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ARTICLE

The binding nature of posting PDA1 issued under EU social security Coordination Regulations and the possible role of national courts

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Abstract

The EU social security Coordination Regulations envisage a special conflict rule that, under strict conditions, allows posted workers to maintain temporarily the social security insurance of the home Member State. The Portable Document A1 (PDA1), the proof of insurance, is a binding document for the institutions and courts of the host Member State that can only be invalidated or withdrawn by the institutions that issued it or by the corresponding national courts. The case-law of the European Court of Justice has clarified that under certain very specific circumstances a fraudulent foreign PDA1 can be disregarded by a Court, but never invalidated. Communication and collaboration between institutions of the issuing and receiving Member States and the judicial procedures for challenging a foreign PDA1 may need to be enhanced and improved, but the current rules of play respond to the logic of the Coordination Regulations, to sincere cooperation, to legal certainty, and to the uniqueness of the applicable law and the competent jurisdiction. The scarce available data shows that only a few of the three million PDA1s issued each year are being challenged. Given that the main role of the EU legislation is to protect workers, it does not seem logical to change the social security framework of posting, although it can be improved. Mutual trust must be restored.

Keywords Posting · Portable Document A1 (PDA1) · Fraud · Social security applicable legislation · Binding nature · *Altun* case

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1 Introduction

Posted workers who fulfil the requirements envisaged in the Coordination Regulations[1] can temporarily maintain insurance under the social security system of their Member State (MS) of origin where their companies are established. As proof of insurance under this special conflict-rule, the social security institution of insurance, the home MS, issues a Portable Document A1 (PDA1),[2] temporary exempting the application of the *lex loci laboris*.

According to the latest figures available, in 2019 3.2 million PDA1s based on Art. 12 were issued, with an average duration of around 115 days (the figures in 2020 were 24% lower than in 2019 due to the Covid-19 pandemic). It has been estimated that those PDA1s correspond to around 1.7 million workers being posted in 2019,[3] around 10% of the 17.9 million EU movers estimated for the same year.[4] Despite these PDA1 estimations and the existence of a prior notification requirement under the implementations of the enforcement Directive,[5] we still do not know exactly how many workers are being posted in the EU.

Intra-EU posting of workers is not migration, but it can impact intra-EU companies' competition and national labour markets,[6] especially in some MS, regions or sectors such as the construction sector.[7] Although most MS share many aspects of economic activity, current labour conditions are not completely harmonised, and social security conditions are just coordinated.[8] Their cost varies substantially between MS and can make a difference.[9] Companies established in MS with lower social standards could use those competitive advantages in more developed MS.[10] In fact, their services are sought by companies of richer MS in an attempt to reduce their costs and increase their competitiveness in a market with narrower margins.[11]

[1] Art. 12 of Regulation (EC) No 883/2004 and Art. 14 of Regulation (EC) No 987/2009.

[2] PDA1s are also issued under other special conflict rules, such as that envisaged for persons working in two or more MS, civil servants, mariners, and cabin crew. PDA1s are not issued when the general *lex loci laboris* rule applies. In this paper we do not distinguish between PDA1s and the previous E101, referring to both with the acronym "PDA1".

[3] A worker can be posted more than once, hence two or more PDA1 can be issued for the same person. The number of individual persons involved is some 60% of the number of PDs A1 issued for these persons. *De Wispelaere, Pacolet, De Smedt* [13], pp. 26, 32 and 33.

[4] EU movers are EU-28 citizens who reside in an EU-28 or EFTA country other than their country of citizenship. 13 million EU movers are of working age (10.4 million if one subtracts those residing in the UK), *Fries-Tersch, Jones, Siöland* [17].

[5] Directive 2014/67/EU.

[6] In the home MS there will be a smaller labour force, favouring the so-called "brain drain". In the home MS, posted workers perform jobs that, in theory, could be filled by national workers.

[7] *Carrascosa* [6], p. 48, and *De Wispelaere, Rocca* [12], p. 16.

[8] C-610/18 *AFMB and Others*, EU:C:2020:565 para. 68.

[9] See C-620/18 *Hungary v Parliament and Council*, EU:C:2020:1001 para. 62; and C-626/18 *Poland v Parliament and Council*, EU:C:2020:1000 para. 66.

[10] Mainly the EU-15, the main recipients of posting. *De Wispelaere, Pacolet, De Smedt* [13].

[11] See the judgments in C-527/16 *Alpenrind and Others*, EU:C:2018:669, regarding Austrian companies hiring the services of Hungarian companies; C-359/16 *Altun and Others*, EU:C:2018:63, regarding Bel-

These significant differences in labour and social security costs[12] can lead to *social dumping*, in the sense of creating downward pressure on the working and social security conditions of workers in host MS,[13] or distort competition.[14] Posting of workers, a key instrument of freedom to provide services, often brings with it suspicion of non-compliance, abuse of law, or even fraud, from the perspective of the host MS. It is therefore a controversial issue. This is not the case as regards other fundamental rights that also have a significant social impact. For instance, the free movement of workers, shielded since the Treaty of Rome by the equal treatment principle, could drain talent and production capacity from the home MS, and the free movement of goods has led to the closure of national companies that could not withstand the competition of the internal market and can also affect the financial balance of social security systems.[15] Both affect the economic development of the home MS, hence affecting the wellbeing of local workers and citizens in general.

This paper focuses on the social security aspects of the posting of employees, and specifically on the binding effect of the PDA1.[16] The objective is to provide a comprehensive summing up of the relevant data, of EU legislation and of European Court of Justice (ECJ) case-law, identifying shortcomings of information.

2 Non-compliance and fraud in the posting of workers

Before focusing on the legal framework of posting, we think it important to determine the extent of the problem of mere non-compliance with social security coordination rules, and of the worse cases of abuse of law[17] and fraud in the posting of workers.

gium companies hiring the services of Bulgarian companies; and C-17/19 *Bouygues travaux publics and Others*, EU:C:2020:379, regarding French companies that relied on the services of a Romanian company and an Irish temporary work agency.

[12] On the large differences between the labour costs of the different MS, see *Contreras Hernández* [9], p. 69, and *De Wispelaere, Pacolet, De Smedt* [13], p. 87.

[13] There is no consensus on the definition of social dumping, *Kiss* [27]. From an economic point of view, social dumping can be generated by the posting of workers from countries with inferior working conditions, but also by the purchase of products from countries with inferior working conditions or by the relocation of companies to those countries, *Sapir* [40] and *European Commission* [15]. Some authors considered that social dumping can also be generated by the political decision to devalue labour conditions to gain international competitiveness and attract investment, *Abler, Standing* [1]. In our view, this latter approach is particularly relevant when governments have little room for manoeuvre beyond the social sphere.

[14] C-784/19 *Team Power Europe*, EU:C:2021:427 para. 65.

[15] The European Court of Justice has acknowledged that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason of general interest that justifies setting a barrier to the free movement of goods. Case C-120/95 *Decker*, EU:C:1998:167 para. 39-40.

[16] We disregard the analysis of the application of the posting rule (Art. 12) to the self-employed persons, and the application of the conflict rule of Art. 13 (multi-state) which is increasingly used, as it is subject to more lax requirements.

[17] From a general point of view, abuse of law can occur "when what is established in the rule is formally observed, but with an illegitimate or spurious objective clearly contrary to the natural objective of the rule itself whose use is intended to be abused", see *Carrascosa Bermejo, Contreras Hernández* [7], p. 55. In fact, the abuse of EU law occurs when the conditions for obtaining a right are artificially created. See, by analogy, Joined Cases C-58/13 and C-59/13 *Torresi*, EU:C:2014:2088, para. 42 and 46.

The topic of abuse of law and fraud in the posting of workers has been the focus of several studies and articles in recent years.[18] Institutions and courts of some MS[19] and an Advocate General have reiterated their concern.[20] The concept of fraud was legally defined for the first time in the currently pending Proposal for the Amendment of the Coordination Regulations "as an intentional act or intentional omission to act, in order to obtain or receive social security benefits or to avoid paying social security contributions, contrary to the law of the MS concerned, the basic Regulation or this Regulation".[21] This definition is in line with several European Court of Justice judgments on fraud.[22]

However, from an empirical point of view, there is very limited data on non-compliance of EU and national rules on posting. In many cases, the few available statistics do not even distinguish between labour and social security non-compliance. Such separate treatment is necessary because EU law itself devotes separate legislation to each aspect with different objectives (see Sect. 3 below).

The main sources of data on this topic are the reports developed in the framework of projects promoted by the European Commission. The reports on fraud and error in the field of EU social security coordination with reference years 2019 and 2020[23] include some data regarding the inappropriate use of applicable social security legislation and on the withdrawal of PDA1s.[24] The country reports from project Posting.Stat[25] provide information on non-compliance and fraud on the posting of workers from and to ten MS,[26] but not all reports include data on inappropriate use of applicable social security legislation. In Tables 1 and 2 we summarise the existing data regarding non-compliance and fraud in the field of posting for the year 2019, considering that – due to Covid-19 – the data is more representative than that used in 2020.[27]

[18] See for instance *Verschueren* [44] and [45], *Rennuy* [38] and *Robin-Olivier* [39].

[19] For instance, France and Belgium, whose Courts of Cassation have referred several questions for preliminary ruling before the European Court of Justice (see Annex with posting ECJ case-law at the end of this paper) and issued many national judgments on this topic. Belgium even passed a national law including several Articles that aimed to fight fraud and abuse in posting but had to be eliminated as were contrary to EU law. See Case C-356/15 *Commission v Belgium*, EU:C:2018:555 and *Joined Cases C-370/17 and C-37/18 Vueling Airlines and CRPNPAC*, EU:C:2020:260.

[20] Opinions of the AG Saugmandsgaard in Case C-359/16 *Altun and Others*, EU:C:2017:850 para. 21 and 42 to 47 and Joined Cases C-370/17 and C-37/18 *Vueling Airlines and CRPNPAC*, EU:C:2019:592.

[21] Art. 1(2)(ea) of the proposed amendment of Regulation (EC) No 987/2009, *Council of the EU* [11].

[22] Case C-620/15 *A-Rosa Flussschiff*, EU:C:2017:309, Case C-359/16 *Altun and Others*, EU:C:2018:63 and Joined Cases C-370/17 and C-37/18 *Vueling Airlines and CRPNPAC*, EU:C:2020:260.

[23] "Network of Experts on intra-EU mobility-social security coordination and free movement of workers / Lot 2: Statistics and compilation of national data" VC/2017/0463.

[24] *Jorens, De Wispelaere, Pacolet* [24], pp. 20 to 22, and *Jorens, De Wispelaere, Pacolet* [25], pp. 23 and 24.

[25] "Posting.Stat-Enhancing the collection and analysis of national data on intra-EU posting" VS/2020/0499.

[26] AT, BE, DE, FR, IT, LU, NL, PL, SI, and SP.

[27] Where no data from 2019 was available, data from other year has been included and indicated.

Table 1 Data on non-compliance and fraud in social security of posted workers by sending MS in 2019[28]

MS	Art. 12 PDA1[29]	Applicable legislation	
		Non-compliance / Fraud	Withdrawn PDA1
BG	14,792	11 cases	33
CZ	10,644	<5 cases	12[30]
ES	136,096	75 cases (746 workers)[31]	No data
HU	57,454	18 cases	97
IT[32]	173,149	23 cases	61
PL	246,849	641 errors and 50 fraudulent PDA1	1,197
PT	58,761	28 fake PDA1	30
SI	95,332	10 letterbox companies	~60[33]
SK	91,611	No data	955

The available data on non-compliance and fraud on the part of posted workers is, as the tables show, limited. However, some conclusions can be drawn. Firstly, most national administrations seem to have devoted very limited effort to determining the extent of non-compliance and fraud in the posting of workers. Even those countries apparently more concerned with the situation, such as Belgium, France, Austria or the Netherlands, provide very limited data. French courts have referred several cases regarding fraud in posting to the European Court of Justice,[34] but the French administration does not provide statistics on the number of infringements of social security obligations or on the number of PDA1s withdrawn: it only provides data on infringements of labour posting obligations, which accounted in 2019 for less than 0.23% of the PDA1 received.

Secondly, when the available data is considered, non-compliance and fraud in regard to the applicable social security legislation does not seem such an acute problem. In Belgium, one of the MS where monitoring of posting seems stronger,[35] cases of falsified PDA1s accounted in 2019 for 0.3% of the PDA1s received, and only 0.5% of the PDA1s received were withdrawn. In Germany, one of the MS that provides more disaggregated data and the MS that receives the most posted workers, the administration considered in only 0.3% of cases that the conditions for issuing a foreign PDA1 had not been met.

[28] Data from *Jorens, De Wispelaere, Pacolet* [24], p. 21, except where mentioned.

[29] Total number of Art. 12 PDA1s issued in 2019 by receiving MS, *De Wispelaere, Pacolet, De Smedt* [13], p. 26.

[30] Data from 2018.

[31] *Carrascosa Bermejo, Contreras Hernández* [7].

[32] Data from 2018.

[33] Data from 2018.

[34] Case C-620/15 *A-Rosa Flussschiff*, EU:C:2017:309, Case C-359/16 *Altun and Others*, EU:C:2018:63 and Joined Cases C-370/17 and C-37/18 *Vueling Airlines and CRPNPAC*, EU:C:2020:260.

[35] They even implemented a system for the systematic control of posted workers: *Landenoverschrijdend Informatiesysteem Migratie Onderzoek Sociaal Administratief* (LIMOSA) (see https://www.international.socialsecurity.be/working_in_belgium/en/limosa.html).

Table 2 Data on non-compliance and fraud in posting by receiving MS in 2019[36]

MS	Art. 12 PDA1[37]	Labour obligations		Applicable legislation	
		Working conditions	Others	Non-compliance	Fraud
AT[38]	320,480	303 underpayment (796 workers)	1,093 failures to notify 276 obstructions 539 failures to present payrolls	895 failures to notify or lack of PDA1s[39]	No data[40]
BE	218,230	2,049 infringements[41]		1,077 withdrawn PDA1s[42] 647 falsified PDA1s, domicile fraud or false information	
CZ	101,502	No data		No data	34 falsified PDA1s 5 letterbox companies
DE	505,737	1,270 infringements of working conditions[43]	398 failures to register[44]	1,472 posting conditions not met[45]	
ES[46]	177,082	35 infringements of working conditions	3 obstructions	26 lack of insurance (144 workers)	No data
FI	35,529	No data		No data	10 falsified PDA1s
FR	450,220	1,034 infringements: 51% failure to notify and 23% infringements of working conditions[47]			
LU	52,863	980 infringements[48]			

[36] Except where mentioned, data from *Jorens, De Wispelaere, Pacolet* [24], p. 20.

[37] Total number of Art. 12 PDA1s issued in 2019 by receiving MS, *De Wispelaere, Pacolet, De Smedt* [13], p. 26.

[38] *Geyer, Premrov, Danaj* [19], pp. 36 to 40.

[39] Failures to notify posting would be a breach of labour obligations while failure to present a PDA1 upon inspection would be a breach of social security obligations.

[40] The report mentions a "major concern" regarding "fake posting", letterbox companies from SI and "bogus self-employment".

[41] Including labour and social security obligations.

[42] *De Wispelaere, De Smedt, Muñoz, Gillis, Pacolet* [14], p. 57.

[43] *Albrecht, Duran, Giesing, Niederhoefer, Rude, Steigmeier* [3], p. 53.

[44] Failures to register under national law, *Albrecht, Duran, Giesing, Niederhoefer, Rude, Steigmeier* [3], p. 53.

[45] Data from 2020, *Jorens, De Wispelaere, Pacolet* [25], p. 23.

[46] *Carrascosa Bermejo, Contreras Hernández* [7].

[47] *Muñoz* [34], p. 54.

[48] *Clément, Hauret* [8], p. 30.

Table 2 (*Continued*)

MS	Art. 12 PDA1[37]	Labour obligations		Applicable legislation	
		Working conditions	Others	Non-compliance	Fraud
LV	5,178	No data		No data	7 falsified PDA1s (78 workers)
NL[49]	219,276	67 infringements of working conditions (170 workers)		802 infringements related to PDA1 445 withdrawn PDA1	
PL	93,630	46 failures to notify[50]			
SI[51]	17,205	260 infringements of working conditions		1 lack of PDA1	No data

If we analyse the situation from the point of view of the sending MS, in most cases the percentage of withdrawn PDA1s is marginal, at between 0.04% and 0,22% of the PDA1s issued. The main exception is Slovakia, where data show that 1% of the PDA1s issued in 2019 were withdrawn. Poland provides the most complete set of data, showing that in 2019 3.85% of the requests for a PDA1 were denied,[52] around 0.48% of issued PDA1s were withdrawn and only 0.02% were considered fraudulent, that is, one in almost 5,000.

In sum, the available data offers a picture in which the percentage of infringements of social security legislation of posted workers is reasonably low, and fraudulent cases are clearly the exception, not the rule. It is possible that a more exhaustive and thorough supervision of posting results will produce more worrying figures. In our opinion, carrying out such an exercise is necessary, as comprehensive data is key to the taking of informed decisions.

3 EU legal framework for the posting of workers

The social security Coordination Regulations have dealt with the application of the posting rule for employees since 1958. The versions in force are basic Regulation (EC) No 883/2004 and implementing Regulation (EC) No 987/2009. The Commission has been steadily working on the amendment of the Regulations since 2016, but it has proven to be a difficult task to achieve. From a labour perspective, the legal instrument in force is the Directive on posting of workers and its national implementation. The original version was Directive 96/71/EC (the Posting Directive),[53] the

[49] *Heyma, Bussink, Vervliet* [20], pp. 46 to 47.

[50] Including failures to notify posting or to present a PDA1. There are a number of cases on this, but no data exists on the number of workers involved. *Kiełbasa, Szaraniec, Mędrala, Benio* [26], p. 129.

[51] *Vah Jevšnik, Cukut Krilić, Toplak* [42], pp. 38 to 41.

[52] 246,849 PDA1s were issued and 9,889 were refused according to *Kiełbasa, Szaraniec, Mędrala, Benio* [26], p. 129.

[53] Directive 96/71/EC of the European Parliament and of the Council of 16.12.1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1.

last amendment was Directive (EU) 2018/957,[54] and in between these enactments, the Enforcement Directive 2014/67/EU was passed.[55]

These two blocks of EU legislation have very different objectives and different legal bases, but both seem to follow the common trend of restricting posting in order to limit social dumping.[56] This approach is supported by the case-law of the European Court of Justice and is probably the result of the controversial political debate which has intensified in the last decade.[57]

In fact, the 2018 amendment of the Posting Directive was preceded by a very difficult negotiation and was somehow controversial, among other reasons because the legislators had not even assessed the impact of the implementation of the Enforcement Directive.[58] Following the Commission mantra "equal pay for equal work at the workplace", the current Posting Directive requires that posted workers be paid at least the same remuneration as that guaranteed to local workers by host labour legislation and sectoral collective agreements.[59] In the case of long-term posting, almost all aspects of the labour relationship of the posted worker are ruled by the employment law of the host MS,[60] provided it is more generous than that of the home MS.

The Posting Directive's aim of protecting the labour rights of posted workers maintains a difficult balance with the freedom to provide services. The Posting Directive undoubtedly restricts posting, as improved labour conditions limit the competitiveness of companies from less developed MS. In any case, in response to the Polish and Hungarian claims, the European Court of Justice confirmed that the Posting Directive guarantees freedom to provide services on a fair basis,[61] as the obligation to protect posted workers derives from Art. 9 TFEU.[62] The Court emphasised that, even in the case of long-term posting, it does not place an unreasonable burden on posting companies.[63] Only future statistics will reveal whether this last amendment of the Posting Directive is going to result in more protected posted workers or in less post-

[54] Directive (EU) 2018/957 of the European Parliament and of the Council of 28.6.2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16.

[55] There is also a specific Directive for posting drivers in the road transport sector, Directive (EU) 2020/1057.

[56] See *Carrascosa Bermejo* [6], p. 40, and *Jacqueson* [22].

[57] *Verschueren* [46], *Sindbjerg Martinsen, Blauberger* [41].

[58] The Enforcement Directive aims to fight fraud, abuse, and circumvention, focusing on letterbox companies and long-term posting through administrative cooperation and increased information obligations for all companies involved.

[59] The said remuneration must take into account all wage elements. In practice, however, these provisions are not always easy to implement, as determining all wage elements is sometimes tricky, *Lhernould* [29].

[60] The only aspects that would be still determined by the *lex causae* are the termination of contracts and the rules on supplementary occupational pension schemes, Directive 96/71/EC Art. 3(1a) after the amendment by Directive (EU) 2018/957.

[61] *Verschueren* [46], *Contreras* [10] and *Parra Gutiérrez* [35].

[62] "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the *guarantee of adequate social protection*, the fight against social exclusion, and a high level of education, training and protection of human health" (italics added).

[63] Case C-620/18 *Hungary v Parliament and Council*, EU:C:2020:1001 para. 65 to 69 and 79.

ing from "low wage countries" to "high wage countries".[64] To some extent, it will all depend on what happens with the second competitive advantage of companies from less developed MS, the social security costs.

3.1 Social security coordination for posted workers

Posting social security coordination has the following characteristics, and, as we can see in Table 3, works in a different way to the Posting Directives:[65]

1. Social security is a *territorial public law*, based on the idea (not always true) that beneficiaries work and reside with their families in a given territory. Consequently, a national social security institution cannot apply a *foreign social security law*, only its own. The same is true *vis-à-vis* the courts, which can not apply foreign social security legislation, and obviously can not oblige a foreign social security institution to insure or affiliate a worker under its social security system or to grant him/her a certain benefit.[66]
2. The social security systems of the MS are not harmonised, just coordinated. For this reason, Title II of the basic Regulation[67] includes a set of conflict rules for determining the applicable national social security legislation.[68] The Court also refers to the term "conflict of laws"[69] although said conflict does not exist as such, from a technical legal point of view, since social security institutions and courts cannot apply foreign laws.[70] Once the Coordination Regulations determine the applicable legislation they also, *de facto*, determine the competent national administration and national courts.
3. The Regulation's *primary objective*[71] is to protect the free movement of workers by preventing a lack of insurance or coverage (the 'negative conflict rule') and preventing the simultaneous application of two or more national laws (the 'positive conflict rule'). In the latter case, the so-called *principle of uniqueness* of the applicable law is considered and its *exclusive effect* is preserved, which means that there is only one applicable social security law and only that law can be applied.[72] The objective is to avoid double contributions and to create legal certainty. For this

[64] *Carrascosa Bermejo* [6], p. 67.

[65] For an exhaustive and updated analysis of the regulatory framework and the most important amendments to the Posting Directive see *Carrascosa Bermejo, Contreras Hernández* [7].

[66] *Carrascosa Bermejo* [4], p. 112.

[67] Art. 11 to 15 of Regulation (EC) No 883/2004.

[68] The objectives and principles of these conflict rules have not changed since their origin, *Carrascosa Bermejo* [4]. For the minor adjustments that have been made to the regulations in force, with references to the most current case-law and scientific doctrine see *Carrascosa Bermejo, Contreras Hernández* [7] and *Martín-Pozuelo López* [32].

[69] Case C-92/63 *Nonnenmacher*, EU:C:1964:20 page 286.

[70] *Carrascosa Bermejo* [4], p. 112. In fact, social security is excluded from Regulation Brussels 1, Regulation (EU) No 1215/2012.

[71] Recital 1 of Regulation (EC) No 883/2004.

[72] Case C-102/76 *Perenboom*, EU:C:1977:71; Case C-71/93 *Van Poucke*, EU:C:1994:120; and Case C-60/93 *Aldewereld v Staatssecretaris van Financiën*, EU:C:1994:271.

reason, the conflict rules are *binding* on employers and employees, which prevents them from choosing or negotiating, individually or collectively, the applicable national social security law.[73] The conflict rules are also *indirect*, in the sense that they do not impose insurance requirements on a system. These must be set by the competent legislation. However, such national legislation cannot undermine the *effectiveness of the Community conflict rule* by making insurance subject to discriminatory requirements.[74] It is also within the framework of this applicable national legislation to decide whether the worker should be included in the scheme for employed workers or in the scheme for self-employed workers.[75]

4. As a general rule, the connection prioritised in the Coordination Regulations, as in most international coordination rules, is the application of the *lex loci laboris*, *i.e.*, the law of the workplace (Art. 11(3)(a) of the basic Regulation). This connection was established in the first Coordination Regulations[76] and seems very useful as it promotes equal treatment of all workers in the same company avoiding any possible *social dumping*.[77] Exceptions to the general *lex loci laboris* rule, as the posting conflict rule, must be justified and interpreted restrictively.[78]
5. The special conflict rule for posting allows maintaining, temporarily, the full application of the social security legislation of the home MS where the company is established and operating, instead of applying the *lex loci laboris* of the MS where the posted worker is temporary working. The temporary limit envisaged in the Coordination Regulations is 24 months.[79] This specific conflict rule protects freedom to provide services, as it enhances competence among companies fostering the internal market and encouraging economic interpenetration.[80] However, as it can cause social dumping its application is subject to strict requirements.
6. If the requirements are fulfilled, the legislation of the home MS is maintained and fully applicable. It is not compared with the social security system of the host MS to identify the most protective one. It must be highlighted that social security insurance creates rights that are in the process of being acquired in the future, not in the very moment when the contributions are paid. Although it could be argued that the social security system of a more protective host MS could be more beneficial for the posted worker, the veracity of this assertion is not at all clear. What would be more protective or better for the interest of posted workers in the short,

[73] Case C-110/79 *Coonan v Insurance Officer*, EU:C:1980:112.

[74] Case C-196/90 *Fonds voor Arbeidsongevallen v De Paep*, EU:C:1991:381.

[75] Case C-137/11 *Partena*, EU:C:2012:593.

[76] Regulations No 3 and 4, adopted in 1958.

[77] There is no unambiguous concept of social dumping. Here it is understood as downward pressure on social security conditions. Indeed, the *lex loci laboris* prevents social costs from being reduced by "importing" workers with lower social security costs.

[78] Case C-527/16 *Alpenrind and Others*, EU:C:2018:669 para. 95.

[79] Art. 12 of Regulation (EC) No 883/2004 and Art. 14 of Regulation (EC) No 987/2009.

[80] The posting rule aims at enhancing the internal market (Case C-35/70 *Manpower*, EU:C:1970:120; Case C-404/98 *Plum*, EU:C:2000:607; Case C-202/97 *FTS*, EU:C:2000:75), to eliminate obstacles for the free movement of workers, to encourage economic interpenetration by promoting freedom to provide services, and to ease the administrative burden for administrations, for sending undertakings, and for workers alike. (Case C-451/17 *Walltopia*, EU:C:2018:861 para. 37 and 38).

medium, or long term? If workers are indeed temporarily posted[81] and intend to continue their professional carrier in the home MS, continuity of the insurance record would certainly be more beneficial. If they are successively posted to different MS, subsequent insurance under different host MS social security systems would also be detrimental as they could end with a split-up insurance record and would have to rely on the complicated rules of the Coordination Regulations each time they applied for a benefit. In the uncertain context of posting, the most protective approach seems to be maintaining the stability of the applicable law. This special conflict rule, is true, provides a certain competitive advantage to companies established in MS with lower contributions. But other rules, connected to EU fundamental rights have the opposite impact, providing a competitive advantage to companies established in more developed MS. Such is the case with rules that enhance the free movement of workers and, especially, the free movement of goods. That does not mean that those rights must be hindered. EU legislation must take all aspects into consideration. And, in the case of the special conflict rule for posting, it already does, as the exception is subject to important preconditions and to a restricted interpretation to avoid fraud. It must be underlined that this temporary exception to the *lex loci laboris*, is not a *caprice* of the European legislator. On the contrary, it is the usual solution envisaged for posting in international bilateral and multilateral social security agreements.[82]

7. In most cases, posted workers and posting undertakings want to maintain social security insurance under the system of their home MS, some of them even after the maximum period of 24 months. Art. 16(1) of the basic Regulation provides a solution for these situations, as the competent authorities of the home and host MS can reach an agreement to that end *derogating all* binding conflict rules laid down in Title II. These agreements must be concluded in the interests of a worker or a category of workers and may have retroactive effect.[83]
8. Under the Coordination Regulations, employers and employees cannot choose the applicable social security legislation. Disputes regarding the validity of a PDA1 or the fulfilment of the applicable requirements (in sum, the applicable legislation) are often disputes between national administrations. Once a PDA1 has been issued, the national administration and the national courts of the MS issuing the PDA1 are the only competent ones. A foreign administration or court cannot oblige the national institution to withdraw insurance under its social security system. In the same vein, for instance, when migrant workers have problems with the calculation of their *pro rata temporis* pensions, they must take legal action in each of the payer/debtor MS. This circumstance has never been challenged, because a MS would not accept that a foreign national court could rule over a decision of its public administration. Coordination of social security law is necessarily based on close and loyal cooperation and collaboration between national institutions.

[81] In 2019 the average duration of posting was four months (115 days) and in 2020 even less (100 days), *De Wispelaere, Pacolet, De Smedt* [13], p. 33.

[82] *Carrascosa Bermejo, Contreras Hernández* [7], p. 18.

[83] Case C-454/93 *Rijksdienst voor Arbeidsvoorziening v Van Gestel*, EU:C:1995:205.

Table 3 Comparison between EU legal instruments on posting

	Coordination regulations	Posting directives
In force	Since 1958	Since 1996
Topic	Social security coordination	Employment conditions
	Public law	Public law
EU legal source	Regulations (uniform approach)	Directive (national implementation)
Legal basis	Free movement of workers: Art. 48 TFEU on equal treatment	Freedom to provide services (Art. 53 (1) and 62 TFEU)
Objectives	The posting conflict rule promotes economic interpenetration and freedom to provide services, reducing the administrative burden for all institutions, companies, and workers (also self-employed)	Ensure the labour protection of the posted employees. Prevent abuse and fraud (mainly through the Enforcement Directive)
Applicable legislation	Maintenance of the existing affiliation to the social security system of the home MS	Partial application of the host MS employment legislation if it is more protective than *lex causae* (comparison)
	Full application of the social security legislation of the home MS, where the company is established	Both legislations could apply simultaneously
Provisions regarding dumping	Possible social dumping (requirements prevent fraudulent use of the posting conflict rule)	Antidumping legislation (It ensures the freedom to provide services *on a fair basis*)[84]
Double posting	Forbidden under the posting conflict rule as the employment relationship is broken	Chain posting is covered
Temporary restrictions	The maintenance of the home MS legislation is initially limited to a maximum period of 24 months. Possible extension by Art. 16 agreement	There is no maximum period but must be temporary posting. Long-term posting if it lasts more than 12 months (18 months if extended): nearly all employment conditions of the host MS apply if they are more protective
	Interruptions of two months or more reset the count to zero	An interruption that allows resetting the count to zero is not provided for
National courts	A national court cannot apply foreign social security legislation	Ligation between employers and posted employees
	A foreign judgment does not bind the social security institutions	A national court (from host or home MS) can apply a foreign labour law legislation to protect workers
		A foreign judgment against an enterprise is binding and can be enforced in another MS

[84] See Case C-620/18 *Hungary v Parliament and Council*, EU:C:2020:1001 para. 51, 57 and 107 and Case *C-626/18 Poland v Parliament and Council*, EU:C:2020:1000 para. 90. See *Verschueren* [46], p. 563.

3.2 Requirements for applying the special conflict rule for posting

The Coordination Regulations, as has already been mentioned, envisage a set of strict requirements to prevent the fraudulent use of the special conflict rule for posting.[85] Some of these requirements have been tightened by the European Court of Justice case-law, and will be further tightened if the proposal for the amendment of the Coordination Regulations[86] is finally passed.

1. The posted employees must have been previously *subject to the social security legislation* that they intend to maintain. Any kind of previous attachment is valid in this regard,[87] even mere habitual residence if the person is subject to social security rules.[88] Recruitment for the purpose of posting is possible if the hired worker was subjected to the social security legislation of the home MS immediately before being recruited,[89] and the Posting Directive also provides for this possibility.[90] The Coordination Regulations do not specifically envisage any concrete length of the previous link to the social security legislation of the home MS, but periods of one month, or even less, have been considered reasonable by the Administrative Commission (AC).[91] The proposal for the amendment of the Coordination Regulations envisages a minimum period of subjection to the social security legislation of the home MS before recruitment of three months.[92]
2. The *direct employment relationship* between the company and the employee must be maintained throughout the posting.[93] The employee can be a third country national (TCN)[94] who does not need a work authorisation while providing a service. The employer can be a temporary employment agency (TEA).[95]
3. The posting undertaking must carry out *significant business activities* in the home MS, or else it will be considered a letterbox company.[96] Mere internal manage-

[85] *Carrascosa Bermejo* [6] and *Verschueren* [46]. Some authors consider these requirements "lenient", see *Rennuy* [37].

[86] *Council of the EU* [11].

[87] See the (non-binding) AC Guide on applicable legislation, *Administrative Commission* [2].

[88] Case C-451/17 *Walltopia*, EU:C:2018:861.

[89] See Art. 14(1) of Regulation (EC) No 987/2009.

[90] *European Commission* [16], p. 18. Question 2.18.

[91] After a case-by-case evaluation, as established in AC Decision No A2 Point 1.4.

[92] Art. 14(1) of the proposed amendment of Regulation (EC) No 987/2009, *Council of the EU* [11].

[93] Some relevant criteria were set out in the (non-binding) AC Decision No A2 Point 1.3. The direct relationship breaks when a so-called, "double posting" takes place.

[94] The Coordination Regulations apply to third country nationals (family members, survivors of EU citizens, stateless persons, and refugees) and to third country national legal residents under Regulation (EU) No 1231/2010. On the possibility of issuing a PDA1 in favour of a third country national legally staying in a MS and working for a company established in the EU, see Case C-477/17 *Balandin and Others*, EU:C:2019:60.

[95] Case C-35/70 *Manpower*, EU:C:1970:120. The maintenance of the employment relationship in this kind of companies was a controversial requirement under Case C-2/05 *Herbosch Kiere*, EU:C:2006:69.

[96] See Case C-404/98 *Plum*, EU:C:2000:607; Case C-202/97 *FTS*, EU:C:2000:75; and Case C-359/16 *Altun and Others*, EU:C:2018:63.

ment activities do not suffice.[97] The AC Guide on applicable legislation provides different criteria for monitoring this requirement.[98] The European Court of Justice has clarified that any temporary employment agency must not only carry out the tasks of selecting and recruiting workers for posting in the home MS, but also provide workers to user undertakings to work in the home MS.[99]

4. The *anticipated duration* of the work cannot exceed 24 months. Where it is foreseeable from the outset that it will exceed this duration, the maintenance of the home MS legislation can only be achieved by means of specific agreements between the corresponding social security institutions under Art. 16 of Regulation (EC) No 883/2004.[100] According to the Administrative Commission, brief interruptions, such as holidays or sickness, should not be considered in calculating the 24 months period.[101] Posting to the same MS would be considered one posting situation, even if services are provided to two or more companies. The Administrative Commission states that a new posting period begins, resetting the counter to zero, when a worker is posted to another MS or two months after the end of the previous posting.[102]
5. A posted worker *cannot replace another posted employee*, to avoid a rotational system of postings to the destination company. In practice, replacement is allowed when the previous posting did not exhaust the 24 month period.[103] A problem could arise if the receiving undertaking relies on posted workers on an ongoing basis and permanent tasks are carried out regularly by posted workers. This concatenation of posted workers to fill the same post has been considered abusive regardless of whether the new posted worker comes from the same company or a different one.[104] This latter stipulation makes the obligation difficult to fulfil in practice, as the posting undertaking must rely on the information provided by the

[97] *i.e.*, activities whose purpose is solely to ensure the internal functioning of the company, Art. 14(2)(3) of Regulation (EC) No 987/2009.

[98] For instance, a turnover of approximately 25% of the total turnover, *Administrative Commission* [2]. These criteria are based on the non-exhaustive list provided by the European Court of Justice in Case C-202/97 *FTS*, EU:C:2000:75 para. 42 and 43.

[99] The idea is to avoid distortions of competition between companies and temporary employment agencies. See Case C-784/19 *Team Power Europe*, EU:C:2021:427 regarding a claim against the Bulgarian Social Security administration that had rightfully denied the issuance of a PDA1 to a temporary employment agency that did not place workers in Bulgaria. This judgment does not follow the Opinion of the Advocate General EU:C:2020:1018, which proposed a more literal interpretation.

[100] These agreements are usually for a maximum of five years and can only be made for the benefit of the workers, on the understanding that they wish to maintain their insurance career in the home MS, avoiding short interruptions which would hinder subsequent access to social security benefits. See Case C-101/83 *Brusse*, EU:C:1984:187.

[101] AC Decision No A2 Point 3.

[102] AC Decision No A2 Point 3(c). The proposal for the amendment of the Coordination Regulations includes the two months reset period in Art. 14(1)(a) of the proposed amendment of Regulation (EC) No 987/2009, *Council of the EU* [11].

[103] The proposal for the amendment of the Coordination Regulations includes this provision in Art.12(2)(a) of the proposed amendment of Regulation (EC) No 883/2004, *Council of the EU* [11].

[104] Case C-527/16 *Alpenrind and Others*, EU:C:2018:669.

receiving undertaking regarding the possible replacement of a posted worker.[105] Another complication is that it is not clear when the replacement ban finishes.[106]

Should the requirement not be fulfilled, the posting conflict rule cannot be applied, something that could affect workers posted in good faith who could eventually have their PDA1 withdrawn and their insurance cancelled, a situation that can be dramatic for a third country national.

3.3 Supervision of the requirements and amendments envisaged in the proposal for the amendment of the Coordination Regulations

Most of the requirements for applying the posting conflict rule are more easily supervised by the institutions and courts of the home MS, for instance the initial direct employment relationship and the significant business activity in the home MS. The fact of having previously being subject to the social security legislation of the home MS can only be checked by the institutions of that MS.[107] Only the last requirement, the replacement ban, can be difficult to supervise for the institution of the home MS, especially if posted workers from other MS filled the position previously. Cooperation and exchange of information between institutions is therefore essential.[108]

The still-pending proposal for the amendment of the Coordination Regulations[109] envisages some additional requirements to facilitate and enhance supervision by the host MS.

First, the posting undertaking will have to *inform the home MS in advance* whenever they are posting a worker to another MS,[110] and the competent institution will have to issue an attestation.[111] This amendment limits the possibility of requesting a PDA1 retroactively, as it envisages only two exceptions:

a) in the case of business trips where no service is provided;[112]
b) under exceptional circumstances, and in sectors other than the construction sector, this can be done no later than three days after the start of the activity.[113]

[105] See Case C-527/16 *Alpenrind and Others*, EU:C:2018:669 analysed in this sense in *Carrascosa Bermejo* [6].

[106] Perhaps the two-month reset period envisaged in AC Decision A2, previously mentioned, could also apply in this case, see *Carrascosa Bermejo* [6]. The proposal for the amendment of the Coordination Regulations envisages the application of the non-replacement rule between employees and self-employed workers, but it does not clarify the reset period of the replacement ban.

[107] It implies the application and interpretation of its own social security legislation.

[108] See Recitals 2 and 6 of the Preamble of Regulation (EC) No 987/2009.

[109] *Council of the EU* [11].

[110] Art. 15(aa) of the proposed amendment of Regulation (EC) No 987/2009, *Council of the EU* [11].

[111] Art. 19(2) of Regulation (EC) No 987/2009.

[112] Art. 1(2)(eb) of the proposed amendment of Regulation (EC) No 987/2009 defines "business trip" as "a temporary [...] activity [...] as an employed or self-employed person, which is limited in time and which is related to the business interests of the employer or, in the case of a self-employed person, the person concerned, excluding the provision of services or the delivery of goods, but including attending [...] business meetings, cultural and scientific events, [...] conferences and seminars, such as those related to academic research, [...], or [...] receiving training". *Council of the EU* [11].

[113] Art. 15(aa) of the proposed amendment of Regulation (EC) No 987/2009, *Council of the EU* [11].

In our opinion, this modification will facilitate supervision by the host MS,[114] as employers will have to provide evidence from the start showing either that they have informed the competent institution of the home MS or that the activity is a business trip. Should the home MS not issue the attestation in due time and should the host MS have doubts on whether the posting was properly reported, they could request additional information from the home MS which should be provided within ten working days.[115]

Furthermore, the proposal for the amendment of the Coordination Regulations envisages a deadline of 35 days for responding to queries received from the institutions of the host MS when the employee cannot produce a PDA1, and enables the latter to proceed as if no document had been issued if no answer is received from the home MS within those 35 days.[116] The proposal for the amendment of the Coordination Regulations, however, also includes a provision stating that should the attestation be issued subsequently, that attestation shall have, *where appropriate*, retroactive effect.[117]

Prior notification has been considered controversial by some MS, and, according to stakeholders consulted, it seems to be one of the main obstacles to the adoption of the new Regulations.

Secondly, the proposal for the amendment of the Coordination Regulations envisages a *30-working day period to rectify an incorrect PDA1*, meaning a document where not all sections indicated as being compulsory are filled in. The host MS institution is to notify the defect without delay, and the issuing institution will be required either to rectify the document as soon possible or to confirm that the conditions of issuing the PDA1 are not fulfilled. If the mandatory missing information is not provided within 30 working days, the institution of the host MS can proceed as if the PDA1 had never been issued, informing the issuing institution accordingly.[118] The new deadlines envisaged in the proposal for the amendment of the Coordination Regulations apparently aim to enforce the effectiveness of "sincere cooperation".

4 The binding nature of the PDA1

The European Court of Justice has reiterated that the objective of the PDA1, and of the posting rule itself, is to facilitate the free movement of workers and the freedom to provide services.[119] The specific posting conflict rule envisages the continuity in the application of the social security legislation of the home MS as the most protective approach regarding posted employees and their companies, assigning, *de facto*,

[114] Some authors are more reluctant, see *Rennuy* [36], p. 222.

[115] Art. 15(ab) of the proposed amendment of Regulation (EC) No 987/2009, *Council of the EU* [11].

[116] *Art. 20(4) of* the proposed amendment of Regulation (EC) No 987/2009, *Council of the EU* [11].

[117] Some doubts arise regarding which administration or Court must decide about the retroactive effect. If the retroactivity is not automatically recognised, it has been pointed out that it could lead to interruptions in the insurance career of the posted worker. See *Martín-Pozuelo López* [32], p. 430.

[118] Art. 5(1)(a) of the proposed amendment of Regulation (EC) No 987/2009, *Council of the EU* [11].

[119] See Case C-202/97 *FTS*, EU:C:2000:75 para. 48 and Case C-2/05 *Herbosch Kiere*, EU:C:2006:69 para. 20.

the control tasks to the national institutions and courts of the home MS. Therefore, the binding value of the PDA1 is maintained until it is withdrawn or invalidated by the issuing institution of the home MS or by their courts.[120] The withdrawal or invalidation must be final,[121] as the European Court of Justice has recently stated that the provisional suspension of a PDA1 by the issuing institution does not eliminate its binding effect.[122]

The European Court of Justice has confirmed that a PDA1 is bound to:[123]

a) *the social security institution of the host MS*. Whether the social security institution of the host MS obliged a posted worker to affiliate under its social security scheme, it would undermine the principles of unicity and exclusivity of the applicable law that provide predictability and legal certainty for companies and posted workers.[124]
b) *the company calling upon the services of the posted worker*. The question was raised in a case in which a posted worker was insured as self-employed in the home and provided the correspondent PDA1 but should have been insured as an employee in the host MS. The principles of unicity and exclusivity still apply to the receiving undertaking.[125]
c) *the national Courts of the host MS*, whatever their jurisdiction.[126] The European Court of Justice has confirmed that the courts of the home MS Courts are the competent ones to settle disputes concerning the correct application of the posting conflict rule. The courts of the host MS cannot "scrutinise the validity" of a PDA1, in the light of the factual background against which it was issued, even if the host MS believes that the situation clearly does not fall within the material scope of the posting rule, or in the event of a manifest error,[127] as "there would be a risk that

[120] Art. 5(1) of Regulation (EC) No 987/2009 interpreted by Joined Cases C-410/21 and C-661/21 *DRV Intertrans & Verbraeken*, EU:C:2023:138 para. 48 to 51.

[121] The term withdrawn "implies, in its legal sense, the disappearance of an act or its retroactive repeal on the basis of a decision of the administration which adopted it". The declaration of invalidity "is also in the nature of a definitive act equivalent to a cancellation of those certificates". Joined Cases C-410/21 and C-661/21 *DRV Intertrans & Verbraeken*, EU:C:2023:138 para. 49.

[122] The provisional suspension of PDA1s decided by the Slovak institution, in order to defer the reconsideration of their validity and the determination of the social security system applicable until the conclusion of the criminal proceedings pending before a Belgium Court, does not entail the loss of their binding effect. Joined Cases C-410/21 and C-661/21 *DRV Intertrans & Verbraeken*, EU:C:2023:138 para. 68. This judgement is based on the wording of Art. 5 of Regulation (EC) No 987/2009, on the obligation to follow the procedure of dialogue and conciliation, and on three important principles: the uniqueness of the applicable law, sincere cooperation, and legal certainty.

[123] In a certain sense, foreign PDA1s are also bound to the legislators of the host MS, in the sense that they cannot adopt national legislation that allows their own institutions to compulsorily subject workers to their own social security scheme, see Case C-356/15 *Commission v Belgium*, EU:C:2018:555.

[124] See Case C-202/97 *FTS*, EU:C:2000:75 para. 54, Case C-2/05 *Herbosch Kiere*, EU:C:2006:69 para. 25, Case C-356/15 *Commission v Belgium*, EU:C:2018:555 para. 88, and Case C-620/15 *A-Rosa Flussschiff*, EU:C:2017:309 para. 41 and 42.

[125] Case C-178/97 *Banks and Others*, EU:C:2000:169 para. 41 and 48.

[126] The social, civil or criminal nature of the jurisdiction of these courts is irrelevant, see Case C-474/16 *Belu Dienstleistung and Nikless*, EU:C:2017:812 para. 16.

[127] Case C-620/15 *A-Rosa Flussschiff*, EU:C:2017:309 para. 51 and Case C-356/15 *Commission v Belgium*, EU:C:2018:555 para. 93. This assertion was criticised by *Icard* [21].

the system based on the duty of cooperation in good faith between the competent institutions of the MS would be undermined".[128] Some authors consider that the Coordination Regulations do not expressly bind courts of the host MS by the PDA1 and even propose the granting of control of competence to the courts of the host MS.[129] In our view, defining a unique competent jurisdiction is indispensable to avoiding contradictory non-unifiable national judgments. This does not imply mistrust on the objectivity and independence of any national court, it just means that one sole court must be appointed. The competent court would have to assess the correct application of the EU conflict-rule and its requirements under issuing and withdrawal procedures defined in the national legislation of the home MS.[130] Therefore, jurisdiction can only be assigned to the courts of the home MS. The European Court of Justice has only admitted that the courts of the host MS might, under very strict requirements and in cases of proven fraud, disregard a PDA1 to prosecute companies involved in fraudulent posting, but can never withdraw or invalidate a foreign PDA1 (see Sect. 6).

It is advisable to issue the PDA1 in advance or at least simultaneously with the posting.[131,132] However, it is possible to issue the PDA1 retroactively, after the posting began or even when it ended,[133] maintaining its binding effect. Some MS, such as France and Austria, impose fines on companies whose posted workers cannot provide the PDA1 upon request. This might improve the number of PDA1s requested in advance by posting companies.[134] However, once the PDA1 is produced, we believe those sanctions to be illegal under EU law and contrary to the freedom to provide services. If a company is not capable of providing the PDA1 for an allegedly posted employee,[135] the European Court of Justice has confirmed that it is for the institutions of the host MS to determine the applicable social security legislation according to the Coordination Regulations, a decision that can only be challenged before the courts of the host MS.[136]

[128] Case C-2/05 *Herbosch Kiere*, EU:C:2006:69 para. 30 to 32 and Case C-527/16 *Alpenrind and Others*, EU:C:2018:669 para.47. These principles are established under Art. 4(3) TFUE, in Art. 76(4) of Regulation (EC) No 883/2004 and in Recital 2 and Art. 20 of Regulation (EC) No 987/2009. See a critical analysis of this case in *Verschueren* [44].

[129] *Verschueren* [45] and [44], and *Rennuy* [37].

[130] Procedures are not harmonised. The (non-legally binding) AC Recommendation No 1 only defines the structure and content of the PDA1 concerned. There is a study on different national practices for the issuance of PDA1 dating from before the Recommendation was published, see *Jorens, Lhernould* [23].

[131] Art. 18 of Regulation (EC) No 987/2009 states that they must be issued "whenever possible in advance".

[132] Considering that one of the requirements for issuing the document requires estimating the duration of the posting, see Case C-115/11 *Format*, EU:C:2012:606 para. 43.

[133] See Case C-178/97 *Banks and Others*, EU:C:2000:169 para. 52 to 57 and Case C-527/16 *Alpenrind and Others*, EU:C:2018:669 para. 70.

[134] *De Wispelaere, Pacolet, De Smedt* [13], p. 16.

[135] Either due to a refusal, an error, a lack of diligence or a delay.

[136] See Case C-33/21 *INAIL and INPS*, EU:C:2022:402. The Italian courts accepted the PDA1 issued retroactively from Ireland, but, after examining those certificates, it was found they were not numbered or arranged in an intelligible or orderly manner, that there were 321 certificates, thus some were probably duplicates, and that they did not cover all the 219 Ryanair employees assigned to an Italian airport during

The reverse side of the binding nature of PDA1 is the fact that the above-mentioned duty of cooperation in good faith also has implications for the institutions of the home MS:

a) *mutual trust* requires the issuing institution to carry out a proper assessment of the facts relevant to the application of the posting conflict rule and to ensure the accuracy of the information contained in the PDA1.[137] AC Recommendation No 1, although not legally binding, provides guidance to prevent the falsification of a PDA1;[138] a standardised list of questions for companies that apply for posting a PDA1, which seem intended to identify letterbox companies; and advice regarding the electronic registration of the issued documents in such a way that its authenticity can easily and quickly be verified. It also recommends including a disclaimer in the national application forms by which the companies declare that they have answered all questions correctly to the best of their knowledge and that they are aware of possible checks that could result in the retroactive withdrawal of the PDA1.

   Some authors have questioned the rigour of the supervision by the issuing institutions. We must not forget that some MS deal with a significant number of requests. Germany, for instance, issues in average around 4,600 Art. 12 PDA1s daily, and Poland issues around 700, a more reasonable but still significant figure.[139] Every control process can surely be improved, but we cannot lose sight of the available means and the scope of the task. Neither can we pass by the fact that MS refuse requests for PDA1s on a standard basis,[140] sometimes against the opinion of the Advocate General,[141] or even before a ruling by the European Court of Justice obliges them to reconsider the refusal.[142] A possible improvement could come from aleatory PDA1 controls by an independent institution, for example the European Labour Authority;

b) *sincere cooperation* requires that where the competent institution of the host MS expresses doubts regarding the accuracy of the facts on which the issue of a PDA1 is based, the home MS institution must review the facts and, if appropriate, reconsider the grounds for that issue or withdraw that certificate. For more on the dialogue and conciliation procedure, see Sect. 5.1.

all of the periods under review. The European Court of Justice concluded that, as regards the employees for whom no PDA1 had been produced, the Italian social security institution had to determine the applicable legislation pursuant the Coordination Regulations.

[137] Case C-620/15 *A-Rosa Flussschiff*, EU:C:2017:309 para. 39.

[138] See Case C-19/67 *Van der Vecht*, EU:C:1967:49.

[139] Germany issued 1,681,710 and Poland 246,849 Art. 12 PDA1 in 2019. *De Wispelaere, Pacolet, De Smedt* [13].

[140] Poland refused 3.85% of the requests received in 2019, see Sect. 2.

[141] In Case C-784/19 *Team Power Europe*, EU:C:2021:427 the court agreed with the Bulgarian social security institution that had refused to issue PDA1s in favour of workers hired by a temporary employment agency that had no significant activity in Bulgaria. Advocate General Campos considered that the PDA1 should have been granted EU:C:2020:1018.

[142] In Case C-451/17 *Walltopia*, EU:C:2018:861 the European Court of Justice considered that the court should assess if residence could mean being subjected to Bulgarian social security, even if the social security institution had denied the PDA1 for lack of previous insurance.

5 Challenging a PDA1 issued by another MS

Where the social security institution of the host MS has doubts about the accuracy and/or conformity with the fulfilment of the requirements for issuing the PDA1, it can directly request the institution of the home MS to provide additional information, verify the facts and, if it deems it necessary, reconsider its initial position or even withdraw the PDA1.[143]

In practice, the social security institutions of the home and host MS exchange information via Electronic Exchange of Social Security Information (EESSI),[144] a system that is used to send the Art. 12 PDA1[145] and to request clarifications or additional information regarding the social security of the posted employees.[146] Apart from this, the Internal Market Information System (IMI) interconnects the inspectorates of MS as well as with other institutions.[147] IMI is a powerful and increasingly used cooperation platform that keeps record of all the communications at the disposal of the Commission, even if it lacks the power to impose sanctions on those MS that refuse to cooperate. The digitalisation and electronic exchange of information on posting workers opens possibilities for enhancing the fight against abuse of law and fraud. In the near future, the European Social Security Pass pilot project (ESSPASS) might help to identify automatically potentially fraudulent posting situations or potential letterbox companies *a priori*.[148]

Should there be a dispute between the social security institutions of the home and host MS, they must resort to the procedure of dialogue and conciliation (see next section)

5.1 Procedure of dialogue and conciliation before the Administrative Commission

This procedure,[149] based on the principles of loyal/sincere cooperation and mutual trust, and envisaged in the Coordination Regulations,[150] is defined in detail in AC Decision No A1.[151] The first phase consists of a dialogue between the national insti-

[143] Art. 5(2) and 5(3) of Regulation (EC) No 987/2009 detailing the procedure of dialogue and conciliation between institutions provided for in Article 76 (6) of Regulation (EC) No 883/2003. In this sense, see Case C-359/16 *Altun and Others*, EU:C:2018:63 para. 43 and Joined Cases C-410/21 and C-661/21 *DRV Intertrans & Verbraeken*, EU:C:2023:138 para. 46.

[144] The EESSI is an IT system for the exchange of information between EU social security institutions.

[145] Art. 15 of Regulation (EC) No 987/2009.

[146] See this possibility under Art. 5(3) of Regulation (EC) No 987/2009.

[147] https://ec.europa.eu/internal_market/imi-net/statistics/2020/07/requests/index_en.htm.

[148] The ESSPASS project is expected, among other things to be an instrument for the electronic issuing of virtual PDA1s and the possible automatisation of its supervision.

[149] For a general overview of the great importance of cooperative systems in cases of mere regulatory coordination that require mutual recognition of certain foreign elements for their proper functioning, see *Gardeñes Santiago* [18] p. 24.

[150] Art. 76(6) of Regulation (EC) No 883/2004 and Art. 5 (2) to (4) of Regulation (EC) No 987/2009.

[151] The Administrative Commission follows the standardised procedure established previously under several bilateral agreements between MS that have served as a model (see Recital 12 of the Preamble of AC Decision No A1).

tutions, followed, if necessary, by a more political dialogue between national Authorities.[152] The AC Decision envisages flexible and lenient time-limits for this phase, especially for the first[153] but also for the second stage of the dialogue.[154]

If no agreement is reached, the procedure can continue with conciliation before an AC Conciliation Board set up on an *ad hoc* basis. This phase can last up to 6 months.[155] Unfortunately, the conciliation procedure is not legally binding as the conclusions of the AC Conciliation Board cannot result in withdrawing or invalidating the PDA1 issued by the institution of a MS.[156]

All in all, the dialogue and conciliation procedure has proven, in the words of the Court of Justice itself, "not always efficient and satisfactory in practice",[157] so logically MS are disincentivised from embarking on a procedure that can last for more than a year to obtain a ruling that may be just a dead letter. It must be stressed that, in case of a dispute, following the process of dialogue and conciliation is mandatory regardless of the situation even in cases of manifest and flagrant error in the assessment of the fulfilment of the requirements for the issuing of the PDA1[158] and in cases of proven fraud or abuse.[159] Furthermore, courts of the host MS cannot disregard or ignore a foreign PDA1 if the dialogue procedure was not started within a reasonable period (see Sect. 6 below).

5.2 Judicial channels

In the event of the failure of the dialogue and conciliation procedure, the host MS has two options to challenge the foreign PDA1. On the one hand, it can initiate a procedure for its invalidation and withdrawal before the courts of the home MS. In fact, this kind of procedure can be initiated at any given moment, as the courts of the MS where the PDA1 was issued are the only competent jurisdiction for challenging the validity of the PDA1. In the event of an administrative or judicial appeal before the home MS, the dialogue and conciliation procedure will be suspended until a decision is taken,[160] as the decision could result in changing the applicable legislation. In practice, the institutions of the host MS will not bring an action before the courts of the MS where the PDA1 was issued.[161] Firstly because they face several barriers, such as language, knowledge of the foreign legislation, and reputational risk. Sec-

[152] AC Decision No A1 Points 6 to 16 sets out the deadlines and steps to be followed.

[153] Ten working days to acknowledge receipt, and three months for replying which can be extended for three additional months if the case is complex or if verifying data requires the intervention of another institution. The MS concerned may agree to derogate from the above deadlines, provided that the extension is justified and proportionate in the light of the individual circumstances.

[154] It can last eight weeks as a whole.

[155] Art. 5(4) of Regulation (EC) No 987/2009.

[156] Case C-527/16 *Alpenrind and Others*, EU:C:2018:669 para. 62 to 64.

[157] Case C-356/15 *Commission v Belgium*, EU:C:2018:555 para. 107.

[158] Case C-359/16 *Altun and Others*, EU:C:2018:63 para. 46.

[159] Case C-356/15 *Commission v Belgium*, EU:C:2018:555 para. 97 and 98.

[160] AC Decision No A1 Point 4.

[161] *Carrascosa Bermejo, Contreras Hernández* [7] and *Rennuy* [38].

ondly, doubts rise where the procedure law of every MS envisages the possibility of having a foreign administration filing a lawsuit as a concerned party.

On the other hand, the host MS can also bring an infringement proceeding against the issuing MS before the European Court of Justice.[162] In practice, this option has never been used, as MS prefer not to antagonise other MS.

In practice, some national institutions tend to file lawsuits before the courts of the host MS, even if it is not the competent jurisdiction under the posting conflict rule. The opening of a judicial procedure before the courts of the host MS does not suspend the dialogue and conciliation procedure, as in this case the said courts do not have, in theory, jurisdiction to change the applicable legislation. In practice, however, courts of the host MS have imposed an obligation, upon posted workers and undertakings that have a foreign PDA1 in force, to insure the workers concerned under the social security system of the host MS (and even to pay contributions retroactively). According to the European Court of Justice, such decisions should be overruled due to the binding effect of the PDA1.[163]

It should be recalled that if a PDA1 is withdrawn, this has retroactive effect. The contributions paid in the home MS are deemed invalid and the workers must be retroactively insured under the social security system of the host MS, preferably by means of an agreement between the institutions involved bearing in mind that the main goal under the Coordination Regulations is the protection of the workers.[164] Usually, workers are not aware of their employers' fraudulent practices, and they are victims in the broadest sense of the term. Especially in the case of third country nationals, who often do not have any authorisation to work in the host MS and cannot be automatically insured there.

5.3 Improvements envisaged in the proposal for the amendment of the Coordination Regulations and other possible solutions

There seems to be room for improving the procedures for challenging the PDA1. The still pending proposal for the amendment of the Coordination Regulations envisages some measures in this regard.[165] The proposal for amendment of Regulation (EC) No 987/2009 provides a proper legal basis for collaboration and exchange of information between national social security institutions for combating fraud and error.[166] In our view, this is an upgrade as it could imply the mandatory usage of the Fraud and Error Platform based on AC Decision No H5.[167] Besides, the Regulation eases compliance

[162] Art. 259 TFEU. See Case C-620/15 *A-Rosa Flussschiff*, EU:C:2017:309 para. 46 and Case C-527/16 *Alpenrind and Others*, EU:C:2018:669 para. 61.

[163] Case C-202/97 *FTS*, EU:C:2000:75, Case C-178/97 *Banks and Others*, EU:C:2000:169, and Case C-2/05 *Herbosch Kiere*, EU:C:2006:69.

[164] Art. 16 of Regulation (EC) No 883/2004.

[165] *Council of the EU* [11].

[166] On an individual level concerning an individual case or on a general level with data matching. See Recital 25 and Art. 2 of the proposed amendment of Regulation (EC) No 987/2009, *Council of the EU* [11].

[167] AC Decision H5 of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Council Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council on the coordination of social security systems.

with data protection rules under Regulation (EU) No 2016/679 in the exchange of information.[168]

As for other possible solutions, imposing a binding arbitration procedure seems complicated, as it would require not only establishing a more solid legal basis that an AC Decision, but also the (highly unlikely) agreement of all MS. In our view, *lege ferenda*, the procedure of dialogue and conciliation should at least be expedited. Moreover, the Coordination Regulations could envisage some type of consequence in the event a MS refuses to adopt the solution proposed by the Conciliation Board, such as the automatic opening of an investigation by the Commission that could result in an infringement proceeding against the "disobedient" MS.

Perhaps it might also be necessary to review the existing judicial procedures in each MS for challenging PDA1 by a foreign institution. First, in order to determine the feasibility of this theoretical option, and secondly, in order to disseminate information among national institutions so as to normalise its usage. *Lege ferenda*, the possibility of creating an *ad hoc* fast procedure before the European Court of Justice could be considered.[169]

6 The *Altun* doctrine: the host MS courts disregarding a PDA1

In 2018, in the *Altun* judgment,[170] the Grand Chamber of the European Court of Justice admitted the possibility of disregarding a foreign PDA1 in cases of proven fraud. The case originated in the inspection of a Belgian construction company that had almost no staff of its own and subcontracted all its work to Bulgarian companies, which in turn posted workers to Belgium. According to a Belgian judicial investigation, conducted in Bulgaria through letters rogatory, these Bulgarian companies had no significant construction activity in their home MS and were, in the view of the Belgian authorities, letterbox companies. The Belgian authorities requested, unsuccessfully, the Bulgarian institution to withdraw the PDA1. Subsequently, they initiated criminal proceedings against the owners and employees of the Belgian construction company on three grounds: for having made or allowed third country nationals work in Belgium without work permits; for not having made the declaration required by law to the Belgian social security institution when these workers started working; and for not having registered these workers with the Belgian social security institution. The claim was dismissed by the first instance court on the ground that "the employment of the Bulgarian workers was fully covered by the E 101/A1 forms, which to date are properly and lawfully issued".[171] The Court of Appeal, however, convicted the defendants considering that it was not bound by foreign PDA1s that had been obtained fraudulently, even if they acknowledged that "the Belgian authorities had

[168] See Recitals 13 and 39(a) of the proposed amendment of Regulation (EC) No 883/2004 and Art. 2(2a) (6) and (7) and Recital 26 of the proposed amendment of Regulation (EC) No 987/2009, *Council of the EU* [11].

[169] *Velázquez Fernández* [43].

[170] Case C-359/16 *Altun and Others*, EU:C:2018:63. See a critical commentary in *Carrascosa Bermejo* [5].

[171] Case C-359/16 *Altun and Others*, EU:C:2018:63 para. 23.

not exhausted the procedure laid down for cases of dispute over the validity of the certificates".[172] On a second appeal, the Court of Cassation referred a question for preliminary ruling to the European Court of Justice.

The judgment of the European Court of Justice established that a court of the host MS can indeed, "in the light of evidence", disregard a fraudulent foreign PDA1 "if, on the basis of that evidence and with due regard to the safeguards inherent in the right to a fair trial which must be granted to those persons, it finds the existence of such fraud".[173] The ruling followed the conclusions by the Advocate General which began with the quotation from the French civil law scholar Planiol: "law ends where abuse begins". The binding effect of the PDA1 and its exclusive effect, however, do not totally lose their strength. The courts of the host MS cannot invalidate or withdraw a foreign PDA1 as these actions remain in the exclusive power of the institutions and courts of the home MS, and said institutions and courts are not bound by the ruling of the host MS court.[174]

The *Altun* judgment was based on the general and unwritten principle that EU law cannot be invoked fraudulently or abusively to take advantage of the benefits it provides.[175] The European Court of Justice had invoked this principle in previous judgments, however the case-law quoted in the *Altun* judgment did not concern conflict rules under the Coordination Regulations, as is the case with the posting rule. On the contrary, the judgments dealt with the denial of rights, mostly unrelated to social security,[176] but in all cases granted under the national legislation of the national court hearing the case, the applicable law not having been in dispute. The European Court of Justice established that these national rights could not be protected by EU law if fraud were proved. In the only social security ECJ judgment mentioned in Altun ruling, the *Paletta II* case,[177] a German Court had to decide if the right to sickness benefits in cash under German social security legislation should be maintained or denied if fraud concerning a diagnosis by an Italian practitioner could be proved. The European Court stated that nothing prevented the employer from providing evidence of abuse or fraudulent conduct by the employee even if such incapacity had been certified in accordance with the Coordination Regulations. In the same vein, although not mentioned in *Altun* judgment,[178] the *Dafeki* judgment dealt with possible fraud in Greek birth certificates which were used by Greek migrant workers to retire in

[172] Case C-359/16 *Altun and Others*, EU:C:2018:63 para. 25.

[173] Case C-359/16 *Altun and Others*, EU:C:2018:63 ruling.

[174] *Carrascosa Bermejo* [6], p. 60, and *Verschueren* [45], p. 494.

[175] Case C-359/16 *Altun and Others*, EU:C:2018:63 para. 48 and 49.

[176] Case C-206/94 *Brennet v Paletta*, EU:C:1996:182, Case C-255/02 *Halifax and Others*, EU:C:2006:121, Case C-196/04 *Cadbury*, EU:C:2006:544, Case C-321/05 *Kofoed*, EU:C:2007:408, Case C-423/15 *Kratzer*, EU:C:2016:604, and Case C-251/16 *Cussens and Others*, EU:C:2017:881.

[177] Case C-359/16 *Altun and Others*, EU:C:2018:63 para. 49. In Paletta II case, the original dispute dealt with the employer's obligation to pay a benefit based on diagnoses made by a general practitioner in Italy. The veracity of the diagnoses and the illness itself was in serious doubt. The European Court of Justice held that the employer's payment during sickness was a temporary sickness benefit in cash, covered by Coordination Regulations. The German employer was, in principle, obliged to pay said benefits as the German applicable law established. Case Paletta II, C 206/94, EU:C:1996:182 para. 24 s.

[178] This connection was pointed out in *Verschueren* [44].

Germany before the initially expected age of retirement.[179] In both cases, a national institution challenged the veracity of a foreign public document, regarding sickness or age, that accredited the right to access a certain benefit under national legislation. The Coordination Regulations, in principle, assimilated these documents to those issued within the framework of host MS applicable legislation.[180] In both judgments, the court confirmed that foreign public documents have an initial presumption of veracity, but could be disregarded if they were proven to be fraudulent, *i.e.*, their accuracy was seriously undermined by concrete evidence.

In our opinion, there is a clear difference between challenging a foreign public document for the purpose of denying a benefit under host MS legislation and challenging the assessment that a foreign public administration has carried out to determine the applicable legislation under a conflict rule envisaged under the Coordination Regulations. We believe that a PDA1 as defined at an EU level and processed according to EU rules is something at a different level to, for instance, a medical diagnosis. Furthermore, determining the applicable legislation, the skeleton supporting the EU social security coordination system, is unquestionably a matter of greater importance than granting or denying a benefit that can be disputed under the courts of the MS of insurance. For this reason, the *Altun* doctrine only allows disregarding fraudulent PDA1s in the course of a judicial proceeding, but it does not allow modifying the applicable legislation.

The *Altun* doctrine was mentioned, *obiter dicta*,[181] in subsequent rulings of the European Court of Justice and was refined in two judgments regarding requests for preliminary rulings by the French Court of Cassation: the *Vueling*[182] and *Bouygues travaux publics* cases.[183] The main proceedings of these two cases dealt with the criminal responsibility of the companies involved in the fraudulent issuance of PDA1s and their civil responsibility regarding damages for lack of insurance and unpaid French social security contributions.[184] Neither of these proceedings were cases concerning the applicable social security legislation.

6.1 Prerequisites and requirements for disregarding a foreign PDA1

After the judgment in the *Vueling* case, the prerequisites for disregarding a foreign PDA1 established in *Altun* case remain as follows:

1. In the event of suspicion of fraud regarding a PDA1, the institution of the host MS must *initiate the dialogue and cooperation procedure promptly*.[185] The institution

[179] Case C-336/94 *Dafeki*, EU:C:1997:579.

[180] Regulation (EC) No 883/2004 Art. 5. From a general point of view Regulation (EU) 2016/1191.

[181] Case C-527/16 *Alpenrind and Others*, EU:C:2018:669 para. 46 and Case C-356/15 *Commission v Belgium*, EU:C:2018:555 para. 101. *Altun* is a reference case beyond social security when fraud is at stake, see for instance Joined Cases C-116/21, C-118/21, C-138/21 and C-139/21 P *Commission / VW*, EU:C:2022:557.

[182] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260.

[183] Case C-17/19 *Bouygues travaux publics and Others*, EU:C:2020:379.

[184] Case C-359/16 *Altun and Others*, EU:C:2018:63 para. 60. Contextualising this exception, see Case C-356/15 *Commission v Belgium*, EU:C:2018:555 para. 102.

[185] See Sect. 5.1.

of the home MS must have the opportunity to review the grounds for the issue of the PDA1 in the light of the concrete evidence submitted by the institution of the host MS.[186]

2. The institution of the home MS administration that issued the PDA1, must not have *carried out the required control* ex officio within a *reasonable period of time*[187] in view of the evidence provided by the institution of the host MS, and/or have failed to make a decision within a reasonable time.

Only where both prerequisites are met can the host MS court check if the conditions for the existence of fraud are met, a decision that is therefore subsidiary to the refusal of the institution of the home MS to withdraw the PDA1, or the lack of an answer.[188] The European Court of Justice envisages these prerequisites will encourage dialogue and conciliation between national institutions and, ultimately, enhance procedural economy.[189] Disregarding a foreign PDA1 is envisaged, therefore, as a last and inevitable option should nothing work.

The European Court of Justice, however, has set diffuse deadlines with references such as "an early stage" or "a reasonable time",[190] and this vagueness creates uncertainty.[191] In fact, the court does not even make explicit whether the whole dialogue and conciliation procedure must be completed before disregarding a foreign PDA1. As for the *dies a quo* to initiate the dialogue and cooperation procedure, we believe it should start at the moment a concrete doubt regarding the applicable social security legislation arises. This does not seem to be the usual practice,[192] and it certainly was not the case in the *Vueling* proceedings, as it took the French institutions four years to contact the Spanish institutions after the labour inspection reported alleged concealed employment against Vueling.[193]

In the absence of response from the issuing institution (administrative silence), we understand that if after three months the institution of the home MS has not responded, the prerequisite is fulfilled, as the deadlines envisaged for the dialogue between institutions will have expired.[194] In the *Vueling* case the Spanish administration did obviously not answer in a *reasonable time*, as it took them more than two years to answer the request and deny the withdrawing of the PDA1, basing its refusal

[186] Confirmed in the judgment on Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 71 and 77, against the Opinion of the Advocate General EU:C:2019:592.

[187] By analogy Case C-356/15 *Commission v Belgium*, EU:C:2018:555 para. 101.

[188] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 71 to 73.

[189] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 76.

[190] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 67 and 77.

[191] See *Verschueren* [45].

[192] In the *DRV Intertrans* case, the Belgian Social Security Inspectorate asked the Slovak Institution to withdraw the PDA1s during the criminal proceedings before the Belgian Courts, two years after the PDA1s had expired. Joined Cases C-410/21 and C-661/21 *DRV Intertrans & Verbraeken*, EU:C:2023:138 para. 24 to 26.

[193] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 83. The French administration seems repeatedly reluctant to follow the dialogue and cooperation procedure, see C-620/15 *A-Rosa Flussschiff*, EU:C:2017:309 para. 56.

[194] Should none of the institutions asks for an extension, AC Decision No A1 Points 11 and 12.

precisely on the tremendous delay by the French institution in communicating their suspicions of fraud.[195] If the issuing institution answers in due time but provides an inadequate response in light of the options envisaged in the dialogue and conciliation procedure, the European Court of Justice has considered that the prerequisite is also fulfilled.[196]

If the prerequisites are fulfilled, then when proving the fraudulent nature of the PDA1 the following requirements should be met:

1. It must be *proven in the context of a fair trial* backed with a consistent body of evidence and where the "persons who are alleged, in such proceedings, to have used posted workers ostensibly covered by fraudulently obtained certificates must… be given the opportunity to rebut the evidence".[197] However, the European Court of Justice does not clarify how interested parties not included in the criminal lawsuit could be *given the opportunity to rebut the evidence*. It is possible that the undertaking that posted the workers could not be prosecuted, and obviously the institution of the home MS can never be.
2. The *objective factor* of the existence of fraud must be verified – meaning that it must be proven that the EU requirements for issuing the PDA1 are not met (see Sect. 3.2). In the *Altun* case, the referring court considered that the posting undertakings were letterbox companies that carried out no significant activity in their home MS, Bulgaria.[198] In the *Vueling* case, the referring court considered that the workers operated in a stable and continuous manner from their home base in France,[199] and should therefore be insured there, applying the home base specific conflict rule for flight and cabin crew instead of the posting conflict rule.[200] This assumption, however, is potentially controversial, as from a general point of view a company established in a MS is entitled to post workers to another MS where it is also established.[201]
3. The *subjective factor* of the existence of fraud must also be verified. It must be proven that the parties concerned had the intention to evade or circumvent the conditions for the issue of the PDA1, and were aiming to obtain an advantage, either by *deliberate omission*, such as the concealment of relevant information, or by *deliberate action*, such as the misrepresentation of the real situation of the worker or the undertaking. In the *Altun* case, it was argued that the Bulgarian undertakings had deliberately misrepresented the reality, as they did not have significant

[195] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 85.

[196] In the *DRV Intertrans* case, the Slovak institution provisionally suspended the validity of the PDA1s, postponing its final response until the conclusion of the criminal proceedings that were taking place in Belgium. Joined Cases C-410/21 and C-661/21 DRV Intertrans & Verbraeken, EU:C:2023:138 para. 63 and 64.

[197] Case C-359/16 *Altun and Others*, EU:C:2018:63 para. 56.

[198] Case C-359/16 *Altun and Others*, EU:C:2018:63 para. 57.

[199] Home base as defined currently under Regulation (EC) No 883/2004 Art. 11(5), and previously under Regulation (EEC) No 1408/71.

[200] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 53 to 58.

[201] *Lhernould* [28], p. 308.

activity in Bulgaria.[202] In the *Vueling* case, the referring court considered that the company was aware that workers assigned to an establishment owned by their employer in France must be subject to the French social security system. It was also established that the company deliberately misrepresented the real residence of the posted workers, as it gave their residence address as that of its registered office in Spain.[203]

The *Vueling* case also clarified that where a national court of a host MS, in this case the French Court of Cassation, passes a criminal judgment on the basis of a "definitive finding of fraud made in breach of EU law", that judgment does not bind the civil/social courts of that MS with the authority of *res judicata*., *i.e.*, a national civil/social court can not impose the payment of damages or compensation for unpaid contributions on the basis of that fraud.

In 2014,[204] the Criminal Chamber of the French Court of Cassation passed a judgment against the Vueling airline on the grounds of concealed employment, ignoring the binding effect of a PDA1. This criminal law judgment was applauded by Posting Directive experts[205] and criticised by experts in social security coordination.[206] Thanks to the authority as *res judicata* of this judgment under French law (a penal judgment is binding in civil and social proceedings), a co-pilot "posted" to France for one year won his initial lawsuit against the airline before the French Courts. He claimed *inter alia* the payment of a lump-sum as compensation for concealed employment and damages as compensation for loss suffered due to the failure to pay contributions to the French social security system, although he never challenged his insurance under the Spanish social security and the issued PDA1 before the Spanish Courts. The Social Chamber of the French Court of Cassation made a reference for a preliminary ruling.

The European Court of Justice considered that the 2014 criminal judgment was indisputably in breach of the EU law, as it did not seek to be apprised of the status of the dialogue between the Spanish issuing institution and the French institution and it did not wait for the outcome of that procedure.[207] Therefore, it established that the authority as *res judicata* of this criminal judgment would result in the incorrect application of EU law in every decision adopted by the civil and social French courts concerning the same facts.[208] In order to avoid that result, EU Law precluded that the French social Court could not hold the airline liable solely by reason of a criminal judgment that was in breach of EU law,[209] as the Criminal Chamber of the French Court of Cassation had not followed the pre-requisites for disregarding the foreign

[202] Case C-359/16 *Altun and Others*, EU:C:2018:63 para. 58.

[203] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 59.

[204] The same day, 11.3.2014, another airline company, British Easy Jet operating in the airport d'Orly, was condemned on the same criminal grounds.

[205] *Muller* [33], p. 788.

[206] *Lhernould* [28], p. 307 and 308.

[207] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 84 and 92.

[208] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 95 and 96.

[209] Joined Cases C-370/17 and C-37/18 *Vueling Airlines & CRPNPAC*, EU:C:2020:260 para. 98.

PDA1.[210] Had the court of the host MS correctly disregarded the PDA1, a claim for civil liability would have been possible.

6.2 Scope of application

In the *Bouygues* case,[211] the European Court of Justice clarified that the binding effect of a PDA1 is limited solely to the obligations imposed by national legislation in the area of social security. A PDA1 has no binding effect with regard to obligations imposed by national law in matters other than social security, such as, *inter alia*,[212] those relating to the employment relationship between employers and workers, in particular their employment and working conditions. In this case, the Criminal Chamber of the French Court of Cassation[213] had been uncertain of the binding effect of the PDA1 regarding the obligation to make a prior declaration of work in France, and regarding the application of the French employment legislation. As the European Court of Justice cannot establish the facts which have given rise to the dispute in the main proceedings or interpret the relevant national laws or regulations at stake,[214] it was for the French Court to determine the purpose of the obligation to make a declaration (according to the *code du travail*):

a) Whether its sole purpose is to ensure that the workers concerned are affiliated to social security and, therefore, only to ensure compliance with the social security legislation, the European Court of Justice reiterates that the PDA1 would, in principle, preclude such an obligation.
b) Whether its purpose is also, even only in part, to ensure the compliance with conditions of employment and other working conditions imposed by the employment law: the European Court of Justice considers that the PDA1 would have no effect on that obligation.

This interesting separation of the two fields (labour and social security) also clarifies, in our view, that the fraud required for disregarding a PDA1 should be exclusively related to social security. A PDA1 may eventually maintain its binding effect for

[210] Consequently, the Social Chamber of the French Supreme Court confirmed the absence of civil liability claimed by the co-pilot in Vueling Case. See judgment of 31.3.2021, 16-16.713FP-PRI commented by *Lhernould* [30].

[211] Case C-17/19 *Bouygues travaux publics and Others*, EU:C:2020:379. The case in the main proceedings concerned two French companies that subcontracted the construction of a nuclear reactor to companies from other MS, including a temporary employment agency, that posted workers with the corresponding PDA1. Following several inspections for serious labour breaches, the posting companies were declared guilty of *concealed employment*, and the French companies of *unlawful provision of work*. The three companies claimed, *inter alia*, that the French Courts had disregarded the binding effect of the PDA1.

[212] In the same vein, a recent ECJ judgement stated that an Article 13 PDA1 "has binding effect as regards the obligations imposed by national social security legislation referred to in the coordination established by Regulation n° 883/2004, such a certificate, however, has no bearing on the determination of the Member State in which HB must assert his outstanding wage claims, in accordance with Directive 2008/94". Case C-710/21 IEF Service EU:C:2023:109 para. 45.

[213] This is the second preliminary ruling referred by the French Criminal Chamber of the Court of Cassation (the first was in case C-620/15 *A-Rosa Flussschiff*, EU:C:2017:309).

[214] Case C-17/19 *Bouygues travaux publics and Others*, EU:C:2020:379 para. 51 and 52.

social security purposes even if a posting company fails to comply with employment conditions. And conversely, a posting company that complies with all employment and Occupational Safety and Health Administration duties could have an incorrect or even fraudulent PDA1.

In this regard, even if a PDA1 is not withdrawn or invalidated by the home MS and there are no grounds for the courts of the host MS disregarding it, a posting company could not be found criminally guilty on social security grounds.[215] Obviously, criminal prosecution for concealed work can be based on labour law grounds, but not on lack of social security insurance in the host MS.[216]

7 Conclusions

In 2019 it was estimated that there were 1.7 million posted workers, most of them posted for a short period of time (less than four months on average). The 3.2 million PDA1s issued under the special conflict rule for posting made it possible for employees to maintain their insurance under the social security legislation of the home MS, where their company was established. This solution is beneficial for the vast majority of posted workers,[217] who do not want to have their insurance record split in short periods of insurance in different MS, and reduces the administrative burden for companies, which do not have to deal with different social security laws and national institutions. The available data shows that the majority of companies comply with the strict requirements established under the Coordination Regulation posting rule.[218] The proportion of posting that is fraudulent seems too low to justify a regulatory change that would be detrimental to the majority of workers, companies, national institutions and the internal market itself. Social security coordination regulations must protect the interests of temporarily posted workers, even if this could provide a competitive advantage for some companies. The maintenance of the social security legislation of the home MS and the social protection of posted workers is the main objective, as restated in the main proceedings of the European Court of Justice judgments on posting included in the chart annexed.

The European Court of Justice has reiterated in its rulings that the PDA1 has an indisputable binding effect for social security purposes, for institutions and courts of the host MS, preventing the simultaneous application of two or more national laws (a positive conflict rule), following the principles of uniqueness of the applicable legislation and its exclusive effect. Defining a uniquely competent jurisdiction is indispensable to avoid contradictory non-unifiable national judgments. This does not

[215] See the judgment of the French Criminal Court of Cassation issued the 12.1.2021, n° 17-82.553 FS-PBI that precisely decided the Criminal dispute in the main proceedings of *Bouygues*.

[216] The French Criminal Court of Cassation is finally following this principle, see judgment 2.3.2021 n° 19-80.991 commented by *Lhernould* [31]. See also the judgments of 12.1.2021, n° 18-86.709 FS-PBI and n° 18-86.757 FS-PBI.

[217] Those that fulfil the requirements and work temporarily abroad want continuity of their insurance record.

[218] In those MS where more data is made public (*e.g.*, Belgium, the Czech Republic and Germany…), more than 99.5% of the issued/received PDA1s were not withdrawn, so in principle they fulfilled the requirements for being issued.

imply mistrust of the objectivity and independence of any national court. Jurisdiction can only be assigned to the courts of the home MS, as the proceedings will involve, besides EU law, the application of national legislation of the home MS. Only the courts of the home MS can oblige the institution of that MS to invalidate or withdraw a PDA1.

The courts of the host MS might, however, under very strict requirements and in cases of proven fraud, disregard a PDA1 in order to prosecute companies involved in fraudulent posting, so as to impose sanctions or to claim civil liability. As mere social security coordination is necessarily based on sincere cooperation and mutual trust, the institutions of the host MS must fulfil the prerequisites of having promptly initiated the dialogue and conciliation procedure and having waited for the answer from the home MS for a reasonable period of time. Even when they can disregard a PDA1, the courts of the host MS can not change the applicable legislation or withdraw or invalidate a foreign PDA1.

The control and supervision of the issuing processes of PDA1s seem to have improved since the launch of AC Recommendation No A1 in 2018. Some home MS refuse to grant a PDA1 in a regular basis, sometimes even being more conservative than the Advocate General or even the European Court of Justice. Nevertheless, there is room for improvement. For instance, the European Labour Authority could make aleatory controls of the PDA1s issued by the MS. The ESSPASS project could also help achieve a more efficient control and supervision of PDA1s.

The Commission itself acknowledges the need to enhance procedures. In its proposal for amending the Coordination Regulations, it envisages, among other reforms, to set a prior information requirement of posting to the home MS (with some exceptions), to shorten the deadlines for dialogue and conciliation process, and to include this process in the Coordination Regulations so that it can be made legally binding. Unfortunately, the solution proposed by the Conciliation Board will still be a mere opinion. To "encourage" MS to accept the solution, the Commission might perhaps automatically open an investigation that could eventually result in an infringement proceeding against the "disobedient" MS. Mutual trust must be restored.

The institutions of host MS never challenge foreign PDA1s before the courts of home MS. We believe this is an anomaly that should be corrected, as it is the most logical step if the dialogue and conciliation process fails. Perhaps a disseminating work by the Administrative Commission or the European Labour Authority is necessary to facilitate its use. In any case, the withdrawal and invalidation of PDA1 must be expedited, and MS must reach agreements to protect the workers, that usually are not aware of their employers' fraudulent practices. Furthermore, there is need for a solution for third country nationals without authorisation to work in the host MS. If they lose their PDA1, they lose their insurance in the home MS and cannot be insured in the host MS.

In sum, we must protect posted workers but also the internal market and the freedom to provide services. In our view, the latter is not the cause of the problems, but part of the solution.

Annex

Table 4 Relevant European Court of Justice case-law (cases dealing with the binding effect of the PDA1 are in bold font)

Date	Case	Names	Judgment	Origin	Destination
05/12/1967	C-19/67	*van der Vecht*	ECLI:EU:C:1967:49	The Netherlands	Belgium
17/12/1970	C-35/70	*Manpower*	ECLI:EU:C:1970:120	France	Germany
10/02/2000	**C-202/97**	***FTS***	**ECLI:EU:C:2000:75**	**Ireland**	**The Netherlands**
30/03/2000	**C-178/97**	***Banks and Others***	**ECLI:EU:C:2000:169**	**United Kingdom**	**Belgium**
09/11/2000	C-404/98	*Plum*	ECLI:EU:C:2000:607	Netherlands	Germany
07/11/2002	C-333/00	*Maaheimo*	ECLI:EU:C:2002:641	Finland	Germany
26/01/2006	**C-2/05**	***Herbosch Kiere***	**ECLI:EU:C:2006:69**	**Ireland**	**Belgium**
09/09/2015	**C-72/14 & C-197/14**	***Joined cases X & Van Dijk***	**ECLI:EU:C:2015:564**	**The Netherlands**	**Luxembourg**
27/04/2017	**C-620/15**	***A-Rosa Flussschiff***	**ECLI:EU:C:2017:309**	**Switzerland**	**France**
24/10/2017	**C-474/16**	***Belu Dienstleistung and Nikless***	**ECLI:EU:C:2017:812**	**Germany**	**France**
06/02/2018	**C-359/16**	***Altun and Others***	**ECLI:EU:C:2018:63**	**Bulgaria**	**Belgium**
11/07/2018	**C-356/15**	***Commission v Belgium***	**ECLI:EU:C:2018:555**	**Belgium**	
06/09/2018	**C-527/16**	***Alpenrind and Others***	**ECLI:EU:C:2018:669**	**Hungary**	**Austria**
25/10/2018	C-451/17	*Walltopia*	ECLI:EU:C:2018:861	Bulgaria	United Kingdom
24/01/2019	C-477/17	*Balandin and Others*	ECLI:EU:C:2019:60	The Netherlands	Various MS
02/04/2020	**C-370/17 & C-37/18**	**Joined Cases *Vueling Airlines & CRPNPAC***	**ECLI:EU:C:2020:260**	**Spain**	**France**
14/05/2020	**C-17/19**	***Bouygues travaux publics and Others***	**ECLI:EU:C:2020:379**	**Romania & Poland**	**France**
03/06/2021	C-784/19	*Team Power Europe*	ECLI:EU:C:2021:427	Bulgaria	Germany
19/05/2022	**C-33/21**	***INAIL and INPS***	**ECLI:EU:C:2022:402**	**Ireland**	**Italy**
16/02/2023	**C-710/21**	***IEF Service***	**ECLI:EU:C:2023:109**	**Germany**	**Austria**
02/03/2023	**C-410/21 & C-661/21**	***DRV Intertrans & Verbraeken***	**ECLI:EU:C:2023:138**	**Estonia**	**Belgium**

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