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## **Social security data for posting of workers**

### **Reform of cross-border coordination of social security**

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#### **This Working Paper at a Glance**

The cross-border exchange of social security data in the case of postings requires reforms both in European social security coordination law and at national level. Digitalised and simplified procedures employing modern technologies, improvements around the Portable Document A1 (PD A1), better identification of the parties involved and other reform proposals would not only relieve companies from red tape and strengthen the European Internal Market, but also significantly increase the social protection of workers.

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# 1. Coordination of European Social Security Law

The European Internal Market and in particular the freedom to provide services under Article 56 of the Treaty on the Functioning of the European Union (TFEU) enable companies to provide their services in other EU Member States<sup>1</sup> than their country of establishment. For this purpose, they may use their own staff employed in the state in which they have their registered office. This is referred to as posting of workers.

In principle, the labour (cf. Article 8 para. 2 Rome I Regulation<sup>2</sup>) and social security law (cf. Article 12 Regulation 883/2004<sup>3</sup>) conditions of the home state apply to posted workers. To date, there is no uniform social security law within the EU, nor is there any comprehensive harmonisation in this area – and this will not change in the foreseeable future.<sup>4</sup> However, there is comprehensive coordination of the social security systems within the EU – and beyond – with Regulation 883/2004 and the implementing Regulation 987/2009.<sup>5</sup>

Coordination is based on the principle of exclusivity, aggregation and export. This means that only one Member State is responsible for a person at a time and that contribution and employment periods completed in another Member State must also be taken into account when calculating benefits. In addition, cash benefits from the social security system of one or more Member States must in principle also be provided where a Union citizen resides (cf. Article 7 of Regulation 883/2004).<sup>6</sup> In primary EU law, these principles are laid down in Article 48 TFEU.

This brief summary of coordinating social security law already shows that data knowledge across national borders is necessary for this system to work. This is particularly obvious in the case of the posting of workers, which is why it is used as an example for this study.

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1 The acronym EU is used in this document for the sake of simplification. It refers to the states in which the stipulations of Regulation 883/2004 apply, i.e. the EU and the other contracting states to the European Economic Area Agreement (Norway, Iceland, Liechtenstein) and partly the United Kingdom.

2 Regulation (EC) No 593/2008 on the law applicable to contractual obligations of 17/6/2008, OJ 2008 L 177/6.

3 Regulation (EC) No. 883/2004 on the coordination of social security systems of 29/4/2004, OJ 2004, L 166/1 ff.

4 Cf. for example *Behrend*, NZA Beilage 2020, 65.

5 Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down detailed rules for the application of Regulation (EC) No 883/2004 of 16/9/2009, OJ 2009 L 284/1.

6 *Behrend*, NZA-Beilage 2020, 65.

In practice, the cross-border exchange of social security data for posting proves to be a complex and evolved system, which not only has the technical function of mutual information on the existence or non-existence of an insurance relationship and the existence or non-existence of benefit claims. It is also an essential factor for the functioning of the Internal Market on the one hand and the fight against undeclared work on the other.

It is all the more problematic if this data exchange does not function properly. Companies complain of a high bureaucratic burden and the authorities complain of insufficient or unreliable information. In order to solve this problem, several projects exist at European level, of which the SDG (cf. chapter 2.1.1), the ESSPASS (cf. chapter 2.1.2) and the EESSI (cf. chapter 2.1.3) will be examined in particular below.

The focus will be on the Portable Document A1 (in the following: PD A1) certificate, as it is of particular importance for the issue at hand. In order to be able to prove affiliation to the social security system of the home country in the case of posting, workers and self-employed persons must in principle apply for and receive a PD A1 in advance for every cross-border work-related activity, cf. Article 19 para. 2 of Regulation 987/2009. According to Article 15 para. 1 and 19 para. 2 of Regulation 987/2009, the social security authority of the home country is responsible for issuing the document.<sup>7</sup>

In addition to confirming membership of a national social security system, the document also contains a statement on the employment status – i.e. in particular the question of whether the person is a worker or self-employed.<sup>8</sup> This assessment refers exclusively to the evaluation in the country of origin.<sup>9</sup> In addition, it certifies whether the other conditions for their issuance are also met, such as whether the posting company usually operates in the home state and that other workers are not simply being replaced as part of “chain posting”.

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7 Cf. also HdbArbR-*Appel/Callsen*, § 87 para. 87.

8 Cf. Recommendation No A1 of 18/10/2017 on the issuing of the certificate referred to in Article 19(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council, OJ 2018 C 183/5.

9 Also EuArbRK-*Krebber*, Art. 2 RL 96/71/EG para. 3.

## 2. EU social security data exchange – need for reform

### 2.1 Existing European projects

#### 2.1.1 “Your Europe” – Single Digital Gateway

The online portal “Your Europe”<sup>10</sup> based on Regulation 2018/1724<sup>11</sup> combines digital European and national administrative procedures, among other things, and is thus referred to as the “Single Digital Gateway” (SDG).<sup>12</sup> There are links to the websites of the competent national social security authorities, where it is possible to apply online for a PD A1, for example, see Article 2(2)(b) of the SDG Regulation. The result is that the application remains on the national level, the European SDG website only serves as a guide.

#### 2.1.2 ESSPASS – European Social Security Pass

The European Social Security Pass (ESSPASS) is a pilot project that has been running since 2021 and is intended to improve the cross-border claiming and assertion of social security rights by means of digital proof. The ESSPASS also offers potential with regard to the PD A1 if a PD A1 issued electronically (or, if applicable, already the proof of application for a PD A1) can be transferred by the worker to the ESSPASS. The ESSPASS is to become part of a European Digital Identity (“EUID”)<sup>13</sup>. To this end, the ESSPASS is to be integrated into a “digital wallet”, the “EUID-wallet”<sup>14</sup>, which is to be ready for use by the end of 2024.<sup>15</sup> The EUID-

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10 Available at <https://europa.eu/youreurope/> (4/6/2023).

11 Regulation on the establishment of a single digital gateway to information, procedures, assistance and resolution services and amending Regulation (EU) No 1024/2012 of 2/10/2018, OJ 2018, L 295/1 et seq.

12 Currently being implemented in Germany through the Online Access Act (Onlinezugangsgesetz – OZG) (BGBl. I 2017, p. 3122); cf. on the implementation status <https://dashboard.ozg-umsetzung.de> (4/6/2023).

13 For details on European digital identity: European Commission, <https://tinyurl.com/dh93hyjb>; and <https://tinyurl.com/ycxtckzn> (both 4/6/2023).

14 European Commission, <https://tinyurl.com/46cw27r6>; and <https://tinyurl.com/vza8fwxt> (both 4/6/2023).

15 Project homepage: <https://www.dc4eu.eu/outputs/> (4/6/2023); in addition: ESV Editorial Office Law, <https://tinyurl.com/yhyz4y97> (4/6/2023).

wallet is an app that will enable EU citizens to access official documents (driving licences, educational qualifications, etc.)<sup>16</sup> and to identify themselves with public authorities and private service providers throughout Europe.<sup>17</sup>

In order to enable secure identification as well as forgery protection, the pan-European blockchain infrastructure – “EBSI” for short (“European Blockchain Services Infrastructure”) – is to be used.<sup>18</sup> If, for example, a PD A1 has been applied for or issued, a corresponding “hash” is stored in the EBSI. No other personal data is recorded. The verification of the data in the ESSPASS and its authenticity is to be carried out with the help of a QR code generated either by the worker’s EUiD-wallet or the app of a verifier.<sup>19</sup>

Currently, however, Regulation 910/2014 on electronic identification and trust services (eIDAS Regulation)<sup>20</sup> does not provide a legal basis for the introduction of a European digital identity recognised throughout Europe by both public and private providers.<sup>21</sup> For this reason, the Commission made a proposal to amend Regulation 910/2014 in June 2021,<sup>22</sup> which has not yet been adopted.

However, a “web wallet” was already completed in November 2022 and a “mobile wallet” in December 2022.<sup>23</sup> By mid-2025, a technical solution for the issuing, updating, revoking and (cross-border) verification of PD A1s and the European Health Insurance Card in particular is to be tested as part of the “DC4EU” (Digital Credentials for Europe) project.<sup>24</sup> In addition, “VECTOR” (“Verifiable Credentials and Trusted Organizations Registries”) as an EBSI<sup>25</sup> project forms the basis for the (further) development of a trustworthy system for the exchange and real-time control of

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16 European Commission, <https://tinyurl.com/ycxtckzn> (4/6/2023).

17 European Commission, <https://tinyurl.com/46cw27r6> (4/6/2023) with comments on further components of the EUiD.

18 Detailed information on the EBSI: <https://ec.europa.eu/digital-building-blocks/wikis/display/EBSI/Home> (4/6/2023); on the functioning: *Mienert/Gipp*, ZD 2017, 514, 517.

19 On the whole subject: European Commission, European Social Security Pass – Pilot project, April 2021.

20 Regulation (EU) No 910/2014 of 23/7/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ 2014, L 257/73.

21 See also Deutsche Sozialversicherung Europavertretung, Digitalisierung der sozialen Sicherheit, p. 9.

22 COM(2021) 281 fin.

23 *D’Angelo/Santoro*, in: European Commission, ESSPASS, 2023, p. 9.

24 European Commission, <https://tinyurl.com/pxurxyz>; <https://www.dc4eu.eu/outputs/> (both 4/6/2023).

25 For more on the Verifiable Credentials Framework, see European Commission see <https://tinyurl.com/nzdef5h4> (4/6/2023).

verified social security data in the context of the digitisation of social security systems.<sup>26</sup>

### 2.1.3 EESSI system

Since January 2021, all Member States have been connected to the Electronic Exchange of Social Security Information system (“EESSI” for short),<sup>27</sup> an IT platform for the exchange of social security data.<sup>28</sup> By the end of 2024, it is expected that all social security institutions in these states will also be connected; the obligation to do so results from Regulation 883/2004.<sup>29</sup> The system is also used for communication regarding PD A1s. The issuing authority informs not only the applicant but also the competent social security authority in the host country in real time about the issuing of the PD A1. Queries and the discussion of divergent assessments can also be clarified via the system.

## 2.2 Need for reform: data quality, acceleration, de-bureaucratisation

Even if the above-mentioned selection of initiatives at EU level represent considerable improvements in the coordination of social security systems or could bring about such improvements if successfully implemented, they are not sufficient, as will be illustrated again using the example of the PD A1. There is potential for improvement both at national and European level.

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<sup>26</sup> See for this *Abeloos*, in: MoveS 24/04/2023, p. 18; according to Volker Schörghofer (Austrian Social Security) in: MoveS, Webinar Presentation – The digitalisation of social security coordination, 24/4/2023, p. 17.

<sup>27</sup> *Orak*, NZS 2021, 914, 917.

<sup>28</sup> In detail: *Bauer/Hilmar*, *SozSi* 2019, 116, 116; on the status in Germany: BMAS, *Machbarkeitsstudie zu den IT-technischen Anforderungen einer weitergehenden Digitalisierung im Bereich Soziale Sicherheit*, p. 36; on the not yet complete implementation in the statutory health insurance system *Orak*, NZS 2021, 914, 917.

<sup>29</sup> *Abeloos*, in: MoveS, Webinar Presentation – The digitalisation of social security coordination, 24/4/2023, p. 11.



## 2.2.1 Procedure for applying for/issuing a PD A1

Following best practice examples from other Member States in designing the application and issuing processes for the PD A1 could speed up the procedures and significantly reduce red tape.

Belgium<sup>30</sup>, Estonia<sup>31</sup> and Austria<sup>32</sup>, for example, have fully automated digitalised procedures with corresponding control mechanisms and a single central data exchange system<sup>33</sup>, which can be accessed by all national social security authorities, hence personal data only need to be recorded once. In Belgium, for example, the certificate is issued within 24 hours at the latest, if no manual intervention is required.<sup>34</sup> If case handlers need to resolve discrepancies, verification must be completed within a maximum of 20 days.<sup>35</sup>

In Germany, the competent institution must send the PD A1 to the employer within three working days of the application in accordance with § 106(1) sentence 3 of the German Social Code (SGB) IV, and the employer must make it available to the worker without delay. The certificate is issued in the form of an electronic document.<sup>36</sup> According to information from the Deutsche Rentenversicherung Bund (Federal German Pension Fund), within their area of responsibility approx. 90 percent of A1 applications for workers and roughly 70 percent of A1 applications for self-employed are processed by way of an electronic, automated A1 procedure. The remaining applications are processed manually, and in some cases further investigations have to be carried out.

However, the degree of automation is not as high at all competent institutions. It is also noticeable that the response time of three working days

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30 Application via the online service “WABRO”: [https://www.socialsecurity.be/site\\_de/employer/applics/gotot/index.htm](https://www.socialsecurity.be/site_de/employer/applics/gotot/index.htm) (4/6/2023).

31 Application on the Estonian state portal: <https://www.eesti.ee/et/> (4/6/2023).

32 Application via the online service “ELDA”: <https://www.elda.at/cdscontent/?contentid=10007.838933&portal=eldaportal> (4/6/2023); for details on how ELDA works, see the ELDA Online manual: <https://tinyurl.com/4w487nx9> (4/6/2023).

33 In Belgium, for example, the various social security institutions are connected with the Central Social Security Database (BCSS). Via BCSS, necessary data is automatically transmitted between social security authorities avoiding the need to transmit individual personal data more than once. See BCSS <https://tinyurl.com/2rkm8ut5> (4/6/2023).

34 See *De Ridder/Ceuppens/Bertoja*, The National Security Office – “Wabro/Limosa”, presentation, slide 6; European Commission, Non-Paper on the applicable social security legislation for posting purposes and state of digitalisation at member state level, p. 23.

35 *De Ridder/Ceuppens/Bertoja*, The National Security Office – “Wabro/Limosa”, presentation, slide 12; European Commission (fn. 34), p. 23; on “MISP2” and X-Road in Estonia, see MISP2 Managers’ Guide, <https://tinyurl.com/2e3739ar> (4/6/2023).

36 Cf. no. 2.6 of the Common Principles for the electronic application and certification procedure A1 according to § 106 SGB IV of 18/6/2020, effective 1/1/2021; no. 2 contains a detailed explanation of which office is responsible in which cases.

in Germany is significantly higher than that of the other countries mentioned here, where only one day is regularly set.

However, there is potential in particular for improving the verification of facts before issuing a PD A1, whereby especially the inclusion of further data sources in an automated plausibility check should be considered. Although this can already be done at the national level, stricter requirements at the EU level are recommended in order to improve the accuracy of the data documented by the PD A1 and thus also to strengthen trust in the same.

### **2.2.2 Identification of workers, self-employed, employers and contractors**

Acceleration and automation entail the risk of a loss of quality. This makes it all the more important to unambiguously assign a PD A1 to a person and to ensure that the information on which it is based, including that relating to the employer and client, is robust.

#### **Identification of individuals**

Digitisation efforts in the area of social security coordination have also brought the role of work cards or social security cards into the focus of discussions.<sup>37</sup> However, such cards and the obligation to carry them do not exist throughout the EU.<sup>38</sup> In Germany, for example, there has been no obligation to carry social security cards since 2009, even in sectors where there is a risk of undeclared work (cf. the previous legal situation, § 18h SGB IV old version). § 2a of the Undeclared Work Act (Schwarz-ArbG) now only requires that proof of identity (especially passport or identity card) be carried in the sectors mentioned there.

In some other EU countries, on the other hand, there are social security cards that must be carried, which are sometimes linked to the declaration of posting. In the French construction industry, for example, workers have been required to carry a professional card (“Carte BTP”) with them at work since 2017. This card contains their identification data (including a photo, name, date of birth and gender) as well as those of the employer and the respective client in the sending country.<sup>39</sup> The check is done by means of a QR code.

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37 European Commission, <https://tinyurl.com/pxurxyz> (4/6/2023); on this also the presentations by *Veleanu/Blum*, p. 29 ff.; *Albäck*, p. 51 ff. each in European Commission, ESSPASS, 2023.

38 Detailed in *Buelen* (ed.), *Social Security Cards in the European Construction Industry*, 2015.

39 CIBTP France, <https://www.cibtp.fr/carte-btp/perimetre> (4/6/2023).

At the European level, two variants for the unique identification of individuals are currently being discussed. The introduction of an individual European Social Security Number (“ESSN”)<sup>40</sup> could enable identification across all agencies in Europe. The ESSN would especially have the advantage of being interface-independent. So technically it could also be used by institutions that are not directly involved in the social administration, e.g. paritarian organisations based on collective agreements.

After initial efforts to launch an initiative to introduce the ESSN<sup>41</sup>, the European Commission declared in 2021<sup>42</sup> that it was no longer pursuing the introduction of an ESSN, as a unique identifier such as the ESSN was no longer necessary due to other digital solutions.<sup>43</sup>

The Commission refers here to the development of the EUiD on the basis of “distributed ledger technology” which is to facilitate the identification of individuals.<sup>44</sup> Interconnectivity with the ESSPASS has already been pointed out above. Such identification would have the advantage of avoiding extensive and complex adjustments in the national social security systems – as would be necessary with the ESSN. Data and access would be stored in a decentralised manner, which would be in line with the principle of subsidiarity.<sup>45</sup> Users would also have control over their data.

In addition, this technology could enable real-time verification of the data linked to it. This could increase the efficiency of controls and help combat fraud and abuse. Identification on the basis of distributed ledger technology would thus offer added value compared to the ESSN, which in itself only enables the cross-border identification of individuals.<sup>46</sup>

Ultimately, both variants offer unambiguous identification under social security law and have pros and cons that would need to be looked at from a cost-benefit point of view.

To date, the PD A1 has played no role in the Member State ID card models. Yet it could provide considerable efficiency gains. In particular, the ESSPASS could serve as a uniform model that Member States can declare mandatory for the provision of services in certain sectors on their territory. The PD A1 of the home state and the posting declaration of the host state could be consolidated in the pass. This would allow real-time

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40 Detailed information on ESSN: Deutsche Sozialversicherung Europavertretung, Digitalisierung der sozialen Sicherheit, p. 7.

41 Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market of 28/1/2016 – COM(2016) 650 final, p. 6.

42 European Commission, <https://tinyurl.com/mp6rrk4x> (4/6/2023).

43 European Commission, European Social Security Pass – Pilot project, April 2021, p. 13; European Commission, <https://tinyurl.com/mp6rrk4x> (4/6/2023).

44 Ibid.

45 See also *Bauer/Brunner/Scharl*, *SozSi* 2022, 68, 70.

46 See also *Bauer/Brunner/Scharl*, *SozSi* 2022, 68, 70.

verification of their existence, including possible amendments or revocations by host state authorities. As a result, the procedures could be considerably accelerated and made less bureaucratic.

### Identification of companies

In the case of posting, however, it is not only the identification of the workers that is problematic; the information on the companies is often also insufficient. On the one hand, this applies to the posting company, which must pursue ordinary activity in its home country in order for a posting to be valid under social security law (Article 12 of the 883/2004 Regulation) and must therefore be checked when issuing a PD A1 (cf. Article 15 para. 1 in conjunction with Article 14 para. 2 of the 987/2009 Regulation).<sup>47</sup>

The criteria to be applied are based on No. 1 of Decision No. A2 of the Administrative Commission<sup>48</sup>. Here, the available information could be used, for example, on the duration of the activity in the country, the turnover, fines and penalties imposed, the number of workers, etc. The criteria could also be based on the number of workers. In order to ensure that such a check is actually carried out by the national authorities and institutions, it would be advisable to decide on corresponding specifications at the level of the Administrative Commission. In this respect, reference should be made to the reform proposal on the coordination regulations, according to which a permanent binding effect of the PD A1 would only arise if all information has been provided in full.<sup>49</sup>

In addition, the contracting entity, which must already now be named in box 5.1 of the PD A1, should also have to be designated in a binding and precise manner with a unique identification number when applying for the certificate.

Moreover, it must also be assessed within the framework of the Posting of Workers Directive<sup>50</sup> whether it is an actual or a sham posting (Article 2 para. 1 Posting of Workers Directive); this must be taken into account for the posting notification.<sup>51</sup>

47 ECJ, 10/2/2000 – C-202/97, [2000] ECR I-883 (*FTT*); cf. on internal administrative activity the *Plum* case, ECJ, 9/11/2000 – C-404/98, AP EEC Regulation No. 1408/71 No. 9 (*Plum*); on the criterion, for example, *KKW-Fuchs*, Sammelkommentierung Art. 1–91 Rn. 71 in detail also European Commission, Practical Guide, 2013, 8 f.; on the non-sufficiency of a foreign employment contract for have an effect on (so called “Einstrahlung”) German conflict of laws in § 5 SGB IV KassKomm-*Zieglmaier*, § 5 SGB IV para. 5.

48 Decision No A2 of 12/6/2009 on the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council, OJ 2010 C 106/5.

49 Council document 7489/23 ADD 1 of 17/3/2023.

50 Directive 96/71/EC concerning the posting of workers for the provision of services of 16/12/1996, OJ 1997, L 18/1.

51 Däubler, TVG-*Lakies/Walser*, § 5 TVG Anh. 2 – § 1 AEntG para. 46.

### 2.2.3. Overview of PD A1s and posting notification as well as advance application

While the application for a PD A1 is prescribed by Regulation 883/2004 and Regulation 987/2009, there are no comparable Union law provisions in the area of labour law at European level. In particular, there is no obligation to require a prior notification at all in the case of a posting. Therefore, legal systems differ significantly at this point. According to ECJ case law, Member States may not, for example, demand entry permits from posting companies and their workers on account of the freedom to provide services. Only abuse controls are permissible in this respect.<sup>52</sup>

However, according to ECJ case law, a pre-employment notification is permissible if it is proportionate. In particular, regulations for the protection of workers may require the provision of certain information.<sup>53</sup> This has now also been explicitly codified<sup>54</sup> in secondary law in Article 9(1)(2)(a) of the Enforcement Directive 2014/67/EU.<sup>55</sup> In Germany, § 18 Posted Workers Act (AEntG), which provides for prior notification in the event of a posting in certain sectors in Germany, is therefore not objectionable under EU law.<sup>56</sup>

However, due to the discrepancy between social and labour law notifications, companies are faced with the challenge of having to submit two different notifications for a uniform life circumstance in the case of a posting. However, consolidating the posting and PD A1s would again be faced with the challenge that both forms of notification serve different purposes and are based on different legal bases, have different addressees and record similar yet not completely congruent data.

Nevertheless, consolidating the two notifications would have the advantage of reducing bureaucracy for companies and at the same time strengthening the integrity of both procedures by ensuring that the same data is used in both notifications. In this way, the employment status could be determined more reliably and the validity of the posting could be better assessed, as could compliance with the prohibition of replacement and the accuracy of the information.

52 ECJ, 27/3/1990 – C-113/89, NZA 1990, 653 (*Rush Portuguesa*).

53 ECJ, 25/10/2001 – C-49/98, C-50/98, C-52/98 to 54/98 and C-68/98 to C-71/98, [2001] ECR I-7831 (*Finalarte and others*); ECJ, 23/11/1999 – C 369/96 and C 376/96, [1999] ECR I- 8453 (*Arblade*).

54 See also Däubler, TVG-*Lakies/Walser*, § 5 TVG Anh. 2 – § 18 AEntG para. 3.

55 Regulation (EU) 2020/672 establishing a European instrument for temporary to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak of 19/5/2020, OJ 2018, L 159/11.

56 This also follows in reverse from ECJ, 19/1/2006 – C-244/04, [2006] ECR I-1885 (*Commission v. Germany*); cf. *Thym*, NZA 2006, 713, 713 ff.; *Ulber*, AEntG, § 18 para. 5; Däubler, TVG-*Lakies/Walser*, § 5 TVG Anh. 2 – § 18 AEntG para. 4.

In our opinion, a legal unification of the procedures is not recommendable because of the differing purposes – but on a practical level they could very well be consolidated. This could be done by way of a data entry form in the Single Digital Gateway. The goal should be to present both notifications to the applicant as a uniform process that only requires one-off entry of data. At any rate Article 6 of Regulation 2018/1724 requires Member States to offer fully digital procedures. In addition, to ensure transparency and equal treatment, Member States must already provide information on the applicable working conditions covered by the Posting of Workers Directive pursuant to Article 5 of the Enforcement Directive 2014/67/EU.<sup>57</sup>

A prerequisite, however, would be that the SDG portals provide for this, which would require close coordination between Member States, with each of them retaining responsibility for their own processes. The basis for the exchange could be the Internal Market Information System (IMI), which is already used for reporting postings to the host country in road transport, for which sector-specific posting regulations apply on the basis of Directive (EU) 2020/1057<sup>58,59</sup>. The relevant stakeholders, including paritarian organisations, would then have to be given access to the systems in order for it to work effectively.<sup>60</sup>

The European Commission is currently working on an electronic form for the posted worker notification (eForm or eDeclaration), which is voluntary for the Member States and is to be processed via IMI and in which the German Federal Government is also participating. In the future, the PD A1 will also be included. The legal framework and the substantive protection of workers guaranteed by it are not to be affected.<sup>61</sup> Plans call for an integration of such an electronic form in the Your Europe portal to include uniform reporting obligations or information details, which may be supplemented by individual member state-specific details.<sup>62</sup> Implementation of the initiative is planned for mid/end 2023.<sup>63</sup> As of today detailed information doesn't seem to be publicly available.

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57 Cf. also *Iudicone*, EMEcs, 2022, p. 30 f.

58 See for this Directive (EU) 2020/1057 of the European Parliament and the Council of 15/7/2020 laying down specific rules in relation to Directive 96/71/EC and Directive 2014/67/EU concerning the posting of drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012, OJ 2020, L 249/ 49.

59 European Commission, Posting of Workers in Road Transport, esp. p. 4 ff., available at <https://tinyurl.com/2j3wj2bj> (4/6/2023).

60 The European Commission seems to be open to this, see E-003487/2021(ASW).

61 Cf. BT-Drs. 20/2606, p. 5 ff.

62 Cf. Zentralverband Deutsches Baugewerbe, Annual Report 2021/2022, 2022, p. 33.

63 For example, KPMG, EU Posted Workers Directive Quarterly Review, 2022-01 Summer; *Fragomen*, Posted Worker Notifications: Challenges for Companies and the New E-declaration Initiative, 15/7/2022, available at <https://tinyurl.com/5n922nt4> (4/6/2023).

The introduction of corresponding administrative simplifications would justify all the more a compulsory prior application requirement for the PD A1 as well. While the posting notification under labour law must be made in advance anyway (cf. e.g. § 18 para. 1 AEntG), the advance application is also provided for in principle for the PD A1 (cf. Article 15 para. 1 of Regulation 987/2009). However, according to the case law of the ECJ, a subsequent application must also be possible if on-time application was not possible (also codified in Article 15 (1) of Regulation 987/2009) – therefore an application is even possible after a control.<sup>64</sup> The potential for abuse is obvious and the effectiveness of controls is thus considerably weakened.<sup>65</sup>

The European Commission's reform proposal for Regulation 883/2004 and Regulation 987/2009 would not change this.<sup>66</sup> The compromise proposal within the framework of the trilogue only provides for an improvement to the effect that a fixed period of a maximum of three days after the start of the activity is to be introduced for the application. While this proposal still provides for mandatory prior notification at least for the construction industry<sup>67</sup>, such a sector-specific requirement is no longer provided for in the compromise proposal of the current Swedish Council Presidency.<sup>68</sup>

In our opinion, it would nevertheless be advisable to make prior notification a general obligation, not only to counteract the abuse risk described above. Also systematically, the possibility of a subsequent application contradicts the intention of Regulation 883/2004 to enable an unambiguous assignment to the social security system of a Member State (cf. e.g. Recital 6 of Regulation 987/2009).

In view of the possibility of electronic applications, such a provision would no longer unduly impair the internal market. If applicants have a sufficiently simple digital application system at their disposal, the issue of an excessive bureaucratic burden no longer arises. After all, it is about ensuring the social protection of workers by correctly assigning them to a social security system. Such a provision would also ensure the functioning of the internal market, it would likewise create fair competitive conditions and wouldn't seem disproportionate at all. Because of the consistent case law of the ECJ and the codification in Regulation 987/2009, any possible amendment would have to be passed at European level, however.

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64 ECJ, 30/3/2000 – C-178/97, ECR 2000, I-2005 (*Banks*); ECJ, 6/9/2018 – C-527/16, ECLI:EU:C:2018:669 (*Alpenrind and others*).

65 *Bokeloh*, ZESAR 2021, 35 ff., 40; *Hamann/Rathmann*, EuZA 2022, 280, 290; *Mankowski*, EuZA 2018, 473, 474.

66 Cf. COM(2016) 815 final.

67 As defined in the Annex to the Posting of Workers Directive.

68 Council document 7489/23 ADD 1 of 17/3/2023.

Some also demand that short-term postings should generally be exempted from the requirement of a PD A1.<sup>69</sup> While in the area of labour law Article 3 para. 3 of the Posting of Workers Directive (apart from the construction industry) excludes certain short-term activities such as initial assembly and installation work from the validity of the “hard core” of the binding labour law requirements, such a restriction is unknown to social security coordination law.

This system is quite consistent, since it should be clear at all times which social security system a person belongs to. It is proposed both in the triologue negotiations on the reform of coordination law and by the current Swedish Council Presidency that for one no PD A1 should be required for business trips, and that, at least according to the current proposal, “activities with a duration of no more than three days within a calendar month” should even be generally excluded – without any sectoral restriction.

The unspecific inclusion of activities of less than three days coupled with the possibility of a subsequent notification after three days would further widen already existing “loopholes”. The purpose of Regulation 883/2004 – to ensure the correct allocation of a person to a certain social security system and to make it transparent for the social security institutions – cannot be achieved in this way.

#### 2.2.4. Verification of PD A1

The basis of coordination law is the principle of cooperation based on trust.<sup>70</sup> However, this trust is obviously not sufficiently guaranteed at present. Errors that start with different transliterations of names and extend to fraudulent misrepresentations are problematic. Digital procedures offer considerable potential for improvement, simplification and cutting red tape. This applies in particular to the ESSPASS already mentioned above (B.I.2) which would facilitate both the application and the proof in the event of a check. It should be possible to declare the ESSPASS mandatory in the Member States (if necessary limited to risk sectors).

In our opinion, Member States already today could at least make carrying the corresponding proof mandatory. In future, however, it should be

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69 Cf. in particular the criticism formulated by employers, for example by *Hadeler* (Gesamtmetall) FAZ, 30/4/2019, available at <https://tinyurl.com/544vjakp> (18/5/2023); on the discussion also *Roßbach*, RVaktuell 1/2020, 2, 5; BMAS Referat V/1a1, Bescheinigung A 1 bei kurzfristig anberaumten Tätigkeiten, p. 3; *Hamann/Rathmann*, EuZA 2022, 280, 287.

70 ECJ, 6/9/2018 – C-527/16, ECLI:EU:C:2018:669, para. 45 (*Alpenrind and others*).



possible to check the validity of the PD A1 or the card in real time. This verification could be based on data in the home country.

A European social security register should also be considered, in which PD A1s would be listed<sup>71</sup> and kept, for example, by the European Labour Authority (ELA). The automated notification by the institutions of the home state to the host state might no longer require this for the authenticity check. However, if it were to be used to evaluate the risk of systematic cross-border illegal employment, it could certainly offer added value in terms of combating illegal employment – or, in other words, in terms of ensuring the correct allocation under social security law – especially if the posting notification under labour law was also included.

An obligation to carry the PD A1 could already be introduced at national level to improve controls, even if such a requirement is not prescribed at European level.<sup>72</sup> This could be modelled on other countries such as France, Austria, Italy or Switzerland.<sup>73</sup>

### 2.2.5. Procedure for the correction/withdrawal of a PD A1

In its numerous decisions on the PD A1 the ECJ has emphasised that its mandatory effect for all courts and authorities within the EU is an essential principle inherent to it.<sup>74</sup> Together with the principle of exclusivity laid down in Regulation 883/2004 with regard to the jurisdiction of a social security system, it therefore follows that the jurisdiction of a state documented in the PD A1 always excludes the jurisdiction of other states.<sup>75</sup> According to the legal concept, the binding effect of the certificate continues unless it is revoked or corrected (Article 5(1) of Regulation 987/2009). This basic concept appears not to be questioned, but there is often a need for legislative reform.<sup>76</sup>

71 Demands to this end, e.g. from the DGB, available at <https://tinyurl.com/2ca95fwr>; IG BAU, <https://tinyurl.com/33rwuu8u> (both 4/6/2023); SPD, Resolutions of the Party Convention 2019, p. 12; Die Linke, Election Programme European Election 2019, p. 19.

72 See also Vierzehnter Bericht der Bundesregierung über die Auswirkungen des Gesetzes zur Bekämpfung der illegalen Beschäftigung, BT-Drs. 19/31265, p. 11.

73 BMAS Referat VIa1, Bescheinigung A 1 bei kurzfristig anberaumten Tätigkeiten, p. 3; cf. *Hidalgo/Ceelen*, NZA 2021, 19, 22.

74 Exemplary ECJ, 11/7/2018 – C-356/15, ECLI:EU:C:2018:555, para. 107 (*Commission v Belgium*); on the history and background Fuchs/Janda, *EuSozR-Spiegel*, Art. 76 Regulation (EC) No 883/2004 para. 25.

75 Cf. ECJ, 26/1/2006 – C-2/05, [2006] ECR I-1079, 21 (*Herbosch Kiere*); ECJ, 27/4/2017 – C-620/15, ECLI:EU:C:2017:309, para. 38 (*A-Rosa Flussschiff GmbH*).

76 Cf. *Deinert*, FS Pfeil, 2022, p. 351, 360; *Klengel*, jurisPR-ArbR 17/2019 note 2, under D; *Ulber*, ZESAR 2015, 3; *Klumpp*, DB 2018, 2540, 2540; *Fuchs*, ZESAR 2019, 105 ff.,

Up until to now, the procedure for correcting or revoking a PD A1 has proved particularly problematic if the host state and the home state come to different assessments with regard to the information documented in the PD A1. This is because the host states must comply with a PD A1 even if it is based on an obvious error of assessment.<sup>77</sup> They must then approach the home state within the framework of the dialogue and conciliation procedure developed by the ECJ and codified in Article 5 and 6 of Regulation 987/2009.<sup>78</sup>

In the event that the Member States involved do not reach a consensus by way of dialogue at the first stage, they must attempt to find a solution via the Administrative Commission at the second stage.<sup>79</sup> Only after the procedure has been completed, and in the case of PD A1s that have obviously been obtained in a fraudulent or abusive manner, may they be disregarded by the host states under strict conditions.<sup>80</sup>

The procedure in its complexity is not practical overall.<sup>81</sup> This is also due to the fact that the Administrative Commission only mediates in cases of conflict, but does not make a binding decision. In addition, in the event of a disagreement, the procedure lasts at least seven months, often longer in fact. This does not help an effective enforcing the provisions of the law on posting in social and labour law, especially in view of the fact that the posting has usually already been completed by this time.<sup>82</sup>

In our opinion, it is therefore advisable to set up a review procedure at European level, which could, for example, be established at the ELA. Alternatively, the possibility of judicial determination of the validity and correctness of a PD A1 by the authorities of the host state should be ensured in the courts of the issuing state.

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110; *Scupra/Kuhn*, DB 2018, 2054, 2054; Preis/Sagan, *European Labour Law-Heuschmid/Schierle* para. 16.39.

77 ECJ, 6/2/2018 – C-359/16, ECLI:EU:C:2018:63, para. 46 (*Altun and others*); ECJ, 10/2/2000 – C-202/97, [2000] ECR I-883, para 55 (*FTS*).

78 ECJ, 11/7/2018 – C-356/15, ECLI:EU:C:2018:555, para. 107 (*Commission v Belgium*).

79 ECJ, 10/2/2000 – C-202/97, ECR 2000, I-883, para. 59 (*FTS*); ECJ, 26/1/2006 – C-2/05, ECR 2006, I-1079, 28 (*Herbosch Kiere*); ECJ, 27/4/2017 – C-620/15, ECLI:EU:C:2017:309, para. 45 (*A-Rosa Flussschiff GmbH*).

80 ECJ, 6/2/2018 – C-359/16, ECLI:EU:C:2018:63, para. 48 (*Altun and others*); *Hlava*, AuR 2019, 84, 85; *Brand*, EuZA 2020, 440, 45 ff.

81 Cf. also *Klein*, SRa Sonderheft 2015, 76, 88 f. on the practical problems.

82 On the usually short duration of postings *Walser*, SR Sonderheft 2022, 29, 33.

### 3. Conclusion

In its current form, the exchange of social security data between EU Member States for the posting of workers neither sufficiently ensures the protection of workers nor guarantees a sufficient level of effective controls and thus the enforcement of the provisions of posting legislation. As shown, there is considerable potential for simplifying procedures.

Improving cross-border data exchange would enable effective monitoring of the provisions of the law on posting workers and thus facilitate the enforcement of existing workers' rights.<sup>83</sup> Measures on both the technical and legal side could bring improvements. From a technical point of view, a uniform design of the application for the PD A1 and the posting notification in an easy-to-use digital system is particularly recommended.

In terms of legislation, the binding nature of the PD A1 should be enhanced by making it obligatory to apply for and carry it prior to deployment. Other digital technical solutions such as the planned ESSPASS are also suitable for the latter. It is important that workers, employers and contractors can be clearly identified and assigned.

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<sup>83</sup> Also: European Commission (fn. 34), p. 25.

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