-fnv/internationaal/mondiaal-fnv/english/projects/about-fnv/>

Provincial Labour Inspection Directorate includes: A labour inspection service, a policy labour service and a legal dispute service.

CGIL: The **Italian General Confederation of Labour** (*Confederazione Generale Italiana del Lavoro*) is a national trade union in Italy. It is one of the most important Italian trade union and has a membership of over 5.5 million.

