POSTED WORKERS FROM AND TO SPAIN

FACTS AND FIGURES

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POSTING.STAT

Abstract

From a sending perspective, Spain is one of the Member States with the highest number of posted workers. In 2019, Spain was only surpassed by Germany and Poland. In 2020, however, there was a decrease (-31%) in the number of postings because of the health crisis caused by the COVID-19 pandemic.

From a receiving perspective, Spain is ranked eighth among all EU/EFTA countries. In 2020, 79,519 PDs A1 were issued for posting workers to Spain (mainly from Portugal and Germany). However, these social security data do not coincide with the data of the prior notifications tools available in the Autonomous Communities, which have been collected for the first time in Spain in the framework of the *POSTING.STAT* project.

This report provides information on the scale, characteristics, and impact of posting to and from Spain and includes statistics on postings between 2018 and 2020. It analyses the aforementioned posting prior notifications to the Autonomous Communities, and the PDs A1 issued by the Spanish social security administration, providing new information regarding the country of origin, economic sectors involved, activity and duration of postings, with a special focus on France as receiving Member State of posted workers from Spain.

The report also addresses irregular posting and presents data on the number of infringements sanctioned in Spain during the period 2018-2020, analysing some controversial cases such as the *Vueling* and *Terra Fecundis case.* Finally, it examines the implementation and impact of Directive 2014/67/EU and Directive (EU) 2018/957 in Spain.

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Executive summary

This report, carried out within the framework of the *POSTING.STAT* project, aims to **increase knowledge** about the posting of workers to and from Spain by exploring a variety of national **administrative micro-data** sources to provide information on the phenomenon. This report firstly gives an introduction to the **regulatory framework** of posting, both in the labour and social security field, including detailed statistics on posting in Spain between **2018 and 2020**, providing a qualitative analysis and evidence on the scale, characteristics, and the impact of posting to and from Spain. Particular attention is paid to postings from Spain to France and also to the impact of the COVID-19 pandemic. This report addresses irregular posting from the **receiving perspective**, including the scale and characteristics of the administrative infringements detected and the sanctions imposed in Spain, noting that there is no significant amount of litigation. From the **issuing point of view**, two relevant and controversial cases are analysed. The case law of the Court of Justice on fraud in Portable Documents A1 (PDs A1) focusing on the *Vueling* case, as well as the French criminal judgement that condemns, in the first instance, the Spanish temporary employment agency (TEA) *Terra Fecundis*, which operated in the French agricultural sector. Finally, the report concludes by analysing the impact of the transposition of Directive (EU) 2018/957 in Spain.

Spain is one of the **main sending Member States** of posted workers in the EU. In 2019, prior to the health and socio-economic crisis caused by the COVID-19 pandemic, it was ranked third among all EU/EFTA countries, only surpassed by Germany and Poland.

In general, the **availability of micro-data** on the posting of workers depends to a large extent on two conditions. The first is the fulfilment of the administrative obligations of companies when posting workers. The second is the existence of centralized national registers which collect and make available such information to the authorities, institutions, and other stakeholders.

From a **receiving perspective**, the Central Electronic Register foreseen since 2017 is not yet operational. Therefore, data on the number of posted workers sent to Spain can only be extracted from the notifications submitted in the 17 Autonomous Communities (AA.CC.). However, these data are not available without a particular request. For the first time, thanks to the help of the Ministry of Labour and Social Economy and the AA.CC., a representative sample of such data has been obtained for the period 2018-2020.

For **outgoing postings**, the only source of information are the PDs A1 issued by the Social Security General Fund (TGSS) which, as explained in this report, also have limitations. For the first time, and this thanks to the assistance of the TGSS, it was possible to extract more data from the PDs A1 on the characteristics of intra-EU posting from Spain, such as the sector of activity, the nationality of the posted workers and the duration of the postings.

In addition to the aforementioned case studies (*Vueling* and *Terra Fecundis*), in order to provide a reliable picture of irregular posting, access was gained to **rulings** issued by Spanish Courts and **data from the Internal Market Information System (IMI)** platform. Finally, thanks to the Labour and Social Security Inspectorate (ITSS) and specifically from the Special Unit for the Coordination of the Fight against Transnational Labour (*Unidad Especial de Coordinación de Lucha contra el Fraude en el Trabajo Transnacional*) data was obtained on the scale and type of **administrative infringements and sanctions** associated with posting. These data provide an overview of the inspections carried out in this area between 2018 and 2021.

Finally, based on legal analysis and interviews, evidence is provided on the **legal impact** in Spain of the Posting of Workers Directive amended by **Directive (EU) 2018/957**.

Summary of the main findings obtained

In 2020, roughly 173,000 PDs A1 were issued by Spain under Articles 12 and 13 of Regulation (EC) No 883/2004. This figure represents less than 1% of the country's total employed population. It should be noted, however, that between 2019 and 2020, there was a significant reduction in the number of postings due to the COVID-19 pandemic (-31%). It can be assumed that the geographical proximity to France and Portugal, the availability of companies and workers in labour-intensive sectors such as construction and transport (in which 60% of postings in 2020 took place), as well as the lower labour and social security costs, compared to the European average, are the main factors influencing the postings from Spain. Although the predominant intensive sectors are already mentioned, it is important not to lose sight of services, which represent 30% of postings. The postings carried out by temporary employment agencies (TEAs) represent 4%, and in the agricultural sector less than 1% of postings took place in 2020. The results obtained show that specific attention should be paid to the postings made by TEAs. In 2020, more than 14% of all workers posted from Spain to France were sent by this type of companies. Most of them to provide services as seasonal workers in the agricultural sector. Most of the posted workers sent from Spain in 2020 were Spanish (77%). This is followed by EU/EFTA nationals (12%). Third country nationals (TCNs) represent 11% and are mainly Moroccan, Ecuadorian, and British.

The analysis of PDs A1 issued by Spain shows that the number of posted workers with an A1 form (Art. 12 of Regulation (EC) No 883/2004) remained stable over the last five years, with an **annual growth rate** of 15%. However, it is striking that the PDs A1 issued under Art. 13, i.e., to provide services in two or more countries simultaneously or alternatively, have increased at a much higher rate. In 2015, approximately 34,515 PDs A1 were issued under Art. 13, while, in 2020 more than 91,322 were issued, which represents an increase of more than 180%.

Most of the outgoing postings from Spain do not exceed one month in **duration** (67%). Those lasting between one and three months represent 20% of the total, and those lasting more than three months, up to a maximum of 24 months represent 12%.

From the receiving perspective, as mentioned above, there is still no Central Electronic Register of postings. However, the available data from the prior notifications tools of the regions (AA.CC.) show that workers posted to Spain mainly come from Portugal, with construction and industry being the predominant sectors**.**

In 2020, according to the number of PDs A1, Spain was ranked eight among all receiving EU/EFTA countries of posted workers. However, if we compare the number of A1 forms (Art. 12) issued by other Member States to send workers to Spain with the number of notifications received by the AA.CC, there are significant differences: in 2020, only 30,664 postings were notified, although 79,519 PDs A1 were issued to posted workers sent to Spain. The explanation for this disparity can be found in the fact that these PDs A1 refer to workers posted on several occasions, although we are inclined to believe that the companies failed to comply with their duty to notify the posting and did not notify, as permitted, those postings lasting less than eight days. These circumstances make it difficult to know the real number of workers posted to Spain, which we believe is underestimated. The implementation of the **Central Electronic Register of Postings** is urgent and until it is operational it will be difficult to make progress in the control of this type of labour mobility and to report reliable data to the Commission and other stakeholders.

Based on the **notifications made to the AA.CC**., the number of incoming postings increased by 6% between 2018 and 2019 but decreased by 28% between 2019 and 2020. This reduction is explained by the crisis caused by the COVID-19 pandemic. The restrictions put in place by the Member States and the public health measures to combat the pandemic led to limitations on labour mobility, suspension of projects and, in many cases, the return of posted workers to their countries of origin.

The main Member States from which posted workers were sent to Spain in 2020 were Portugal (54%), Germany (13%), Italy (12%), France (8%), and Romania (5%). However, the nationality of these workers,

which can differ from the Sending Member State, also being non-EU nationals, is not known. Unfortunately, these data are not yet available for Spain.

Aragon (19%), País Vasco (18%), Madrid (15%) and Galicia (14%) were the territories to which most postings were reported in 2020. These four territories accounted for 66% of the total received postings. In a second group are Navarra, Comunidad Valenciana, Castilla-La Mancha, and Cataluña. These three territories accounted for 24% of the total received postings.

By **sector of activity**, construction (48%) and industry (26%) were the predominant sectors in which the posting companies sent posted workers to Spain. The service sector accounted for 16% of the total, while the agricultural sector accounted for less than 10%. Regarding this sectoral distribution two nuances should be made. First, the construction activities carried out by posted workers are sometimes contracted by local companies (final clients, intermediaries, or contractors) whose main activity is not construction. Second, a significant number of client companies contract activities that require the posting of workers to carry out **installation and/or maintenance work on machinery**. However, some AA.CC. consider them indistinctly (without well-defined criteria) as activities carried out in the construction sector, the industrial sector, or the service sector.

The **duration of postings of workers to Spain** during 2020 was, in most cases, between one and six months (68%). Only 12% of postings were for more than six months, with postings of more than 12 months being negligible, accounting for only 5% of the total.

In relation to irregular posting in Spain, there are difficulties in conceptualizing and controlling it. There is currently no agreed legal concept of **irregular posting** in Spain. In this national report it is understood as postings in which formal or substantive requirements established in the regulatory framework (labour and/or social security) are not complied with. It must be acknowledged, however, that analysing it on the basis of existing data on detected infringements has its limitations, as there are undeclared postings.

Two situations support the idea of the **low importance of (the fight against) irregular posting in Spain**. On the one hand, the low activity of the Labour Inspectorates in this area, the low participation in Spain's IMI system and the low litigation rate between 2008 and 2021. For instance, inspections specifically aimed at posted workers only accounted for 0.3% of the total number of inspections carried out by the Spanish Inspectorate. Moreover, few **judgments** on posting to and from Spain were identified (22 using a longer time period than 2018-2020). On the other hand, there is no Supreme Court case law, and no preliminary rulings have been referred to the CJEU. In these few judgments, Portugal is the main country of origin of postings to Spain, while the main destination Member States are France and Portugal. Construction is the main sector targeted by most judgments. In some cases, the claims are related to accidents at work suffered by posted workers, while in most cases the Spanish Labour Inspectorate has played a relevant role in identifying non-compliance or fraud.

Although detected irregular posting might be limited in Spain, it is certain that a significant number of **non-compliances escape the control** of the Spanish inspection services. Indeed, the figures provided here could be just the tip of the iceberg. Between 2018 and 2020, 1,543 inspections were carried out to control compliance with labour and social security obligations of workers posted to Spain. These inspections resulted in the imposition of 315 sanctions. The **infringement rate** was over 20%, which means that in more than one out of five inspections, a non-compliance was detected resulting in the imposition of a fine. Of all the sanctions, 30% were imposed on companies established in Portugal and 20% on companies established in Spain. Of the number of workers affected, 40% of sanctions were imposed on companies established in Romania. By sector of activity and number of infringements, industry (including construction and related activities as the most important sub-sector) accounted for 53% of the sanctions, the agricultural sector for 25% and the service sector for the remaining 22%.

The ***Vueling*** **judgment** (joint cases C-370/17 and C-37/18) concerns PDs A1 considered fraudulent by the French administration. This judgment and subsequent rulings of the Court analyse in more detail the

requirements for disregarding these documents, normally in a sanctioning procedure. However, as the study points out, this doctrine does not support a change in the applicable social security legislation. On the other hand, the report brings us closer to the phenomenon of transnational agricultural work and its problems. In addition, it analyses in depth the first criminal judgement on the TEA ***Terra Fecundis***, which together with its administrators was convicted for "disguised work" and "labour trafficking". This judgement describes the growing activity of this company, which posted seasonal workers, most of whom were TCNs of Ecuadorian origin (with work and residence permits in Spain, where they were hired) to hundreds of French agricultural companies. The judgement considers that the Spanish TEA was a letterbox company and deems it proven that they did not provide services in Spain. Therefore, the PDs A1 are regarded as fraudulent and the judgement does not take them into account.

Finally, on the **transposition of the Posting of Workers Directives** in Spain and the impact of the latest amendment by Directive (EU) 2018/957, the following conclusions are reached. The three Directives regulating the posting of workers have been **correctly transposed** into Spanish law. The Spanish rules have never been challenged by the Commission, nor have they been brought before the CJEU. The impact of the transposition of Directive (EU) 2018/957 has been limited, mainly because many of the new rules were already applicable before its adoption. This was the case, for example, regarding one of the most controversial issues: remuneration as a form of payment for posted workers to Spain. However, there is, for example, a need for greater specificity regarding the rules for calculating the time limits for identifying a long-term posting. It also seems necessary to establish specific rules for certain sectors where the posting of workers to Spain is recurrent and where they are more susceptible to unequal treatment and unfair competition, namely in the agricultural and construction sectors. The international road transport sector has already been subject to an *ad-hoc* regulation at EU level, which has been satisfactorily transposed to Spain in 2022.

From a legal perspective, as noted above, it can be said that posting in Spain is not a highly conflicting issue and has not been the subject of much litigation. A good example is that there is no Supreme Court case law on the application of Law 45/1999 and very little judicial doctrine. The correct application of posting regulations in Spain has been facilitated by the collective bargaining system, which allows for the *erga omnes* application of collective agreements and, recently, by a labour reform approved at the end of 2021 that avoids the priority application of the company collective agreement in remuneration matters.

The **official Spanish website on posting of workers**, created following the Enforcement Directive (Directive 2014/67/EU) provides information in Spanish, English, French and German on legislation, working conditions applicable to comply with the provisions of Spanish labour and social security law and other legislation. It also includes links to existing websites and other contact points, in particular the social partners' website and access to sources of collective agreements (REGCON) and arbitration awards applicable to posted workers. Although it generally complies with the requirements of the Directive, the Spanish website lacks information on how to notify that the company intends to delay the consideration of a long-term posting for a few months (up to six) after the end of the year of posting in Spain. Unfortunately, there are no public data or official statistics available on the number of motivated notifications submitted so far, nor on the type of notifying company.

Resumen ejecutivo

Este informe, elaborado en el marco del proyecto *POSTING.STAT*, tiene como objetivo **aumentar el conocimiento** sobre el desplazamiento de trabajadores desde y hacia España, explorando diversas fuentes de **datos administrativos** a nivel nacional y proporcionando información, desconocida hasta ahora, en relación con el fenómeno. En este trabajo, tras una introducción al **marco regulador** del desplazamiento, tanto laboral como de seguridad social, se aportan estadísticas detalladas sobre el desplazamiento en España entre los años 2018 y 2020, aportando un análisis cualitativo y evidencias sobre el volumen, las características y el impacto del desplazamiento desde y hacia España. Especialmente se presta atención a los desplazamientos efectuados con destino a Francia y también al impacto de la pandemia del COVID-19. El informe aborda asimismo el desplazamiento irregular desde el **punto de vista receptor** aproximándose a la magnitud y características de las infracciones administrativas detectadas y las sanciones impuestas en España. Desde el **punto de vista emisor** se realiza un análisis de dos casos relevantes y polémicos. Por un lado, la jurisprudencia del Tribunal de Justicia sobre el fraude en los Documentos Portátiles A1 (DPs A1) enfocando en el asunto *Vueling,* así como la sentencia penal francesa que condena, en primera instancia, a la ETT española *Terra Fecundis* que operaba en el sector agrícola francés. Finalmente, el informe termina analizando el impacto de la transposición de la Directiva (UE) 2018/957 en España.

España es uno de los **principales Estados miembros emisores** de trabajadores desplazados en la UE. En 2019, con anterioridad a la crisis sanitaria y socioeconómica provocada por el COVID-19, ocupaba el tercer lugar en el ranking de los países del EEE, solo superado por Alemania y Polonia. Desde la perspectiva de país receptor, en 2020 España era el octavo país receptor de trabajadores desplazados en su territorio.

Con carácter general, la **disponibilidad de datos** sobre el desplazamiento de trabajadores depende en gran medida de dos condiciones. La primera, del cumplimiento de las obligaciones administrativas que tienen las empresas cuando desplazan trabajadores. La segunda, de la existencia de registros nacionales centralizados que recojan y pongan a disposición de las autoridades y personas interesadas tal información.

Desde el **punto de vista receptor**, a escala nacional, todavía no está operativo el Registro Electrónico Central previsto normativamente desde el año 2017. De manera que los datos sobre el número de personas desplazadas a España solo pueden extraerse de las notificaciones presentadas en las 17 Comunidades Autónomas (CC.AA). Ahora bien, estos datos no son accesibles sin una petición expresa a cada una de ellas y no se tiene constancia de los desplazamientos inferiores a 8 días debido a que estos no han de ser comunicados. Por primera vez se ha conseguido, gracias a la ayuda del Ministerio de Trabajo y Economía Social y de las propias CC.AA. una muestra representativa de tales datos en el período 2018-2020.

Desde el **punto de vista emisor**, para los desplazamientos salientes, la única fuente de información son los certificados A1 expedidos por la Tesorería General de la Seguridad Social (TGSS) que, como se explica en este informe, también presentan sus limitaciones. No obstante, por primera vez, este informe ha conseguido, gracias a la ayuda de la Administración de Seguridad Social española, extraer de los PDs A1 más datos sobre las características del desplazamiento intracomunitario desde España, tales como el sector empresarial involucrado, la nacionalidad de los trabajadores desplazados o la duración de los desplazamientos.

Además de los **casos de estudio** mencionados (*Vueling* y *Terra Fecundis*), para poder ofrecer una visión fidedigna del desplazamiento irregular se accedió a las sentencias emitidas por Juzgados y Tribunales españoles y a los datos de la plataforma IMI. Finalmente, gracias a la Inspección de Trabajo y de Seguridad Social (ITSS) y concretamente de la Unidad Especial de Coordinación sobre Lucha contra el Fraude en el Trabajo Trasnacional, se consiguieron datos sobre el volumen y tipo **de infracciones administrativas y sanciones** asociadas con el desplazamiento. Estos datos proporcionan una visión general del resultado de las inspecciones realizadas en esta materia entre los años 2018 y 2021.

Por último, sobre la base de un análisis jurídico y de las entrevistas realizadas, se aportan evidencias sobre el impacto legal en España de la Directiva sobre el desplazamiento de trabajadores, modificada por la Directiva (UE) 2018/957. A continuación, se presentan algunas de las principales evidencias obtenidas:

El número de trabajadores desplazados desde España a otros Estados miembros de la UE en el año 2020 ascendió a 173.184, una cifra que representa menos del 1% del total de la población ocupada del país. Hay que tener en cuenta, no obstante, que entre 2019 y 2020, se produjo una reducción significativa del número de desplazamientos debido a la pandemia causada por la pandemia de COVID-19 (-31%). Puede anticiparse que la proximidad geográfica con Francia y Portugal, la disponibilidad de empresas y trabajadores en sectores intensivos en mano de obra como la construcción y el transporte (que absorbieron el 60% de los desplazamientos en 2020), así como el menor coste laboral y de Seguridad Social en comparación con la media europea (22,80 €/hora), son los principales factores que inciden en el desplazamiento de trabajadores con origen en España. Aunque ya hemos señalado los sectores predominantes, también hay que mencionar el sector servicios y actividades auxiliares, que representan un 30%, los desplazamientos efectuados por Empresas de Trabajo Temporal (ETTs) un 4% y el sector agrícola menos del 1%. La nacionalidad mayoritaria de los trabajadores desplazados desde España en 2020 es la española (77%). Le siguen los nacionales de países miembros de la UE/AELC (12%). Por su parte, los Nacionales de Terceros Países (NTPs) representan un 11% del total y son principalmente marroquíes, ecuatorianos y británicos.

Del análisis de los DPs A1 expedidos en España se concluye que el número de trabajadores desplazados con un certificado A1 (art. 12 del Reglamento (CE) n. 883/2004) se ha mantenido estable en los últimos 5 años y con una **tasa de crecimiento anual** del 15%. Sin embargo, llama la atención que los DPs A1 expedidos al amparo del art. 13, es decir, para prestar servicios normalmente en dos o más países de forma simultánea o alterna, han aumentado a un ritmo mucho mayor: en 2015 se emitieron 34.515 certificados A1, sin embargo, en 2020 se expidieron más de 91.322, lo que representa un incremento superior al 180%.

La mayoría de los desplazamientos efectuados desde España no supera un mes de **duración** (67%). Aquellos con duración entre uno y tres meses representan un 20% del total y los superiores a tres meses hasta un máximo de veinticuatro, apenas representan un 12%.

Desde el punto de vista receptor, como ya se apuntaba, no existe todavía un Registro Electrónico Central de los desplazamientos, no obstante, de los datos recopilados de los organismos competentes de las CC.AA. se evidencia que en España se reciben trabajadores desplazados, sobre todo, de Portugal, siendo la construcción y la industria los sectores predominantes**.**

Considerando los certificados A1, España ocupaba en el año 2020 el octavo lugar en el ranking de los países de la UE/AELC que más trabajadores desplazados recibieron en su territorio. Ahora bien, si comparamos el número de DPs A1 (art. 12) expedidos por otros Estados para enviar trabajadores a España con las notificaciones recibidas por las Comunidades Autónomas observamos diferencias significativas: en 2020 solo se notificaron 30.664 desplazamientos, sin embargo, se expidieron 79.519 DPs A1 con destino a España. La explicación a esta disparidad puede encontrarse en que estos certificados A1 se refieren a trabajadores desplazados en varias ocasiones, aunque nos inclinamos por un incumplimiento por parte de las empresas del deber de notificar el desplazamiento y por la no notificación, permitida, de aquellos desplazamientos de duración inferior a 8 días. Estas circunstancias dificultan conocer el número real de trabajadores desplazados a España que, entendemos, está subestimado. La puesta en marcha del **Registro Electrónico Central de los desplazamientos** resulta urgente y hasta que no sea operativo será difícil avanzar en el control de este tipo de movilidad laboral y reportar datos fidedignos a la Comisión y a otras partes interesadas.

Partiendo de las comunicaciones efectuadas a las CC.AA. se observa que el número de desplazamientos aumentó entre 2018 y 2019 un 6%, pero disminuyó en un -28% entre los años 2019 y 2020. **Esta reducción se explica por la crisis provocada por el COVID-19:** las restricciones establecidas por los Estados miembros y las medidas de salud pública instauradas en las fronteras para combatir la pandemia supusieron

limitaciones a la movilidad laboral, la suspensión de proyectos y, en muchos casos, la repatriación de los trabajadores desplazados a sus países de origen.

Los principales Estados miembros de origen desde los que se desplazaron trabajadores a España en 2020 fueron: Portugal (54%), Alemania (13%), Italia (12%), Francia (8%) y Rumanía (5%). No obstante, se desconoce la nacionalidad de estos trabajadores que pueden tener nacionalidades diversas, e incluso ser extracomunitarios. Esos datos no están todavía disponibles en España.

Aragón (19%), País Vasco (18%), Madrid (15%) y Galicia (14%) fueron los **territorios a los que más desplazamientos se notificaron** durante el año 2020. Entre las cuatro sumaron el 66% del total. En un segundo grupo, se encuentran Navarra, Comunidad Valenciana, Castilla-La Mancha y Cataluña: entre las tres sumaron el 24%.

Por **sectores de actividad**, la construcción (48%) y la industria (26%) fueron las actividades predominantes en las que prestaron servicios las empresas que desplazaron trabajadores a España. El sector servicios representó el 16% del total y el sector agrícola no llegó al 10%. Sobre esta distribución sectorial conviene hacer las siguientes matizaciones: la primera es que las actividades de construcción realizadas por trabajadores desplazados son, en ocasiones, contratadas por empresas locales (clientes finales, intermediarias o contratistas) cuya actividad principal no es la construcción. La segunda es que un buen número de empresas clientes contratan actividades que requieren el desplazamiento de trabajadores para realizar **trabajos de instalación y/o mantenimiento de maquinaria**, sin embargo, algunas CC.AA. las consideran indistintamente (sin un criterio bien definido) como actividades desarrolladas en el sector de la construcción, el sector industrial o el sector servicios.

La **duración de los desplazamientos** con destino a España durante 2020 fue, en la gran mayoría de los casos, de entre uno y seis meses (68%). Solo el 12% de los desplazamientos se extendieron durante más de seis meses, siendo testimoniales los superiores a doce meses: apenas un 5% del total.

En relación con el desplazamiento irregular en España, existen dificultades para conceptualizarlo y controlarlo. Actualmente no hay en España un concepto legal y consensuado sobre el **desplazamiento irregular**. En este informe nacional se entiende como tal el desplazamiento en el que se incumplen requisitos formales o de fondo establecidos en el marco normativo del desplazamiento (laboral y/o de seguridad social). Hay que reconocer en cualquier caso que analizarlo a partir de los datos existentes sobre infracciones detectadas tiene limitaciones al existir desplazamientos no declarados.

Abona la idea de una **escasa importancia del desplazamiento irregular** en España dos situaciones: por un lado, la baja actividad de las Inspección de Trabajo en esta materia, la escasa participación en el sistema IMI de España y la baja litigiosidad entre los años 2008 y 2021: en este periodo se han localizado pocas sentencias sobre desplazamiento desde y hacia España (22 utilizando un período de tiempo más amplio que el de 2018-2020). Además, no existe jurisprudencia del Tribunal Supremo y no se ha planteado ninguna cuestión prejudicial ante el TJUE. En estas escasas sentencias, Portugal es el principal país de origen del desplazamiento a España, mientras que los principales Estados de destino son Francia y, en segundo lugar, Portugal. La construcción es el principal sector al que se dirigen la gran mayoría de las sentencias. En algunos casos, las demandas están relacionada con accidentes laborales sufridos por trabajadores desplazados, mientras que en la mayoría de los casos la Inspección de Trabajo española ha jugado un papel relevante en la identificación de incumplimientos o fraudes.

Con total seguridad, un **número significativo de incumplimientos** escapan al control de los servicios de inspección en España. En efecto, las cifras que aquí se aportan podrían ser solo la punta del *iceberg*. Entre 2018 y 2020 se llevaron a cabo 1.543 inspecciones para controlar el cumplimiento de obligaciones laborales y de seguridad social de trabajadores desplazados a España. Estas actuaciones dieron lugar a la imposición 315 sanciones. La tasa de infracción fue superior al 20%, lo que supone que, en una de cada cinco actuaciones, se detectó algún incumplimiento que dio lugar a la imposición de una multa. Un 30% de las sanciones se impuso a empresas establecidas en Portugal y un 20% a empresas establecidas en España. Por número de trabajadores afectados, sin embargo, el 40% del total de sanciones fue impuesto a empresas

establecidas en Rumanía. Por sectores de actividad y número de infracciones, el sector secundario (con la construcción y sus actividades afines como subsector más protagonista) aglutinó el 53% de las sanciones; el sector agrario el 25% y el sector servicios el restante 22%.

La sentencia *Vueling* (asuntos acumulados C-370/17 y C-37/18) se refiere a DPs A1 considerados fraudulentos por la Administración francesa. En esta sentencia y en pronunciamientos posteriores del Tribunal se analizan con más detalle los requisitos necesarios para no considerar estos documentos, normalmente en un procedimiento sancionador. No obstante, como el estudio señala, esta doctrina no avala el cambio de legislación de Seguridad Social aplicable. Por otro lado, este informe nacional se aproxima al **fenómeno del trabajo agrícola transnacional y su problemática**. Además, analiza en profundidad, la primera sentencia penal sobre la ETT *Terra Fecundis* que fue condenada y también sus administradores por "trabajo encubierto" y "tráfico de mano de obra". Esta sentencia describe la creciente actividad de esta empresa que desplazaba temporeros, en su mayoría, NTPs de origen ecuatoriano (con autorización de trabajo y residencia en España donde eran contratados) a cientos de empresas usuarias agrícolas francesas. La sentencia considera que la ETT española era una empresa buzón y considera acreditado que muchos no prestaron servicios en España, por lo que considera los certificados A1 fraudulentos y no los tiene en cuenta.

Finalmente, en relación con la **transposición de las Directivas sobre desplazamiento de trabajadores** en España y el impacto de la última modificación operada por la Directiva (UE) 2018/957 se alcanzan las siguientes conclusiones:

Las tres directivas que regulan el desplazamiento de trabajadores han sido **incorporadas correctamente** al ordenamiento español, la normativa española nunca ha sido cuestionada por la Comisión, ni llevada ante el TJUE. El impacto de la transposición de la Directiva (UE) 2018/957 ha sido limitado; principalmente porque muchas de las nuevas reglas ya eran aplicables antes de su aprobación. Así sucedía, por ejemplo, respecto de una de las cuestiones más controvertidas: la remuneración como forma de retribución de los trabajadores desplazados a España. Ahora bien, se echa en falta, por ejemplo, mayor concreción respecto de las normas de cómputo de los plazos para identificar un desplazamiento de larga duración. También parece necesario el establecimiento de reglas específicas para determinados sectores donde el desplazamiento de trabajadores a España es recurrente y son más susceptibles a la desigualdad de trato y a la competencia desleal: el sector agroalimentario y el de la construcción. El sector del transporte internacional por carretera ya fue objeto de una regulación *ad-hoc* a nivel comunitario cuya transposición se ha llevado a cabo en 2022 de forma satisfactoria. **Desde una perspectiva puramente jurídica** puede decirse que el desplazamiento en España no es una cuestión muy conflictiva y no ha sido objeto de una elevada litigiosidad. Un buen ejemplo es que no existe jurisprudencia del Tribunal Supremo sobre la aplicación de la Ley 45/1999 y una muy escasa doctrina judicial. La correcta aplicación de la normativa sobre desplazamiento en España se ha visto facilitada por el sistema de negociación colectiva, que permite la aplicación *erga omnes* de los convenios estatutarios y, recientemente, por una reforma laboral aprobada a finales de 2021 que impide la aplicación prioritaria del convenio colectivo de empresa en materia salarial.

El **sitio web oficial español sobre desplazamiento** de trabajadores, creado a raíz de la Directiva *Enforcement* (2014/67/UE) proporciona información en español, inglés, francés y alemán sobre la legislación, las condiciones de trabajo aplicables para cumplir con las disposiciones de la legislación laboral y de seguridad social española y con otra legislación relacionada con el desplazamiento de trabajadores. Incluye también enlaces a los sitios web existentes y otros puntos de contacto, en particular, al de los interlocutores sociales el acceso a fuentes de consulta de convenios colectivos (REGCON) y laudos arbitrales aplicables a los trabajadores desplazados. Aunque con carácter general, cumple con los requerimientos de la mencionada Directiva, se echa en falta en la web española información sobre cómo ha de notificarse que la empresa pretende demorar la consideración de un desplazamiento de larga duración unos meses (hasta seis) después de haberse cumplido el año de desplazamiento en España. Tampoco se disponen de datos públicos ni de estadísticas oficiales sobre el número de notificaciones motivadas presentadas hasta el momento, ni del tipo de empresa notificadora, lo que unido a la inexistencia del Registro Electrónico Central dificulta el control del desplazamiento de trabajadores en España y su control por parte de la Inspección de Trabajo.

1. Introduction

One of the issues that politicians, scholars, professionals, social partners and others stakeholders have to deal with when they analyse the posting of workers to and from Spain is the lack of official data that would allow them to understand the volume, characteristics and impact of this phenomenon. From the point of view of the reception of posted workers, the Spanish case is remarkable because there are no official and centralised public data on the number of persons posted to Spain in the framework of a transnational provision of services[1].

One of the reasons for this situation is the non-existence of a central register that compiles and makes available to interested persons or institutions the notifications that companies make to one of Spain´s 17 Autonomous Communities (Spanish regions) when they send posted workers to this country. Although the posting must be notified to the labour authority of the territory where the company provides its services, these notifications are not subsequently sent to a central national register to be processed and made available to any interested person or institution. Despite the fact that this obligation is established in Spanish legislation as a result of the transposition of Art. 9.1 of Directive 2014/67/EU, there is still no protocol to unify these data at national level, nor a common and public database, which leads to a lack of information in this regard.

Recognising this situation, fieldwork was carried out in the framework of the POSTING.STAT project[2] to collect data on the **number of posted workers sent to Spain in the framework of** a transnational provision of services between 2018 and 2020. These data have been obtained, for the first time, from most of the labour authorities of the Autonomous Communities[3] which, at the request of the Ministry of Labour and Social Inclusion, provided this information directly to the authors of this report[4]. In that regard, this data collection and thus this report adds value to the data already available at EU level.

The information received has been harmonised and included in a database for analysis. This is one of the main highlights of this report in relation to the previous situation described. These notifications provide valuable information and their availability is a significant step forward. However, they do have limitations as they do not allow to know the exact number of persons actually posted to Spain, among other reasons, because there is no information on non-notified postings and because of the lack of response from the Communities mentioned, which may lead to the figures being underestimated. On the other hand, in some other cases they may be overestimated because it cannot be ruled out that the same persons may have been posted to several Autonomous Communities, as a notification is required by the Spanish law on posting when services are provided in the territory of different regions (Law 45/1999, Art. 5.1)[5].

From a sending perspective, the only source that allows us to obtain centralised data about posted workers are the Portable Documents A1 (PDs A1) issued by the Spanish Social Security Administration, specifically by the *Tesorería General de la Seguridad Social* (TGSS), which is the body responsible for issuing these forms

1 See the report *Posting of workers, collection of data from the prior notification tools, reference year 2019* (De Wispelaere, De Smedt, & Pacolet, 2021) where no quantitative data are reported by/for Spain in terms of number of notifications, postings, and posted workers. Available at: https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8416&furtherPubs=yes.

2 The results obtained and the quantitative and qualitative information provided in this report are the result of research carried out in the framework of the European POSTING.STAT project (reference VS/2020/00499) which brings together a consortium of universities and research centres from ten different Member States, supported by several European social partner organisations and public authorities. The geographical scope of the project covers the six main 'sending' Member States (Germany, Poland, Italy, Spain, Slovenia, and Luxembourg) and the six main 'receiving' Member States (Germany, France, Belgium, Austria, the Netherlands, and Luxembourg) of posted workers.

3 Only Andalusia, Castile and Leon, Murcia, and the Canary Islands declined to provide data for various reasons (see *section* 2.2).

4 We would like to thank to Verónica Martinez Barbero (General Director of the Directorate General for Labour) and Juan Manuel Gutiérrez, who carried out a data request to the Autonomous Communities.

5 "(...) the employer who posts workers to Spain in the framework of a transnational provision of services must notify the posting to the competent Spanish labour authority before it begins and regardless of its duration and of the territory where the services are to be provided."

when a worker is posted to another Member State to temporarily provide services. This source of information is the most widely used data source to measure the phenomenon of posting of workers, although it only approximates the number of posted workers. Indeed, there are important limitations. For instance, the number of PDs A1 issued under Art. 12.1 and 13.1 of Regulation (EC) Nº 883/2004 (BR) is not necessarily equal to the number of posted workers (see *section 1.2*). In order to issue a PD A1 correctly, the issuing administration increasingly requires more information on the worker concerned and the company posting him/her. The TGSS has made a significant effort to provide some of these available data[6], although we consider that they are still insufficient to understand the situation in depth.

What does this report offer from the sending perspective? It includes data on the scale, evolution, origin, sector of activity, average duration, and other information on the current situation and characteristics of the posting of workers from Spain and, in greater detail, for postings to France, which is the Member State to which most posted workers from Spain are sent to (30% of the total). Considering the period analysed (2018-2020), this report also presents the impact of the COVID-19 pandemic on this type of labour mobility associated with a transnational provision of services.

In addition to the research about posting of workers in Spain and the analysis of the transposition of Directive (EU) 2018/957, the focus is on the phenomenon of irregular and undeclared posting, as well as the fight against transnational labour fraud, and data on the administrative sanctions imposed by the Spanish authorities on companies that posted workers to Spain are provided. In that part of the report (see *Chapter 3*) information on the problems detected from a sending perspective is presented as well, i.e., workers posted from Spain, especially to France, and some specific and highly controversial cases (*Terra Fecundis*) are analysed. We would like to thank the Spanish Labour Inspectorate, specifically from the *Unidad Especial de Coordinación Sobre Lucha Contra el Fraude en el Trabajo Transnacional* for their cooperation[7].

1.1 Objectives, research questions and methodology

One of the objectives of this report is to contribute to a better interpretation of the phenomenon of the posting of workers in Spain by obtaining and analysing administrative microdata. The report provides data that were not available until now and qualitatively expands the information. This information will enable researchers, scholars, politicians, social partners and any other stakeholders to draw conclusions on the state of play and make informed decisions. The results obtained have been integrated into a common database that aims to explore in depth the situation of the posting of workers in the coming years, looking at the effects of the legislation adopted by the transposition of Directive 2014/67/EU and Directive (EU) 2018/957, as well as its quantitative and qualitative impact at macro-level. In this regard, it should be noted that, as Directive (EU) 2018/957 points out, it is of utmost importance to have sufficient and accurate statistical data in the field of posted workers, "in particular with regard to the number of posted workers in specific employment sectors and per Member State". The lack of statistical information has been hampering the possibilities of gaining in depth knowledge of the economic, social and sectoral effects of the posting of workers, as well as of the effectiveness and results of the legislation adopted. This report contributes to improving this situation.

The main **research questions** that have shaped the Spanish report are:

- What is the regulatory framework for the posting of workers in the EU?
- What are the characteristics, the scale, and the impact of intra-EU posting to and from Spain, especially in connection to France?
- What is the impact of the COVID-19 pandemic on intra-EU posting to and from Spain?

6 We would like to thank to Matilde Vivancos Pelegrín, Vicente Álvarez Ferruelo, and Concepción Calle Mendoza for their help.

7 We would like to thank Manuel Velazquez, Sergio Bescos and Juan Pablo Parra, who assisted us on this point and provided the required data.

- What are the characteristics and the scale of infringements related to intra-EU posting in Spain?
- What is the impact of the amended Posting of Workers Directive (Directive (EU) 2018/957 amending Directive 96/71/EC) on intra-EU posting to and from Spain?

In order to answer these questions, a mixed **research methodology** (qualitative and quantitative) has been used to deliver results from an interdisciplinary perspective. We have followed these four phases:

1) Interrelated analysis of law related with the posting of workers, including all the Spanish transposition regulations of Directive 96/71/EC, Directive 2014/67/EU, and Directive (EU) 2018/957.

2) Data collection and examination of PDs A1 issued by the TGSS between 2018 and 2020 with details about the worker´s nationality, economic activity carried out by the companies that posted them, and the length of the postings. There are some limitations about this source of information. First, it is considered that there are many more PDs A1 (Art. 12) than posted workers because the same worker may be posted several times a year with a different PD A1 (De Wispelaere, De Smedt, & Pacolet, 2020: 41). For this reason, a corrective/reductive percentage is applied in the understanding that, on average, a worker is posted 1.7 times per year[8]. Secondly, in many cases, PDs A1 may not be for the provision of services, but simply for business trips, for which this type of form is also currently issued[9]. The third limitation is that not all posted workers have a PD A1, as there are postings that have not been declared for Social Security purposes. Sometimes PDs A1 only are requested by employers in the event of problems with inspections of the host Member State, as is still permitted by the Coordination Regulations, in line with the case law of the CJEU, which gives them retroactive effect[10]. However, this has been countered by the decision of some Member States such as France or Austria to penalise companies whose posted workers do not have a PD A1 (De Wispelaere, De Smedt & Pacolet, 2020: 16). This is a controversial practice, which has led employers posting to these Member States to apply for certificates in advance of their departure (as recommended by Art. 15.1 of Regulation (EC) nº 987/2009), for fear of heavy fines. Considering this practice, the number of PDs A1 could depend on the intensity of the inspections carried out by the receiving Member State. Finally, it is also possible that in the case of a posting exceeding 24 months, if there is no agreement between institutions to maintain the contribution at the Member State of origin (Art. 16 BR), the posted worker starts to pay contributions at the destination Member State and the PD A1 is no longer issued as it stops making sense (De Wispelaere, De Smedt & Pacolet, 2020: 13-15).

3) Data collection and examination of the prior notification made by companies to the labour authorities of the Autonomous Communities to post workers to Spain between 2018 and 2020. These data can be cross-checked with the information available from the PDs A1 issued in the Member States of origin to Spain, allowing for a more in-depth analysis of the characteristics of the postings and a comparison of these figures with the communications made through the prior notification tools. However, once again, there may be limitations to comply with this obligation, resulting in figures that are lower than the actual ones. In this regard, some authors consider data about posting between EU countries to be underestimated, mainly due to the failure to report a posting to the appropriate institutions in the host Member State[11]. On the other hand, there could also be an excess of notifications due to the posting of

8 This percentage is not constant across all Member States, with the PD A1 issued by Luxembourg and Slovenia being considered to involve only around 30% of workers. However, the number of PDs A1 and posted workers is understood to be almost identical in Iceland, Latvia, Norway, Czech Republic, and Sweden (De Wispelaere, De Smedt, & Pacolet, 2020: 33).

9 According to the Interim Agreement reached by Parliament, Council and Commission in March 2019, in relation to the proposal for reform of the Regulations, business travel is defined as follows, precisely exempting the issuance of PD A1 in such cases: "short-term temporary work activity organized on a short-term basis, or other temporary activity related to the employer's business interests and which does not include the provision of services or the delivery of goods, such as attending internal and external business meetings, attending conferences and seminars, negotiating business agreements, exploring business opportunities or attending and receiving training" proposed amendment to Regulation No 987/2009 Art. 1.2.e.b). https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf

10 See CJEU case of 6-4-18 *Alpenrind* C-527/16 (ECLI:EU:C:2018:669), paragraphs 70 and 77 where such retroactive dispatch is admitted even after the posting has ended or if the host administration has decided to insure the posted persons under its own social security system.

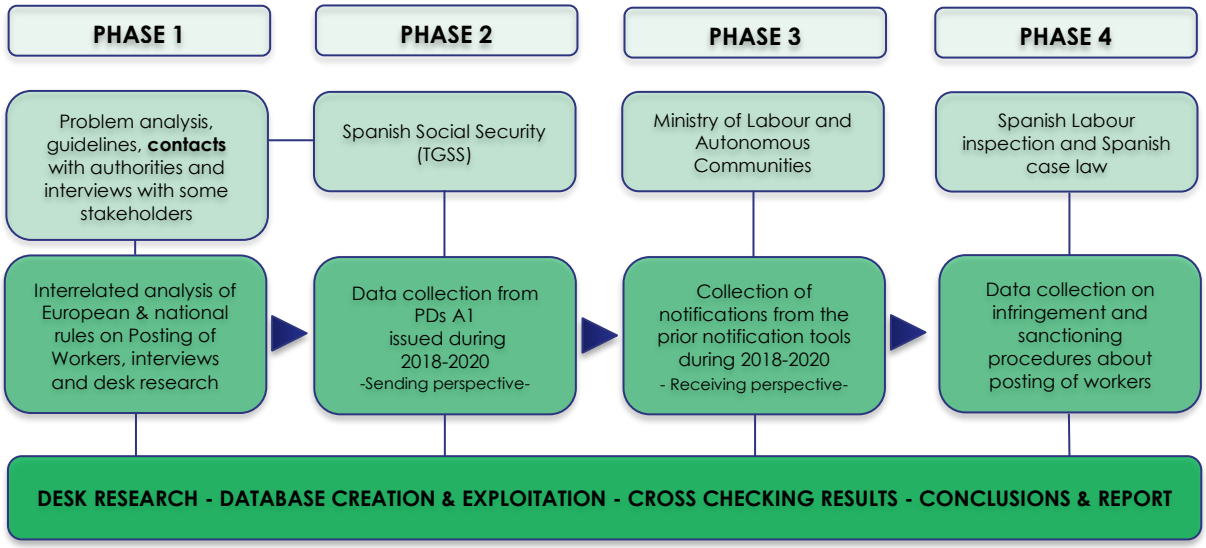
11 See, Contreras, 2020a. Lens, Mussche & Marx, 2019.

the same worker to several Communities, which may in some cases multiply the number of postings counted.

4) Data collection and analysis of infringement and sanction procedures related to the posting of workers to Spain carried out by the Labour and Social Security Inspectation during the period 2018-2021.

These phases were complemented with documentary research on case studies, with the discussions of some issues within the framework of events such as the MoveS Congress held at ICADE in September 2021[12], and also with interviews with competent institutions, experts and other stakeholders related to posting. Our analysis considers Spain as a sender of posted workers but also as a receiver of workers posted by companies established in other EU and European Free Trade Association (EFTA) Member States[13]. The report focuses more on the sending perspective, as it is the main one in Spain. Among the Member States of destination, the focus is on France, a Member State with which there are several controversies associated with irregular postings that deserve to be analysed. The period under review (2018-2021) allows us to assess the impact of the COVID-19 pandemic on the posting of workers. It also seems the optimal time to observe regulatory changes in the regulatory framework of EU law and their impact on national regulation.

Figure 1. Summary of research phases followed during the development of the project



1.2 Regulatory framework of intra-EU posting of workers

The regulation of the posting of workers in the framework of the provision of service is governed by two types of EU law with different purposes and effects: the Social Security Coordination Regulations, in force since the late 1950s, and the Posting Directives, dealing with labour aspects since the mid-1990s.

Coordination Regulations are rules of **international public law** based on the free movement of workers that allow the **applicable national social security law** to be identified (Regulations (EC) nº 883/2004 BR- and 987/2009)[14]. For posting, there is an *ad-hoc* conflict rule that temporarily exempts the application of the general rule (or the law of the place of employment, i.e., the *lex loci laboris*) and allows the social security legislation of the Member State of origin to continue to apply if certain conditions are met (Art. 12 BR). In

12 https://eventos.comillas.edu/68368.html

13 The following are members of the European Free Trade Association (EFTA): Norway, Iceland, Liechtenstein, and Switzerland. Only the European Economic Area Agreement with the EU has entered into force for the first three of these countries. In all of them, the regulations on free movement and posting of workers apply, both from the labour and social security point of view.

14 These rules replace, as of 1 May 2010, EEC Regulations 1408/71 and 574/72 which, in turn, replaced EEC Regulations 3/1958 and 4/1958 which were the first rules with material content approved by the then European Economic Community to facilitate the free movement of workers. Social security rules, as is well known, are not harmonised but only coordinated. See Carrascosa (2019c) for further information on the Coordination Regulations.

addition, the rules for those who normally carry out activities in two or more Member States (Art. 13 BR) are increasingly being applied to posted persons. Both rules are intended to prevent short breaks in the insurance career or excessive splitting of the insurance career in different Member States. In addition, they are intended to promote the freedom to provide services and to avoid administrative complications by favouring the single market. The option to maintain the application of the legislation of the Member State of origin is common to all **international social security legislation**. This is the case, for example, in all the bilateral Social Security agreements signed by Spain, which provide for temporary periods of derogation from the *lex loci laboris*, like those of the Coordination Regulations. This option, considering the differences between the standards of living in the Member States and the different social security systems, could encourage the perception that it favours **social dumping**[15], as it gives companies in the Member States with lower contributions a comparative advantage regarding their labour costs. For this reason, in the context of Art. 12, this possibility is subject to important conditions.

The aim of the Coordination Regulations is to protect workers falling within their scope, but unlike in the employment field, it is not so easy to identify the most protective solution. The effects of being insured under a social security national law can vary in the short or long term, for instance, many years later, when a retirement pension is claimed and has to be calculated *prorrata temporis* under the Coordination Regulations (Carrascosa, 2019: 41) However, it seems clear that it is not in the interest of any worker to have her/his insurance career split into short contribution periods in different Member States and to fall back on the Coordination Regulations each time s/he needs a benefit. Moreover, constant changes in the application of the *lex loci laboris* principle can lead to administrative and business complications and can even be seen as an "obstacle to the free movement of EU workers and the freedom to provide services for employers" (Verschueren, 2020: 486). In this area of social security, there is no private dispute between employers and employees, as it is social security national administrations with conflicting interests that can defend the insurance under their own national rules and the collection of contributions. Moreover, as it happens under Public Law, the reception of foreign social security law in a Court (the *forum*) is not possible, e.g., the national Courts of the host or home Member State cannot apply foreign social security legislation, nor impose obligations on the social security administrations of other Member States, neither from the point of view of affiliation-contribution, nor from the point of view of benefits (Carrascosa, 2004: 112). This impossibility requires loyal cooperation between national social security administrations in the event of a dispute or controversy if legal certainty and the maintenance of the uniqueness of the applicable law are to be achieved.

On the other hand, **Directive 96/71/EC, as amended by Directive (EU) 2018/957, and Directive 2014/67/EC** are based on the freedom to provide services[16] and have an impact on the labour law relationship between the posted workers and their employers. Therefore, they are rules of Private International Law with a clear social anti-dumping purpose, by imposing on companies the application of regulations and certain sectoral collective agreements of the host Member State, if they are more protective than those applicable to the contract of employment of the posted worker[17]. Superior working conditions

15 Although there is no univocal concept of social dumping, here we refer to it as "downward pressure on the working and social security conditions of workers in the destination Member State due to competition from companies that post workers with lower labour rights, especially their wages, on which they also pay lower contributions" under the protection of less demanding social security legislation (Carrascosa, 2019a: 39). It seems that social dumping can also arise from legal and non-abusive posting under EU law. The borderline between lawful and abusive posting should mark the boundary between fair competition within the single market and unfair competition (Maslauskaitė, 2014). The European Parliament assumes a concept of social dumping associated with controversial practices in the context of posting: "while there is no legally recognized and universally shared definition of social dumping, the concept covers a wide range of intentionally abusive practices and the circumvention of existing European and national legislation (including laws and universally applicable collective agreements), which enable the development of unfair competition by unlawfully minimizing labour and operation costs and lead to violations of workers' rights and exploitation of workers..." (Maslauskaitė, 2014). European Parliament Report of 14 September 2016 https://www.europarl.europa.eu/doceo/document/A-8-2016-0255_EN.html

16 These Directives are special rules and apply in contrast to the general rules on the freedom to provide services, which exclude the posting of workers from their scope of application (Directive 2006/123/EC Art. 3 Recital 8).

17 According to the Rome I Regulation, temporary posting need not entail a change in the national law applicable to the employment contract. Indeed, posting does not change the Member State where the work is normally carried out as long as the employment relationship with the employer of origin is maintained (Regulation EC/593/2009, Art. 8.2).

can be claimed against employers before the labour Courts of the sending or host Member State,[18] which can consider and apply foreign labour law to resolve a dispute. In this area of employment, there is no doubt that what is most beneficial for posted workers is to receive higher wages, more holidays or more preventive protection from their employers.

The European Labour Authority (ELA) (established by Regulation (EU) nº 2019/1149), based in Bratislava, is relevant to the control of both types of rules. This new authority, which brings together and coordinates various EU instruments associated with intra-EU mobility, also aims to promote cooperation between Member States and their labour inspectorates, to mediate between national administrations in the event of conflict and to create a European platform to strengthen cooperation in the fight against undeclared work.

The following sections of this report analyse both regulatory blocks and their evolution. The last section is dedicated to the transposition and effects of both Directives in Spain, but especially of Directive (EU) 2018/957.

1.2.1 Social security relationship: The Coordination Regulations

The rule for determining the national social security law applicable to a posted person is mainly found in Art. 12 of the Basic Regulation (BR)[19], although it is undeniable that Art. 13 is increasingly used. In any case, ad-hoc arrangements between national institutions can always be used to determine the national law applicable to the posted person, always to the benefit of the latter (Art. 16). The scope and procedure for the application of these articles is established in the Regulation (EC) nº 987/2009[20]. There is an additional set of instruments that have an important interpretative value of the coordinating Regulations, and although they lack legal effectiveness[21] they should also be considered. The main ones are Decisions A1[22] and A2[23] and Recommendation A1[24] adopted by the Administrative Commission (AC) for the Coordination of Social Security Systems,[25] also agreed under the AC Practical Guide on applicable social security law, which does not reflect the opinion of the European Commission[26].

The Coordination Regulations apply, as far as they are concerned, to posted workers (employed or self-employed), to nationals of the Member States of the EU, the European Economic Area and Switzerland[27] and to their family members and dependants, irrespective of their nationality. Without changing their subjective scope of application, indirectly, they can also apply to **third-country nationals (TCNs)** legally resident in a Member State when they are in a situation of transnationality under Regulation (EC) 1231/2010.[28]

18 Directive 2014/67 Art. 11

19 See a consolidated version on ELI: https://eur-lex.europa.eu/eli/reg/2004/883/2019-07-31

20 See a consolidated version on ELI: https://eur-lex.europa.eu/eli/reg/2009/987/2018-01-01

21 In this sense, see judgments of the ECJ on the Romano case 98/80, Knoch case C-102/91 and precisely on the displacement case FTS C-202/97.

22 Decision No A1 of 12 June 2009 on the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the payment of benefits under Regulation (EC) No 883/2004, OJEU C-106, 24-4-2010. https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:32010D0424(01)&from=EN

23 Decision No A2 of 12 June 2009 concerning the interpretation of Art. 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed persons temporarily working outside the competent State, OJEU C-106, 24-4-2010. https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:32010D0424(02)&from=EN

24 Recommendation No A1 of 18 October 2017 on the issuing of the certificate referred to in Art. 19(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council EU C-183, 29-5-2018. https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:32018H0529(01)&from=EN

25 The AC brings together the Social Security Administrations of all the Member States involved and the Commission itself. See Art. 71 Regulation (CE) 883/2004

26 https://ec.europa.eu/social/BlobServlet?docId=11366&langId=es

27 They also apply to refugees and stateless persons legally resident in a Member State.

28 Previously see Regulation EC/859/2003 which allowed the application, from June 2003 to this group of workers of the coordination regulations previously in force (Regulation EEC/1408/71 and Regulation EEC/574/72).

The posting rules of the Regulations apply to temporary postings not necessarily linked to the provision of services, such as mere business trips.[29] There are no specific conflict rules in their framework for teleworking or virtual work, where the application of the general rule *lex loci laboris* raises many doubts.[30]

Under Art. 12, 13 and 16 BR, as exceptions to the *lex loci laboris*, to prove that the posted worker is insured under the social security of a single competent Member State, this administration issues a PD A1, at the request of the employer or the worker himself,[31]. Contributions are paid to this security system, and it must provide or pay for social security coverage, for example in the case of health care received in the host Member State. The issuing Administration must compile all relevant information for issuing the PD A1 as is obliged to be able to verify any information at the request of the institutions of the host Member State which is bound by this certificate.[32] As will be seen in the section on irregular posting in this report, only the issuing Member State is competent to withdraw the PD A1, even in cases of fraud. In case of disagreement, it is necessary to initiate a dialogue procedure between national institutions involved regarding the validity or accuracy of the facts supporting the issuance of the PD A1, which may lead to conciliation before the Administrative Commission.[33] However, the Court of Justice[34] has accepted that, in cases of duly accredited fraud, under certain conditions, including the prompt initiation of the abovementioned dialogue and conciliation procedure, these PDs A1 may be disregarded by the Courts of the host Member State, usually in the context of criminal penalty proceedings. This exception to the binding nature of the PD A1, only regarding social security obligations, does not in any case relate to the change of applicable social security legislation, as long as the issuing institution does not withdraw the PD A1 or declare it invalid.

Table 1. European Social Security legislation about posting of workers

SITUATION	EU LEGISLATION
Posting of workers	Regulation EC/883/2004 Art. 12.1; Regulation EC/987/2009 Art. 14.1 and 2
Posting of self-employed persons	Regulation EC/883/2004 Art. 12.2; Regulation EC/987/2009 Art. 14.1 to 4
Workers with normal activity in two or more Member States	Regulation EC/883/2004 Art. 13 Regulation EC/987/2004 Art. 14. 5 to 11
Agreements between social security institutions	Regulation EC/883/2004 Art. 16
Application to legally resident Third-Country Nationals in a regular administrative situation	Regulation EC/1231/2010

Source: Own elaboration

Since December 2016, there has been a Commission proposal to amend the Coordination Regulations[35], which affects the rules on posting and tightens the requirements for issuing a PD A1 under Art. 12. Certain provisions of the above-mentioned Decisions and Recommendations of the Administrative Commission have been transferred to the text of the Coordination Regulations in order to make them legally effective,

29 According to the agreement reached by the Commission, European Parliament and the Council in 2019 for amending the Regulations they could be defined as "'business trip' means a temporary working activity of short duration organised at short notice, or another temporary activity related to the business interests of the employer and not including the provision of services or the delivery of goods, such as attending internal and external business meetings, attending conferences and seminars, negotiating business deals, exploring business opportunities, or attending and receiving training;" https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf

30 For more information about these doubts, see Strban, Carrascosa, Schoukens, & Vukorepa (2020: 38).

31 Preferably before the posting, but also retroactively (Regulation 987/2009/EU Art. 19.2).

32 See Administrative Commission Recommendation No A1, OJEU 29-5-18 and Reg. EC/987/2009 Art. 5.1, 2 and 3.

33 See EC Reg. EC/987/2009 Art. 5, CACSS Decision No A1 OJEU C-106, 24-4-10.

34 See mainly judgments on Altun cases C-359/16, Vueling cases C-370/17 and C-37/18 and Bouygues travaux publics and Others C-17/19.

35 COM (2016) 128 final.

in some cases by tightening their provisions. In addition, for example, the prohibition on the concatenation of postings is also imposed on the self-employed [36]. At the time of writing, this reform project had not yet been approved. Although a provisional agreement was reached between the European Parliament, the Council, and the Commission in March 2019[37], the necessary majorities were not obtained for its approval. The same happened with a further rapprochement in December 2021,[38] which ultimately failed to achieve the necessary consensus. During the current French Presidency of the Council, the amendment of the Coordination Regulations is not on the formal agenda.

1.2.1.1 Social Security and the Posting rule (Art. 12 Regulation (EC) No 883/2004)

There is an *ad-hoc* special conflict rule for a posting that temporarily exempts the application of the *lex loci laboris* or the law of the place of work, which is the general rule. This conflict rule allows to temporarily (24 months) maintain the application of the social security legislation of the Member State of origin where the company is established. As confirmed by the Court of Justice, the aim of this special rule is to promote the development of the internal market, the freedom of movement and the freedom to provide services, preventing the fragmentation of workers' insurance careers, and avoiding administrative complications[39]. To prevent abuses and **social dumping**, the application of this special conflict rule is subject to increasingly stringent requirements which have been interpreted restrictively by the Court of Justice:[40] The issuing body of the Art. 12 PD A1 must establish that:

a) There must be a **direct employment relationship** that should be maintained throughout the posting. This direct relationship is broken when there is a so-called "double posting" i.e., when the company receiving the posted workers makes them available to another company located in the same or another Member State, or even a third country[41].

b) There must be a **prior insurance** of that worker in the system whose social security legislation is intended to be maintained. Indeed, the posted worker must be subject to that legislation for at least one month prior to the posting, although not necessarily as an employee of the posting company[42]. Recruitment for the purpose of posting is possible[43], as we will see that it is also possible, at the labour law level, under the Posting Directive.

c) The posting company must carry out **significant business activities** in the Member State of origin, beyond mere internal management[44], i.e., activities whose purpose is solely to ensure the internal functioning of the company. There are different criteria[45] for monitoring this requirement, which ultimately ensures that the posting company is not a letterbox company. Regarding the application of this requirement to **temporary employment agencies (TEA),** the CJEU recently clarified certain

36 Negotiations are now focusing on issues such as periods of prior affiliation in the Member State of origin to be posted, clarification of the consequences of possible interruptions in posting and their legal consequences about the maintenance of the social security legislation of origin, and the reinforcement of cooperation between administrations in case of lack of agreement and shortening of dialogue and mediation deadlines. See Carrascosa (2019c: 59) for more extensive information on the content of this reform.

37 https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf

38 See https://data.consilium.europa.eu/doc/document/ST-15068-2021-ADD-1/en/pdf

39 See ECJ Manpower C-35/70; Plum C-404/98; FTS C-202/97 and paragraphs 2 and 3 of the Explanatory Memorandum to CACSS Decision No A2. Also reiterated in CJEU 11-7-18, European Commission v Kingdom of Belgium C-356/15, ECLI:EU:C:2018:555.

40 Carrascosa (2019a) and Verschueren (2020).

41 See AC Decision n° A2 point 4 and Recital 7 of the Preamble of this Decision.

42 See CJEU Walltopia C-541/17

43 See Art. 14.1 Regulation 987/2009

44 See Regulation 987/2009, Art.14.2)

45 Some criteria to be assessed, according to a non-exhaustive list accepted by case law, are: "the place of the registered office of the undertaking and of its administration, the number of administrative staff working in the Member State of establishment and in the other Member State, the place where the posted workers are recruited and where most of the contracts with customers are concluded, the law applicable to the employment contracts concluded by the undertaking with its employees on the one hand and with its customers on the other, as well as the turnover achieved during a sufficiently significant period in each Member State concerned "(see paragraphs 42 and 43 of the judgment of 10 February 2000, FTS (C-202/97, EU:C:2000:75)).

issues in the context of a case in which the TEA Team Power challenged the refusal of the sending Member State to grant it the PD A1.[46]

d) In addition, the **foreseeable duration** of the work cannot exceed 24 months. When the posting lasts longer than 24 months, or when it is foreseeable from the outset that it will exceed this duration, the non-application of the law of the place of work (that of the destination of the posting) can only be achieved by means of **specific agreements between Social Security Administrations** (under Art. 16 of Regulation 883/2004). The 24-month threshold does not mean that longer postings are not possible, but rather that, unless there is an agreement between institutions, posted workers will be covered by the social security system of the Member State of destination, the *lex loci laboris*. These agreements between competent[47] administrations, which are usually for a maximum of five years, can only be made for the benefit of the worker[48], in the understanding that the worker may wish to maintain their insurance career in the home Member State, without short interruptions, which would only hinder subsequent access to social security benefits. Regarding the calculation of the 24-month period, the interpretation of the AC Decision nº 2 must be considered[49]. Firstly, its calculation is not interrupted by holidays, sickness or training or other short breaks. Besides, when the posting is to the same Member State, only one posting is counted, even if it involves providing services to two or more companies. If the worker is posted to another Member State, a new period of posting begins. Once the 24 months have expired, the worker cannot be posted to the same companies located in the same Member State, without being subject to the *lex loci laboris*. However, a new PD A1 can be issued after two months, which would allow the counter to be reset to zero.

e) As a fifth requirement, the posted worker may not be **sent to replace another worker who has previously been posted**, to avoid a rotational system of postings to the destination company. This prohibition of substitution affects the concatenation of postings regardless of whether the new posted worker comes from the same or a different company. So, it seems that the focus must be on the post to be filled. This demanding interpretation seems to oblige the posting company to know who has previously occupied the post to prevent the PD A1 from being invalidated[50].

The elements for assessing the issuance and validity of the PD A1 seem to be mainly located in the Member State of origin, which is the one that decides on it. Currently these PDs A1 under Art. 12 are communicated via the Electronic Exchange of Social Security Information (EESSI)[51] to the host Member State according to Art. 15 Implementing Regulation. Unfortunately, in some Member States this communication is only used for statistical purposes. However, where the control or verification of a requirement must be carried out in the Member State of destination it is always possible to seek the cooperation and information of the labour inspectorate of the host Member State.[52] In any case, it seems that the collaboration between national social security institutions and inspectorates is crucial and must be improved.

Although this report focuses mainly on posted workers, it should be noted that the Coordination Regulations also cover, since the 1980s, **self-employed workers** temporarily carrying out a similar[53] activity in another Member State. In this case, it is the workers themselves who must have maintained a substantial self-employed activity in the Member State of origin prior to the posting and is required insurance under the home Member State social security system for at least two months prior to the posting[54]. In addition,

46 See CJEU 3-6-2021, Case Team Power Europe C-784/19 ECLI:EU:C:2021:427

47 In the case of Spain, individual agreements are managed by the TGSS, while collective agreements for certain groups of workers are approved by another Department of the Ministry of Inclusion, Social Security and Migration.

48 See judgment in Brusse case C-101/83 ECLI:EU:C:1984:187.

49 In accordance with the interpretation contained in point 3 of Administrative Commission Decision No A2

50 See CJEU 6-9-18, Alpenrind case C-527/18 analysed in this sense by Carrascosa (2019: 54).

51 EESSI (Electronic Exchange of Social Security Information) is the IT system that, after many vicissitudes, has been implemented for the electronic exchange between social security institutions. https://ec.europa.eu/social/main.jsp?catId=1544&langId=en

52 On the contrary, arguing that the home Member State lacks the capacity and incentive to monitor displacement norms (Rennuy, 2020).

53 The similarity relates to the nature of the activity itself, irrespective of whether in the Member State of employment it means that, for social security purposes, they are regarded as employees or self-employed persons (Banks judgment C-178/97).

54 CACSS Decision No. A-2 point 2.

the self-employed person must maintain, in the Member State of origin, the organisational infrastructure for the exercise of his/her activity, fulfilling the necessary requirements to be able to continue it on his return. The expected duration of the task to be carried out in another Member State may not exceed 24 months. As can be seen, in this case there is no prohibition on substitution or concatenation of postings. Thus, a self-employed person may replace a previously posted self-employed person, but also an employee, even if the posted self-employed person was hired as an employee at the destination Member State.

1.2.1.2 Social Security and the pursuit of activities in two or more Member States rule (Art. 13 Regulation (EC) No 883/2004)

In addition to the rules on posting, Art. 13 of the Basic Regulation contains another conflict rule, which is in principle intended for employees or self-employed persons who *normally* work, simultaneously or alternately, in two or more Member States for one or more companies,[55] but which is increasingly being used in the case of posting. This may be because under this specific conflict rule, the strict requirements set out by Art. 12 BR do not have to be obeyed. For example, it is not necessary for the company to carry out substantial activities at the Member State of origin, a requirement established to avoid letterbox companies in the event of posting, nor is there a time limit, or a prohibition on the replacement of posted workers.

For applying this Art. 13 BR the worker must pursue its activities in two or more Member States normally, that is, on a regular basis, with habituality and regularity, without considering marginal[56] professional activities. **Concurrent or simultaneous** activities in time do not pose too many problems regarding the application of Art. 13 which requires habituality as is only applicable to who "normally pursues an activity as an employed person in two or more Member States"[57]. However, its application, as opposed to Art. 12 on posting, is questionable in the case of successive activities in different Member States. In the latter case, posting has traditionally been associated with more unpredictable temporary activities, whereas Art. 13 has been linked to the carrying out of simultaneous or alternating activities in two or more Member States on a permanent basis which will be repeated in the succeeding 12 calendar months. The AC's Practical Guide considers Art. 13 applicable to regular and, to a certain extent, predictable situations which denote regularity of work in two Member States and reserves the rules of Art. 12 for situations lacking such regularity[58]. Art. 13 BR is particularly relevant for so-called "highly mobile workers" such as hauliers, and could also be relevant for seasonal workers, including those in the agricultural sector. For its part, the CJEU insists on the need to consider in each case the duration of activity and the nature of the recruitment in order to determine whether Art. 13 BR should be applied[59]. In case of successive work in several Member States, where the work was carried out in each Member State consecutively and in each Member State under a different employment contract which were also signed consecutively, since the Court understood that they do not normally work in two or more Member States, as required by Ar. 13, but in one Member State at a time[60]. The problem does not lie in the type of contract, as the application of this Art. 13 has also been rejected,

55 A "person who normally pursues an activity as an employed person in two or more Member States" means a person who simultaneously or alternately pursues, for the same undertaking or employer or for several undertakings or employers, one or more different activities in two or more Member States (Regulation 987/2009 Art. 14.5).

56 EC Reg. 987/2009 Art. 14.5a. Marginal activities should not be considered. The Guide of the Administrative Commission states that a marginal activity is performed during less of the 5% of the normal working time and for a salary that supposes less than the 5% of the ordinary remuneration.

57 See for example those who work weekdays in one Member State and weekends in another on a continuous or regular basis. In these cases, Art. 13 would be a conflict rule "intended primarily for workers whose posting is not intended to be temporary" (Carrascosa 2004: 145). As explained in the ECJ judgment of 16-2-95 in Calle Grenzshop case C-425/93 ECLI:EU:C:1995:37, concerning a Danish worker resident in Denmark who works only for a company domiciled in Germany, regularly carrying out, at a rate of several hours per week and for periods not limited to 12 months, a part of his activity in Denmark.

58 The Guide notes that "The frequency of alternation is not important, but there needs to be some regularity of activity. For example, a commercial representative who travels year after year in the territory of a Member State, collecting orders for nine months, and who returns to his Member State of residence to work for the remaining three months, would be carrying out his activities on an alternating basis" (Administrative Commission, 2013: 25).

59 Judgment CJEU of 12-7-1973 Hakenberg case C-13/73, concerning a French national resident in France who worked on commission for several French companies, 9 months in Germany and 3 months in France.

60 See ECJ 4-10-12, case Format C-115/11 ECLI:EU:C:2012:606i

where such successive activity in different Member States is carried out under a single contract if such periods of activity in each of the Member States exceed one year, as again he/she is deemed to work in only one Member State at a time[61]. It is not clear what would happen if one worked 11 months in each Member State. Apart from the fact that work in the other Member State(s) could be understood as marginal, a priori, it would appear to be a fraud of law if such a duration was not justified.

The competent institution for determining the applicable law under Art. 13 is the Member State of residence of the worker. The procedure is complicated, and it requires gathering all the information on all the workers involved and all the substantial activities performed. The residence Member State must follow the procedure in Art. 16 of the Implementing Regulation. Firstly, establish the applicable legislation provisionally, and inform the Member States involved (that is, where the activity is performed and where the companies have their registered office or place of business). Currently the information is exchanged via EESSI. After two months, this provisional determination of the applicable legislation becomes definitive, unless any administration states in the meantime, that it has another view on the matter. In case of disagreement the institutions must try to reach an agreement following the specific dialogue and conciliation procedure established under Art. 6 of the implementing Regulation.

Residence Member State, for determining the national applicable law must consider the current personal circumstances of the worker concerned, but also the work situation foreseen for the following 12 calendar months,[62] in accordance with the following connections:

a) Among the Member States of employment, priority is given to the application of the **law of the place of employment where** the worker **also resides** if a substantial part of his work is carried out there (25% of activity or time)[63].

b) However, if he/she resides where he/she **does not carry out a substantial part** of his/her professional activity, it is decided to apply the law of the place where the company has its headquarters[64], i.e., where the fundamental decisions of the company are taken and where the functions of its central administration are carried out.[65] In this case, when the worker is **moonlighting**, i.e., employed by two or more companies:

- If they are all based in the same Member State, the social security legislation of that Member State shall apply.[66]

- If the companies have headquarters in different Member States and the employee resides in one of them, the legislation of the headquarters that does not coincide with the employee's residence[67] is chosen.

- The law of the Member State of residence of the employee prevails only if it coincides with the headquarters of two or more of the employer companies.[68]

1.2.2 Employment relationship: the Posting Directives

The key piece of legislation in the labour field is the **Posting Directive (Directive 96/71/EC)** which protects the freedom to provide services for companies by imposing certain requirements on the working

61 See ECJ 20-5-21, Case Format C-879/19 ECLI:EU:C:2021:409

62 Reg. EC/987/2009 Art. 14.10

63 In order to determine whether he/she carries out a substantial part of his/her activity in a Member State, in accordance with Art. 13.1.a) of Reg.14.8 883/2004, it is necessary to consider whether he/she carries out a quantitatively significant part of all his/her activities as an employed person in that Member State, without this necessarily being the majority of those activities. To determine whether a substantial part of the activity is pursued in a Member State, the following indicative criteria shall be considered: working time and remuneration. In the context of an overall assessment, a percentage of less than 25 % for the above criteria will be an indicator that a substantial part of the activities is not exercised in the Member State concerned.

64 Reg. CE/883/2004 Art. 13.1.b). i)

65 EC Reg. 987/2009 Art. 14.5a.

66 Reg. CE/883/2004 Art. 13.1.b.ii)

67 Reg. CE/883/2004 Art. 13.1.b.iii)

68 Reg. CE/883/2004 Art. 13.1.b). iv)

conditions of their employees. The Directive only covers the posting of employees, irrespective of their nationality, and protects bogus self-employed persons if their employment relationship is proven. It should also be stressed that it is aimed exclusively at the physical posting of workers, and therefore does not affect the telematic or virtual[69] provision of services that is carried out from the Member State of origin, for example, through **teleworking**, by someone who does not physically move to the Member State of destination (Carrascosa, 2021: 485). In any case, the requirements of the Directive are only enforceable if there is a sufficient connection between the posted person and the territory of the Member State of destination, and it is not enough that the person crosses the territory of a Member State in international transport,[70] as has been affirmed in the case of the railway sector[71].

Specifically, **merchant navy** companies are explicitly excluded from the scope of application of the Posting of Workers Directive regarding their seafarers[72], and although workers in the aeronautical sector could share some of its peculiarities, they are not mentioned. Furthermore, the important specificities of drivers engaged in **road transport** have led to the approval of a Directive on the posting of said workers. The specific content of this Directive (recently transposed in Spain[73]) displaces the common rules set on the Posting Directive[74] which, *de facto*, had not been applied in the sector. Spain was one of the Member States that requested a specific solution for this sector. Although it is a controversial issue, it was considered that the Spanish sector suffered from a problem of social dumping with respect to Romanian and Bulgarian companies, which were sometimes originally Spanish companies that had been relocated (Páramo, 2019: 357).

The Posting Directive applies to **companies established** in the EU, in the Economic Area and in Switzerland, without allowing companies established in a **third country**, other than those mentioned, to obtain more favourable treatment than the companies concerned.[75] The posting concerned by the Directive is the posting to **provide services** in a Member State other than the one in which the company is established, which would exclude, for example, mere business trips. Moreover, the posting must necessarily be of a **temporary** nature, although the Directive does not limit its duration. It is required that during the posting, the employment relationship of the workers concerned with the employing undertaking must be maintained, which does not exclude recruitment precisely for the purpose of the posting.[76]

69 Although this may not be a settled issue for the future, it is currently clear from CJEU judgment 18-9-14, Bundesdruckerei GmbH case C-549/13, ECLI:EU:C:2014:2235. This ruling upholds the non-application of the Posting Directive and the freedom to provide services itself when "the subcontractor is established in another EU Member State and its workers engaged in the performance of the services covered by the contract operate exclusively in the country of origin", in this case telematically.

70 See the judgment of the CJEU in FNV Transporten case C-815/18; ECLI:EU:C:2020:976. It ruled out the application of the Posting Directive considering the nature of the activities, the low level of connection of the posted worker with the territory where the worker operates, considering the proportion of this activity in the framework of his entire activity. It was also previously considered that it might be disproportionate to apply the Directive to workers of a company established in a border region who carried out, part-time and for short periods, part of their work in the territory of one or more Member States other than that in which the company was established. The Court in any event left it to the 'competent authorities of the host Member State to determine whether and, if so, to what extent the application to that undertaking of national legislation laying down a minimum wage is necessary and proportionate to ensure the protection of the workers concerned' CJEU 15-3-01, Mazzoleni case C-165/98 (see Ramos, 2010: 741).

71 See judgment of the CJEU in case C-16/19, Dobersberger case ECLI:EU:C:2019:1110, where it is stated that the Posting Directive does not cover the provision of services by a Hungarian company to a company established in Austria, itself linked to a railway company established in Austria. The Hungarian company provided services with its employees on board international trains passing through Austria, where they were engaged in cleaning, and serving food and drink to passengers. In this case, it is considered that these workers carried out a significant part of their work on the territory of Hungary, where they also started and finished their work and had their centre of interests.

72 Directive 96/71, Art. 1.2

73 See Royal Decree-law 3/2022. https://www.boe.es/eli/es/rdl/2022/03/01/3

74 See Directive (EU) 2020/1057 and Regulation (EU)1072/2009.

75 See Directive 96/71 Art. 1.4.

76 It is contrary to EU law to impose additional requirements on companies posting workers from outside the EU, such as, for example, a certain period of employment prior to the posting (CJEU 21-10-04, Commission v Luxembourg C-445/03; 19-1-06, Commission v Germany C-244/04; 21-9-06, Commission v Austria C-168/04). This is the Commission's understanding: "As regards working and employment conditions, Directive 96/71/EC requires that an employment relationship exists between the posted worker and the posting employer for the entire period of posting. Therefore, the Directive applies to posted workers even if the employment relationship has not been established for a specified time prior to the posting, provided that the employment contract exists from the beginning to the end of the posting". See point 2.18 of the Commission's Practical Guide on Posting of Workers (Commission, 2019: 18).

The Posting Directive identifies **three types of** posting of workers that are subjected to different rules. The first is the posting carried out by a company to provide services contracted or subcontracted by another company in another Member State, the second refers to mobility within a group of companies when they are located in different Member States, and the third is the one derived from the posting of workers by a temporary agency to a user located in another Member State[77].

The Directive deploys its **anti-dumping objective** by obliging companies to make a comparison between the labour regulations applicable to posted workers employment contracts (*lex causae*) and those in force in the Member State of posting, regarding a hard core of basic working conditions that the Directive identifies in Art. 3.1. These conditions have been extended and tightened in the 2018 amendment, especially regarding so-called "long-term postings". If the conditions in the host Member State are more protective, employers must match them during the posting. Of course, the Directive **does not impact equally** on all European companies. It may be completely neutral for companies governed by the labour laws of more developed Member States whose workers enjoy better working conditions than those in the host Member State. However, the Posting Directive will affect companies from Member States with lower standards of living that post workers with working conditions inferior to those in the destination Member States. This is a common situation, as the destination of posting is concentrated in the more developed Member States where most business activity is developed in the so-called Europe of 15 (EU-15).[78]

The Posting Directive, based on the freedom to provide services, is not a social Directive (Casas, 2001). It has also been considered a *Directive of maximums* at national level (Llobera, 2013: 211) for preventing Member States from imposing additional guarantees to the conditions and requirements for implementation set out in Art. 3.1[79]. In their transposition, the Member States cannot, in principle, extend the list of conditions or tighten the requirements regarding them. Only national public policy provisions could support such actions in a restrictive manner, otherwise it would infringe the fundamental right to freedom to provide services through such protectionist measures[80]. The Directive specifically allows the Member States, in its transposition, to **relax or exempt** certain requirements in view of the short duration of the posting or the nature of the service to be provided; exclusions which, however, cannot benefit TEAs.

1.2.2.1 The Enforcement Directive (Directive 2014/67/EU)

The adoption of the so-called "enforcement" Directive was aimed at enabling Member States to establish appropriate measures and control mechanisms to prevent and sanction any abuse or circumvention of the obligations imposed by the Posting Directive itself, which it does not amend. To this end, several measures were established. For instance, it offers non-exhaustive criteria to enable national administrations to separate real postings from **fraudulent ones**, thus avoiding abuses.[81] Some of these elements allude, for example, to the possible characteristics of a "letterbox company", which can be defined as those companies that lack real and substantial activity in the Member State of origin and that merely post workers by benefiting of the competitive advantage of lower working conditions (McGauran, 2016), to which we will refer when addressing irregular posting.

77 Directive 96/71/EC Art. 2-3(a)(b) and (c)

78 The EU-15 is made up of the Member States before the 2004 enlargement: the six founding Member States: Germany, France, Belgium, Italy, Luxembourg, and the Netherlands; together with Denmark, Ireland and the United Kingdom, which joined in the 1970s; Greece, Portugal and Spain, which joined in the 1980s; and finally, Sweden, Finland and Austria, which have been part of the EU since the 1990s. Actually, it would now be more correct to call it the EU-14, after Brexit.

79 It is an atypical Directive (Van Hoek, 2011: 19), different from the social directives that allow Member States to go beyond the required protection; its legal basis (Art. 56 to 62 TFEU) "prevents its classification as a social norm" (Casas, 2001: 57) and it does not have the character of a minimum norm as it does not include a non-regression clause in its Art. (Art. 153.4 TFEU) that guarantees its application as such and can be improved by legal, regulatory, administrative or conventional provisions (Contreras, 2020: 166).

80 Directive 96/71 Art. 3.10

81 Directive 2014/67/EU Explanatory Memorandum point 9 and Art. 4.

In parallel, the Enforcement Directive allows Member States to increase the **administrative obligations** of all companies that post workers to their territory with the aim of facilitating their control by national inspections[82]. As the Commission's 2019 report on the transposition of this Directive shows,[83] the result was that practically all of them oblige companies **to notify the posting to** the Administration of the Member State of destination[84]. The Member States also required, with varying degrees of specificity, that the company provide more information about itself as employer, about the posted workers, about the nature of the work to be carried out or even about the recipient of the service. In addition, they required the identification of a contact person vis-à-vis the host administration or a representative who could negotiate on their behalf with the host Member State trade unions. Companies must also keep (in paper or electronic form) certain documents relating to the posting's employment contract, which had to be available in the host Member State to a greater or lesser extent. They must be translated, into the official language of the host Member State. All the companies must be aware of the different national requirements, some of them established by sector, if they do not want to deal with administrative sanctions or even criminal prosecution. Indeed, the Directive also refers to the need for adequate and effective verification and monitoring of the obligations implemented. The inspection, which cannot be discriminatory on grounds of nationality or being disproportionate, must be based on a risk assessment considering factors such as the existence of large infrastructure projects, long subcontracting chains, geographical proximity, the special problems and needs of particular sectors, the history of infringements, and the vulnerability of certain groups of workers.[85]

In order to facilitate compliance with the employer's obligation to compare and, where more protective, apply the **employment rules of the host Member State**, the 2014 Directive requires Member States to facilitate access to and knowledge of these rules by creating single official websites at national level[86], which are currently accessible from the Your Europe website[87]. In parallel, sending and receiving Member States must make it easier for the posted persons themselves to claim their rights, even if the employment relationship has ended, and may initiate judicial or administrative proceedings in this regard to claim, inter alia, their wage entitlements.[88] The Directive focuses specifically on the contractor's own liability in cases of subcontracting chains covered by posted workers, where abuses and fraud are concentrated, especially in the construction sector.[89] Member States could provide for this or other measures to enable the contractor's liability for wages and contributions, but could also go further by extending liability to other elements or employers involved in the subcontracting chain. Finally, it should be noted that the 2014 Directive also favours administrative cooperation between institutions[90], improving the exchange of information and even ensuring the effectiveness in the Member State of origin of administrative sanctions imposed in the Member State of destination[91]. To this end, the Directive amends Regulation (EU) 1024/2012, which regulates the Internal Market Information System (the so-called "IMI Regulation"), the use of which will be analysed when referring to irregular posting.

82 For a more detailed analysis for the Spanish case, see *Chapter 4 section 4.2* of this report.

83 Report from the Commission (to the European Parliament and the Council) on the application and implementation of the Enforcement Directive 2014/67/EU, COM (2019) 426 final. SWD (2019) 337 final. https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52019DC0426&from=DE

84 In the transposition of Art. 9 of Directive 2014/67/EU, all Member States except the UK, which as of 1-2-2020 is no longer part of the EU after Brexit, included this obligation in their national legislation. See Carrascosa (2021) on posting and mobility in general after Brexit.

85 Directive 2014/67/EU, Art. 10

86 For a more detailed analysis to the single official website of Spain, see *Chapter 4 section 4.5*. Link to the single official website of Spain.

87 See, Directive 2014/67/EU Art. 5 & 6 Directive 2014/67/EU. On access to this information see https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_es.htm%23national-websites

88 See Directive 2014/67/EU Art. 11

89 See Directive 2014/67/EU Art. 1.2

90 See Directive 2014/67/EU Art. 6 and 7. Details of the competent authorities and liaison offices can be found at https://europa.eu/youreurope/citizens/national-contact-points/index_es.htm

91 See Directive 2014/67/EU Art. 13 and following E

1.2.2.2 The Directive amending the Posting Directive (Directive 2018/957)

As a third regulatory milestone, it is worth mentioning Directive (EU) 2018/957[92] which did amend the PostingDirective[93] without waiting for the results of the transposition of the Enforcement Directive of 2014[94]. Its adoption was the result of three years of **negotiations**, in the context of a fierce **controversy** fraught with accusations of protectionism against those who advocated "equal pay for equal work in the same workplace"[95]. This third Directive, without changing its main legal basis - the freedom to provide services - **tightens and extends the working conditions** that host Member States can require posting undertakings to comply with, especially beyond certain periods of time. Although we will return to some of these issues when analysing the transposition in Spain, the following changes brought about by this Directive can be highlighted:

1. Regarding the list of **working conditions**[96] the following can be highlighted: on the one hand, reference is no longer made to the minimum wage, but to the **remuneration** at the destination, which is undoubtedly a much broader[97] concept. On the other hand, new working conditions to be considered at the place of employment are added to this hard core: the conditions of accommodation of posted workers when their employer provides housing for workers away from their normal place of work and the allowances or reimbursements for travel, accommodation[98] and subsistence expenses for workers away from home for professional reasons[99].

2. In the case of **posting by Temporary Employment Agencies** (TEAs) Member States no longer have a choice ,as the equal treatment of posted temporary workers with respect to the working conditions of the user company is imposed, neutralising any competitive advantage.[100] Reference is also made to the so-called **chain posting**, carried out by the user company that received posted workers, clarifying that the initial temporary agency, the employer, is the company responsible for communicating the posting and guaranteeing the working conditions, for which it is necessary to increase the information obligations between the companies involved.

3. Lastly, the directive refers, for the first time, to the duration of necessarily temporary postings, without limiting their duration, but only with the aim of increasing the requirements for what it calls "**long-term postings**". This type of posting will be of this type once it exceeds one year or 18 months (12+ 6 months) if there is a reasoned notification from the company requesting a delay of up to 6 months with respect to such a qualification. Even if the posting is expected to last more than one year, it does not become a long-term posting until it exceeds one year or, if applicable, 18 months, which is not the case in the framework of the social security relationship where the foreseeable duration of the posting

92 ELI: http://data.europa.eu/eli/dir/2018/957/oj

93 For a consolidated version of the resulting Directive 96/71/EC see ELI: https://eur-lex.europa.eu/eli/dir/1996/71/2020-07-30

94 The Commission's report (to the European Parliament and the Council) on the implementation and enforcement of Enforcement Directive 2014/67/EU was only issued on 25 September 2019, COM(2019) 426 final. {SWD(2019) 337 final}

95 For an explanation of this controversy that pitted some "rich western" Member States (especially France, Austria, and Belgium) against "poor eastern" Member States that wanted to postpone a reform that they considered hasty and contrary to the single market (Bulgaria, Czech Republic, Slovakia, Estonia, Hungary, Latvia, Lithuania, Poland, and Romania), see Gárate (2019) and Guamán (2017) and all the literature cited above. Another type of confrontation was also maintained in the discussion, based on the trade unions' rejection of the CJEU's case law, which they understood to make collective social rights conditional on the provision of services. We are referring to the famous judgments of CJEU 11-0712, Viking C-438/05, CJEU Grand Chamber 18-0712, Laval C-341/05 and CJEU 3-084, Rüffert C-346/06. These judgments, which have been widely commented on by national and international doctrine, had little practical impact in Spain, as there is a model of statutory collective bargaining *erga omnes*. See recently the different points of view of the scientific doctrine, see Baylos (2019) and del Rey (2019).

96 See Art. 3.1 of Directive 96/71/EC as amended by Directive (EU) 2018/957.

97 The minimum wage itself had already been interpreted broadly, including the method of calculating the wage, whether hourly or piecework, a daily allowance, a commuting allowance and holiday pay. See CJEU 12 February 2015, Sähköalojen ammattiliitto (C-396/13, EU:C:2015:86), paragraphs 38 to 70, by including, beyond the minimum wage provided for by the host Member State's legislation, a certain number of other elements.

98 This is a step forward, as the judgement mentioned in the previous footnote denied that the payment of accommodation and luncheon vouchers was part of the salary, paragraphs 58 to 63 and judgement (Gárate, 2019: 393).

99 However, it should be noted that if such reimbursement is not part of the remuneration, it is regulated by national law or practice applicable to the employment relationship (Directive 2018/957 Recital 19, art 3.1 and 3.7).

100 Directive 2018/957 Art. 3.1b, applying the equality already provided for internally by Directive 2008/104 Art. 5 itself, which provides for the application of the conditions 'those which would apply to them if they had been recruited directly by that undertaking to occupy the same post'.

is considered to determine the applicable law and the threshold is 24 months. When a posting becomes a "long-term posting" because of its duration, an almost complete comparison must be made with the working conditions in the host Member State. Indeed, only the following two matters **are excluded**[101]**:**

a) The procedures, formalities and conditions for the conclusion and termination of the employment contract, including non-competition clauses;

b) Supplementary pension schemes.

Thus, although the *lex causae* is maintained, i.e., the law applicable to the employment contract[102], the rest of the working conditions, if they are more beneficial in the legislation and/or sectoral collective agreements of the destination Member State, would be governed in practice by the provisions of that legislation, under conditions of equality.

In order to prevent the company from avoiding the onset of long-term posting and the legal consequences mentioned previously through chain posting workers below the thresholds of one year or 18 months, the Directive provides for the aggregation of periods of posting when different workers are doing the same work in the same place for the purpose of exceeding these thresholds.

The Court of Justice has already expressed its views on this new Directive, considering that it is in line with EU law by allowing the development of the freedom to provide services under fairer conditions[103]. Although one of the stated aims of this reforming Directive is to protect the posted worker, it is true that its new measures neutralise the competitive advantage of lower labour costs for companies from less developed Member States in their access to the single market. In the years to come, statistics will show whether the new Directive has meant more protection for posted workers or simply less posting from less developed Member States to the EU-15 (Carrascosa, 2019a: 64).

101 Directive (EU) 2018/957 Art. 3(1a)

102 See about this issue Fotinopoulou(2019: 79).

103 See judgments on the actions for annulment brought by Hungary and Poland against Directive (EU) 2018/957: CJEU 8-12-20 Hungary v European Parliament and Council C-620/18 and CJEU 8-12-20 Poland v European Parliament and Council C-626/18. These judgments have been the subject of doctrinal commentaries in Spain, among other authors, by Parra (2021) and Contreras (2021b).

2. Volume, characteristics and impact of intra-EU posting of workers from and to Spain

This chapter reports data on posted workers from and to Spain. From the sending perspective, the information comes from the PDs A1 issued by the Spanish Social Security Administration. From the receiving perspective, the data come from the prior notification tools available in the Autonomous Communities. This latter data source was not available until now because there is still no central register in Spain that gathers these data. In the next sections information is provided about the characteristics of posting of workers to and from Spain with a focus on the quantitative evolution, the main destination countries, the nationality of posted workers, and the duration of the postings.

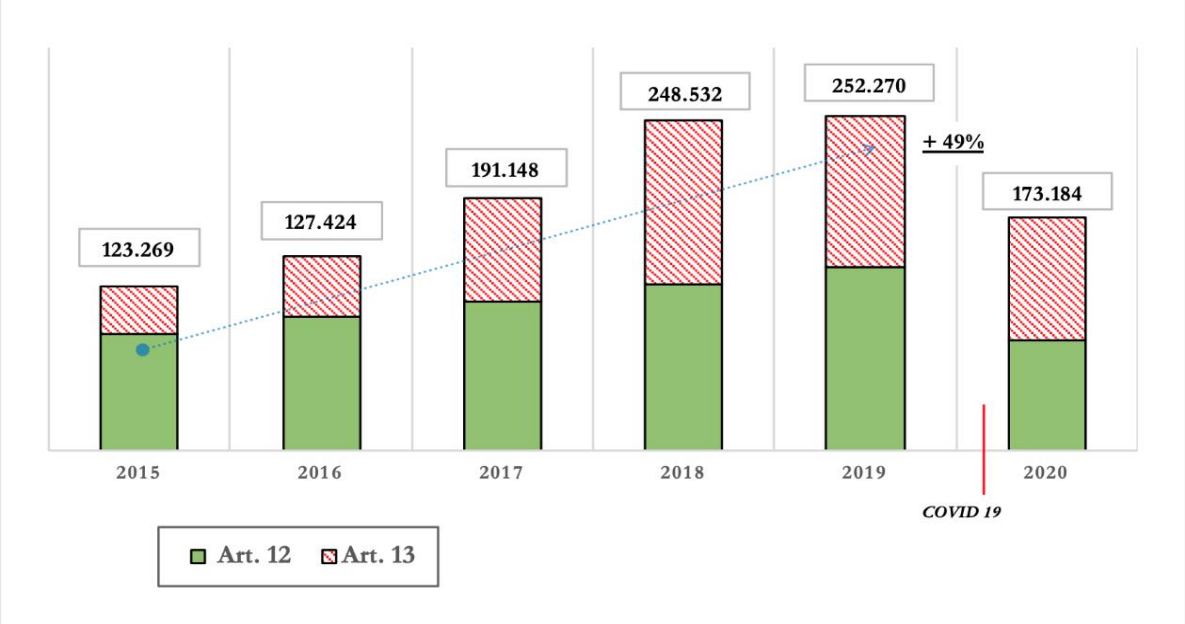
2.1 Posting of workers from Spain based on PDs A1

This section quantifies the number of PDs A1 (Art. 12 & 13 BR) issued for persons (employed and self-employed) posted from Spain to EU or EFTA countries and it describes the trends and characteristics of this phenomenon mainly based on data received from the Spanish Social Security Administration. We also provide information on the main destination countries, the sectors of activity, and the average duration of postings from Spain, but only for posted workers with a PD A1 issued under Art.12 BR. Finally, we focus especially on the French case because it is the Member State to which most posted workers are sent from Spain and, fortunately, we have been able to collect quantitative data from PDs A1 (Art. 12 and 13 BR) to analyse the number of postings, the nationality of workers posted to France, the distributions by sector of activity, and the average duration of postings for the French case specifically.

2.1.1 General overview and evolution of the number of posted workers from Spain

According to the data referring to the year 2019 (pre-COVID-19 pandemic) Spain is ranked third among all EU/EFTA countries in terms of number of posted workers from its territory, only surpassed by Germany and Poland. In that year around 252,270 PDs A1 (Art. 12 & 13 BR) were issued by the Spanish Social Security Administration *(TGSS)* for workers and self-employed persons who were posted to the territory of EU or EFTA countries to provide a temporary service. More than half of them were issued for posted workers sent to a single Member State under Art. 12 BR (54%). The rest (46%) were issued under Art. 13 BR for posted workers sent from Spain to provide activities simultaneously in two or more Member States. From a labour law perspective, persons with a PD A1 issued under Art. 13 BR can also be 'posted' to another Member State.

Figure 2. Number of PDs A1 issued by Spain, 2015-2020 (PDs A1 under Art. 12 & 13 BR)



Source: Administrative data PD A1 Questionnaires 2018-2020 (De Wispelaere, De Smedt, & Pacolet, 2015-2020)

During the period between 2012 and 2017 the number of PDs A1 (Art. 12 & 13 BR) issued in Spain increased by 148%, and between the period 2018 and 2019 the trend followed an upward pace as well (De Wispelaere, De Smedt, & Pacolet, 2020: 19) (*Figure 2*). However, in 2020, the volume of posting was drastically reduced (-31%) due to the COVID-19 pandemic (*see Table 2*).

The number of PDs A1 issued has increased significantly: the growth experienced between 2015 and 2019 was almost 50%. These data show a clear trend: intra-EU posting from Spain to other EU/EFTA countries has grown linearly in recent years and has done so at an average annual rate of 20%. It must be recognised, however, that workers posted from Spain do not represent a large percentage of the total labour force in Spain, accounting for less than 1%[104]. However, they do have a relative importance if we consider the main Member States to which they are mainly sent (France, Germany, and Portugal) and the activities or sectors of activity in which they are integrated or temporarily provide services: road transport, construction and the agricultural sector (see *section 2.1.2*).

There is a decrease in the number of postings between 2019 and 2020. The main reason was the health crisis caused by the COVID-19 pandemic, which particularly affected this type of transnational labour mobility due to the restrictions introduced at national borders to contain the pandemic[105]. However, the results obtained show that the reduction in the number of postings from Spain to France was significantly lower than that to the rest of the main Member States to which posted workers are sent.

Since 2015, a certain trend developed: while the number of PDs A1 under Art. 12.1 (posting to a single Member State) has remained stable at an annual growth rate of approximately 15%, the number of PDs A1 under Art. 13.1 (posting to several Member States) has increased at a much faster rate. While 34,515 PDs A1 (Art. 13) were issued in 2015, more than 112,800 were issued in 2019, which represents an increase of more than 227%. This situation may have its origin, among other reasons, in the greater flexibility offered to

104 The active population in Spain in 2021 is approximately 22 million people. Vid. EUROSTAT, Active population by sex, age and citizenship, Available in: https://ec.europa.eu/eurostat/databrowser/view/lfsq_agan/default/table?lang=en

105 The health crisis caused by COVID-19 did not suspend labour mobility for essential tasks, however, it did lead to a reduction in the total volume of travel due to the introduction of restrictions that prevented even internal mobility, through confinements, within Member States to contain the pandemic. Vid., EUROPEAN COMMISSION, Communication COVID-19. Guidelines on the application of the temporary restriction on non-essential travel to the EU, on facilitating the transit regime for the repatriation of EU citizens and on its effects on visa policy and Communication from the Commission. Guidelines on the exercise of freedom of movement of workers (2020/C 102 I/03), OJEU No C102 I/12 of 30 March 2020.

employers by Art. 13.1 BR, which is not subject to the increasingly demanding requirements of posting regulated by Art. 12 BR. For example, and in relation to its duration, unlike posting to a single Member State, which has a maximum duration of 24 months, a PD A1 under Art. 13 is not limited to a specific period, beyond the need to extend it for successive periods of 12 months in accordance with Spanish practice (see mod. TA300)[106]. Moreover, there are no limitations on the substitution of one worker for another at the destination for the same service or activity developed, nor are there any limitations on the possible destinations. There is also no requirement that the employer normally carries out substantial activities, other than purely internal management, in the territory of the Member State of establishment.

Table 2. Total number of PDs A1 issued by Spain, 2019-2020

	PDs A1 issued 2019 (% in total 2019)	PDs A1 issued 2020 (% in total 2020)	% Change from 2019 to 2020
Art. 12 – Posting	**136,096 (54%)**	**81,862 (47%)**	**-41%**
Posted workers	127,746 (94%)	76,453 (93%)	
Posted self-employed	*8,350 (6%)*	*5,409 (7%)*	
Art. 13 - Working in two or more Member States	**112,839 (44%)**	**91,322 (53%)**	**-19%**
Employed, working in two or more Member States	104,462	*84,364*	
Other situation	*8,377*	*6,958*	
Other categories	**3,335 (2%)**	**No data**	
TOTAL	**252,270 (100%)**	**173,184 (100%)**	**-31%**

Source: Administrative data PDs A1 Questionnaires 2019-2020 (De Wispelaere, De Smedt, & Pacolet, 2018-2020)

As can be seen in *Table 2*, 94% of total number of PDs A1 (Art. 12 BR) were issued in Spain during 2019-2020 to employees and thus only 6% were issued for self-employed persons. Another significant evidence is the reduction of PDs A1 issued in this period caused by the COVID-19 pandemic (-31% in total) which means 79,086 less PDs A1 issued.

The analysis of the data collected from the Spanish Social Security Administration proves that many PDs A1 under Art. 13 BR were requested by reporting that the posted worker's destinations were **all the Member States** of the European Economic Area and Switzerland, not just two or three Member States. This situation is surprising, firstly, because it does not reflect the reality of the postings declared (it is materially unlikely that the posted worker provides services in all EU/EFTA countries) and, secondly, because the ease of obtaining a PD A1 under Art. 13 BR, which does not seem to be conditional on the obligation to indicate which are the actual Member States where the activities will be provided. The analysis by sector or economic activity shows that most of the PDs A1 requested and issued under Art. 13, which include all EU/EFTA countries as the destination of the temporary work activity, were issued to employees and self-employed persons who work in the international road transport sector. However, these multiplied PDs A1 are not included in *Table 2*, which shows the real number of total PDs A1 issued in Spain during 2019 and 2020.

106 https://www.seg-social.es/wps/wcm/connect/wss/ee6988f8-25c2-438b-bcf3-d9aa82dad9d5/TA.300+%28V.13%29.pdf?MOD=AJPERES

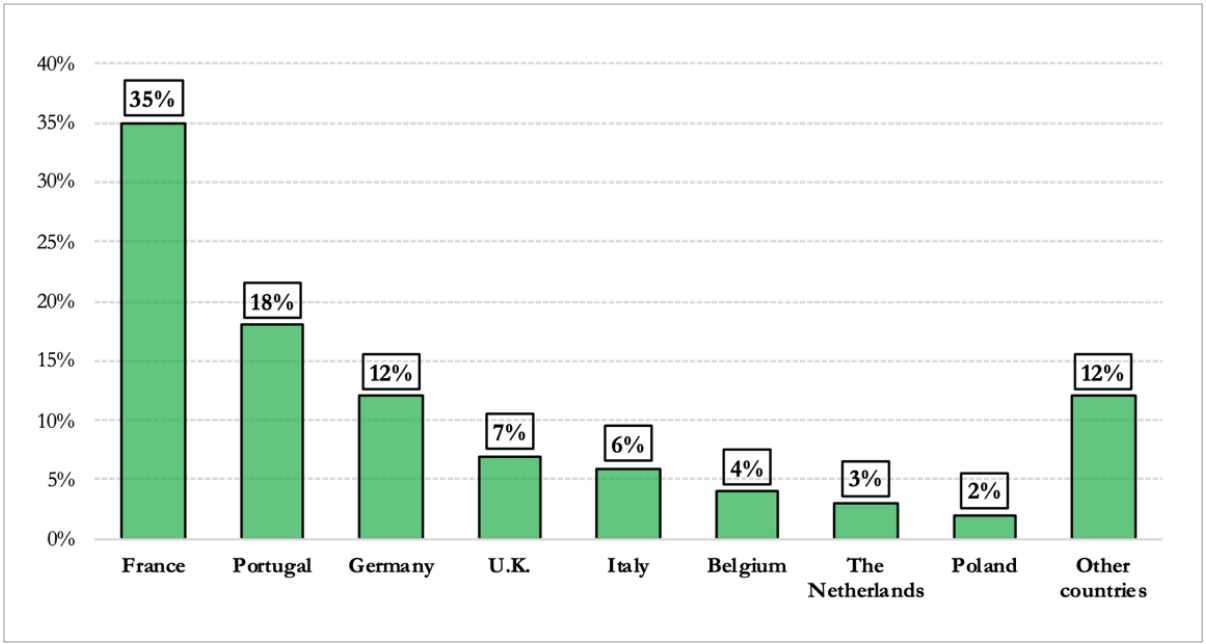
2.1.2 Characteristics of posted workers from Spain (Art. 12.1)

This section focuses mainly on the results obtained from the analysis of PDs A1 (Art. 12.1) issued by the Spanish Social Security Administration during 2019 and 2020 under Art. 12 BR. The information refers to the main receiving EU/EFTA countries of posted workers from Spain, the main sectors of activity in which they were employed, and the duration of the postings.

2.1.2.1 By receiving country

The main receiving countries of workers posted from Spain in 2020 were France (35%), Portugal (18%), and Germany (12%) (*Figure 3*). These three Member States, two of them neighbouring, account for a very significant share of all reported postings to one of the 32 countries considered, namely 65% of the total. The United Kingdom[107] (7%), Italy (6%), Belgium (4%) and the Netherlands (3%) make up the second group of countries where most of the posted workers were sent during this period from Spain. These last four countries together account for 20% of all PDs A1 issued under Art. 12.1 BR. It should be noted that France is the Member State with which Spain has strongest links concerning the posting of workers in the framework of the transnational provision of services (to a one single Member State).

Figure 3. Main receiving countries of posted workers from Spain, 2020 (% share of total)



Source: Administrative data obtained from Spanish Social Security Administration in the framework of the project *POSTING.STAT*

From the analysis of the current situation and the trends followed in recent years, it can be assumed that the **main factors for the posting of workers from Spain to other Member States** are:

1) **Geographical proximity**. This factor is one of the main reasons for the posting to those Member States with which Spain shares a border (France and Portugal) and, albeit to a lesser extent, to Italy. These three Member States accounted for almost 59% of all postings from Spain that were reported to the Social Security Administration under Art. 12 BR in 2020. Based on interviews with some

107 The United Kingdom did not leave the EU until February 2020, however, throughout that year under the transitional period set out in the Withdrawal Agreement EU law continued to apply. So the effects of Brexit were not felt in practice until 1-1-2021. On 1 May 2020, the trade and cooperation agreement between the EU and United Kingdom came into force (https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en). Neither of these two agreements protects the freedom to provide services between the United Kingdom and the EU, which disappears as a freedom and thus the possibility of posting workers.

stakeholders as well as desk research, it was pointed out that territorial proximity and language are factors that predispose to the existence of greater business links involving mobility of companies and posted workers from Spain with these three Member States.

2) The **availability of companies and workers in certain sectors** (i.e., construction, transport and storage, wholesale and retail trade, assistants) in which, as EURES (2021) points out, there is a demand for labour in several EU countries. This is the case, for example, in Belgium, the Netherlands and the United Kingdom[108], Member States to which workers move from Spain to provide services, especially in the construction subsector and other related activities (manufacturing labourers and freight handlers). In this regard, it should be noted that Spain is a major power in the construction sector[109], and its construction companies are renowned for being highly competitive[110]. After the financial crisis of 2008, Spanish construction companies internationalised, mainly the large ones, but also the medium-sized ones[111].

3) **The lower labour and social security costs** that, apart from Portugal, Spain has in relation to the Member States where most posted workers are sent to. According to EUROSTAT (2021)[112], in 2020 the average labour cost per hour worked in Spain was € 22.8. This amount is far from the € 37.5 in France, € 36.6 in Germany, € 36.8 in the Netherlands, or € 41.1 in Belgium. This factor may be an incentive to hire Spanish companies for the provision of certain services in their respective territories because, although these companies must respect the minimum remuneration in the host Member State (Art. 3.1 Directive 96/71/EC), social security costs are still temporarily linked to the Spanish social security system and in this sense there can be some competitive advantage over local companies that have to pay a higher contribution on higher salaries.

2.1.2.2 By nationality of the posted worker

The results obtained in relation to the nationality of posted workers who applied for a PD A1 (Art. 12) to be posted to one of the main receiving Member States of workers posted from Spain (France, Portugal, Germany, Italy, and Belgium) in 2020 show that 77% were Spanish, 12% were nationals of other EU/EFTA countries and 11% were third-country nationals (TCNs) (*Figure 4*).

108 EURES (2021), Labour Market Information in Europe: https://ec.europa.eu/eures/public/living-and-working/labour-market-information_en

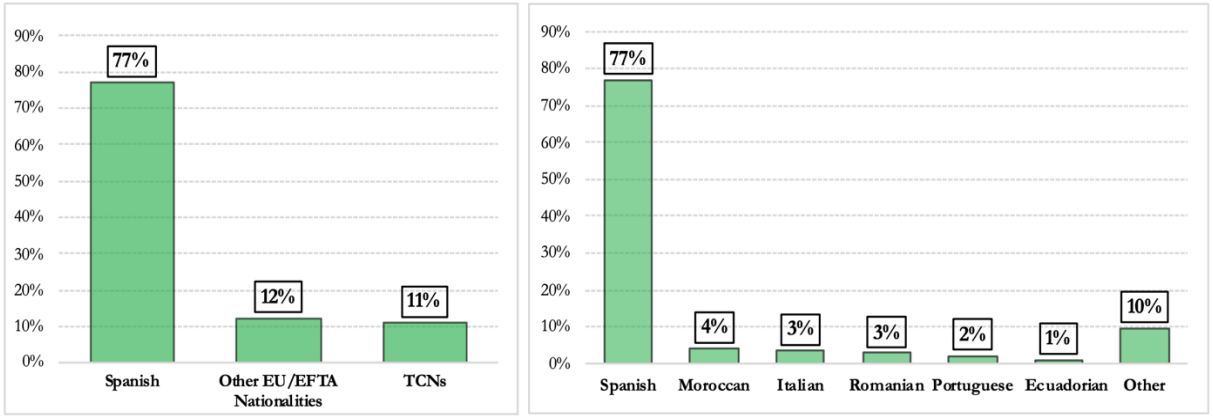
109 "There were more than 83,000 firms operating in the construction sector in January 2019 in Spain, employing 1.27 million workers. This sector is highly atomized, with a predominance of small firms." https://www.economiadehoy.es/las-constructoras-medianas-ganan-cuota-en-el-mercado-espanol

110 The largest international construction company for the tenth year in a row is the Spanish company ACS https://cincodias.elpais.com/cincodias/2021/08/19/companias/1629394201_852335.html

111 See the 2019 report on the internationalization of medium-sized companies associated with the ANCI (National Association of Independent Construction Companies) https://www.ancisa.com/wp-content/uploads/2019/07/ANCI-Actividad-Internacional.pdf

112 Eurostat (2021), Labour cost levels by NACE Rev. 2 activity, Labour cost for LCI. Available at: https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lc_lci_lev&lang=en

Figure 4. Share in total number of PDs A1 (Art. 12) issued for posted workers sent from Spain to the main receiving Member States (France, Portugal, Germany, Italy & Belgium), by nationality, 2020



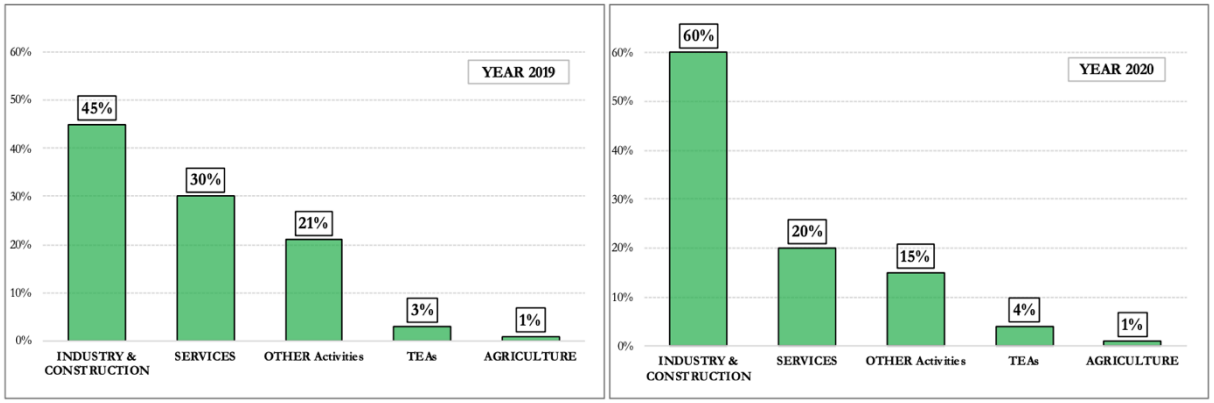
Source: Administrative data obtained from the Spanish Social Security Administration in the framework of the project *POSTING.STAT*

It should be noted that the nationality of posted workers does not necessarily coincide with the Member State where the posting company is established. However, the main nationality of the posted workers from Spain is Spanish. This group represents almost 80% of the workers posted from Spain to its main receiving Member States. Regarding TCNs posted from Spain, they are mainly Moroccan, Ecuadorian, and British but they account for a rather small proportion of the total number of posted workers from Spain. As can be seen in *Figure 4*, TCNs represent 11% of the total group of posted workers sent from Spain to its main receiving Member States. Although these data indicate that most of the posted workers were Spanish, the fact is that within the group of workers from third countries, 9 out of 10 were from Morocco or Ecuador and were posted from Spain mainly to work in the agricultural sector in France. This characteristic differs from the Spanish posted workers who were mainly employed in other sectors of activity (construction and services).

2.1.2.3 By sector of activity

The share by sector of activity of posted workers sent from Spain to one of the main receiving Member States in 2019 and 2020 (France, Portugal, Germany, United Kingdom, Italy, Belgium, and the Netherlands) shows that, on average, there is no absolute predominance of a single sector, although it should be noted that industry and construction are the most intensive sectors in the use of workers posted from Spain.

Figure 5. Sectors of activity of posted workers from Spain, 2019[113] and 2020 (% share of total)

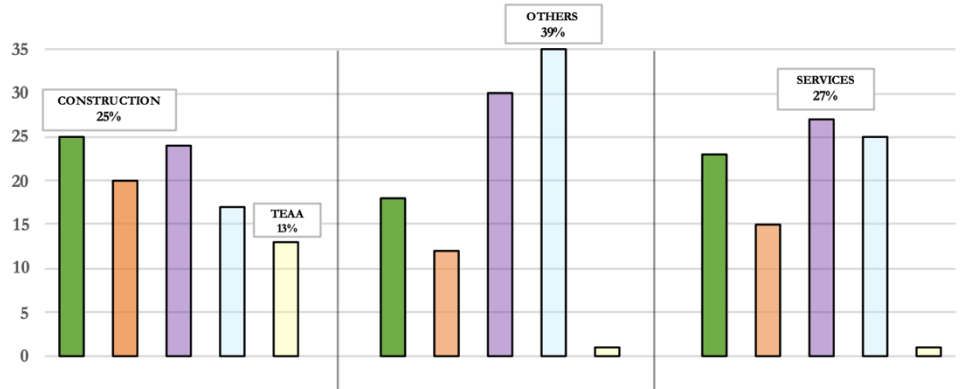


Source: Administrative data obtained from the Spanish Social Security Administration in the framework of the project *POSTING.STAT*

113 The year 2019 has been taken as a reference because, although data are available for 2020, this was an exceptional year due to the COVID-19 pandemic which caused a reduction in the number of postings due to the restrictions introduced on intra-EU mobility by both the European Commission and the Member States.

In 2019[114] less than 1% of the postings were made to carry out activities in the agriculture and fishing sector[115], 3% were posted via Spanish TEAs, 21% of the total postings were made to provide services in other activities, 30% to carry out activities in the service sector and, finally, 45% of the total postings from Spain to one of the seven main receiving countries (France, Portugal, Germany, United Kingdom, Italy, Belgium, and the Netherlands) were made to carry out activities in the industry and construction sector. It should be noted that these postings were carried out exclusively to work in one of these Member States. In other words, once the temporary provision of services abroad had ended, theoretically they returned to Spain following the rules of Art. 12 BR.

Figure 6. Share of posting by sector of activity in the main receiving Member States, 2019 (PDs A1 under Art. 12)



	FRANCE	PORTUGAL	GERMANY
CONSTRUCTION	**25%**	18%	23%
INDUSTRY	20%	12%	15%
SERVICES	24%	30%	**27%**
OTHERS	17%	**35%**	25%
TEA Activities	13%	1%	1%

Source: Administrative data obtained from the Spanish Social Security Administration in the framework of the project *POSTING.STAT*

Figure 6 shows that in 2019, there was a balanced distribution of the sectors of activity in which posted workers from Spain to France, Portugal or Germany provided services. Both in Portugal and Germany, services and related activities stand out as the sectors in which most of the posted workers from Spain were employed. It should be noted that the industrial sector (construction included) accounted for between 30% and 45% of the total number of postings to a single Member State (France, Portugal, or Germany).

Although there is a certain similarity in the sectoral distribution among these Member States, considering the activity carried out by the posting undertakings, this is not the case for the workers who were posted by TEAs. It is striking that more than 13% of the total number of workers posted to France (approximately 6,000 PDs A1 under Art. 12 BR) were employed by this type of companies and many of them provided services as seasonal workers in the agricultural sector. This could in fact be verified with some stakeholders as well as desk research. It should be noted that this is not the case for postings to Germany and Portugal, nor for postings to Italy, the United Kingdom, the Netherlands, or Belgium, where postings made by TEAs represent only between 0.5% and 1% of the total number of postings from Spain.

114 The year 2019 has been taken as a reference year because 2020 was an exceptional year due to the COVID-19 pandemic which led to a reduction in the number of postings owing to the restrictions introduced on intra-EU mobility by the European Commission and the Member States.

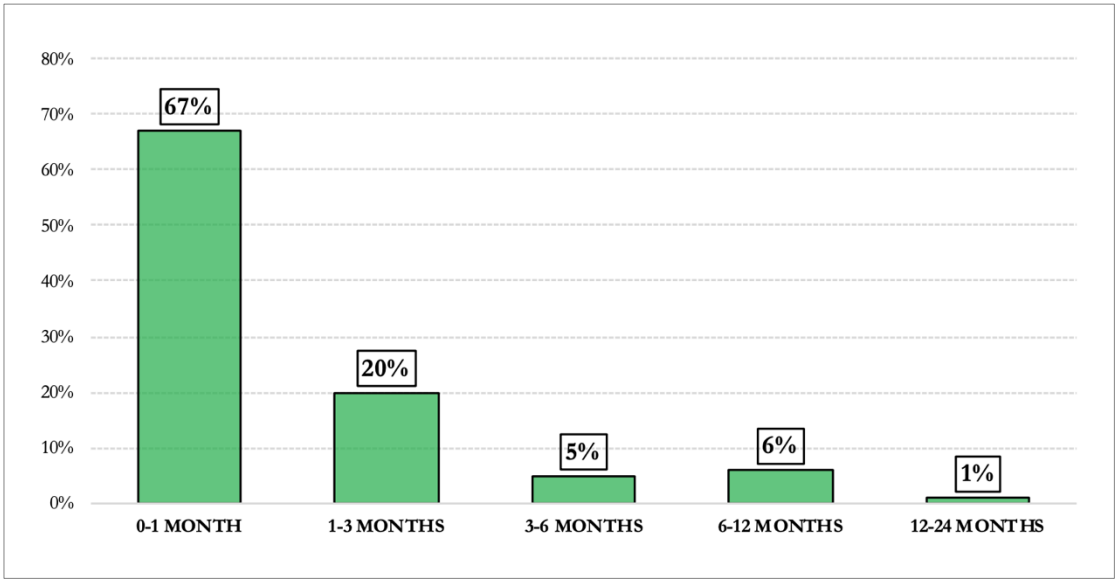
115 In the case of France, this percentage reaches approximately 10%. As shown in the *section 2.1.3*, most of these workers provided services in the agricultural sector and were sent by TEAs.

The PDs A1 (Art. 12 BR) issued by Spain by sector of activity show that the distribution of postings to France, Portugal, and Germany is quite similar to posting to the rest of the EU/EFTA countriesthere are no clear leading sectors. Although the construction subsector plays an important role, it does not account for more than 25% of the total number of postings. The same is true for industry and services. The latter sector employs at least one out of every four posted workers from Spain. As will be seen for the French case, this characteristic is not reproduced when considering PDs A1 issued under Art. 13 BR, in which the subsector that accounts for the greatest number of postings is the international road transport: around 50-60% of the total, followed by construction with 15-20%.

2.1.2.4 By duration

With regard to the duration of postings, it has already been said that the maximum validity of the PDs A1 issued under Art. 12 BR is 24 months, although the posting can continue without this coverage. In Spain, the application for obtaining a PD A1 must indicate the actual, albeit approximate, duration of the posting, which is usually less than one year. Although this situation occurs in most cases, social security officials pointed out during the interviews that, regardless of the actual duration of the posting, a minority of companies apply for a PD A1 (Art. 12 BR) for 24 months.

Figure 7. Duration of postings from Spain according to PDs A1, Art. 12, 2019 (% share of total)



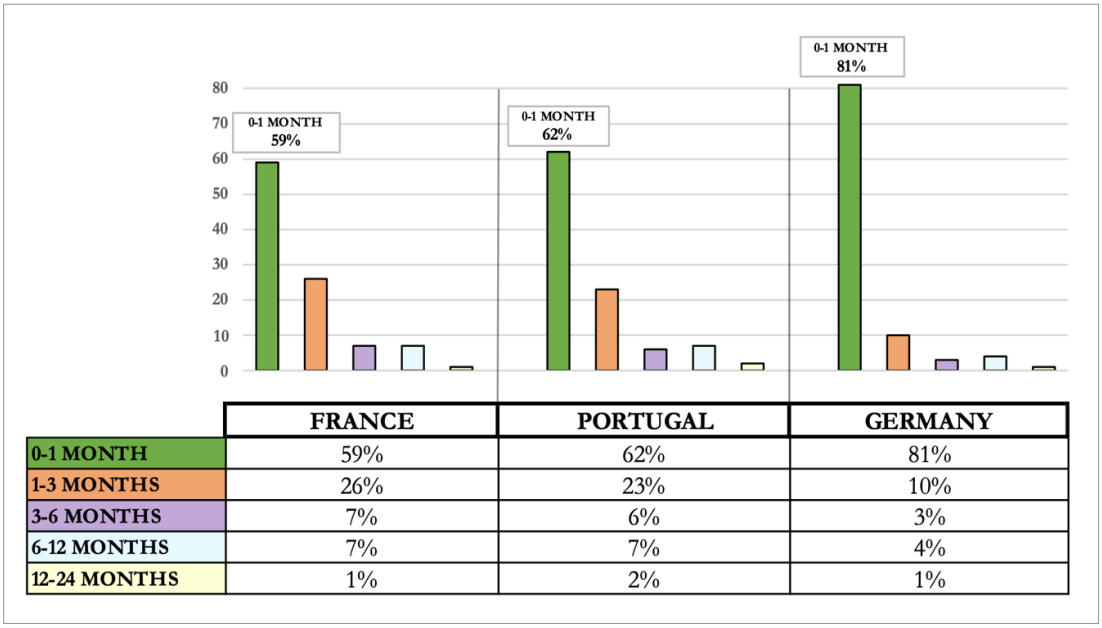
Source: Administrative data obtained from Spanish Social Security Administration in the framework of the project *POSTING.STAT*

In Spain, the majority of the PDs A1 issued under Art. 12 BR apply to a period of less than a month (*Figure 7*). Specifically, and in the case of postings to those Member States where most posted workers were sent to from Spain (France, Portugal, and Germany), this statement is clearly confirmed. Only 10-15% of the postings lasted more than three months, with postings of more than 12 months being minimal with barely 1-2% of the total. In any case, if more than two years are exceeded, an agreement between social security institutions (Art. 16 BR) could always be used to prevent the application of the *lex loci laboris* for a maximum period of five years (including the previous two years). Based on interviews with some stakeholders, this is a marginal practice, as in the last five years Spain has only signed 13,100 agreements (7,672 agreements to maintain Spanish law and 5,428 to maintain the legislation of other Member States).

As can be seen in the graphs in *Figure 8*, the duration of the posting does not differ much between Member States of destination. Perhaps the German case stands out, where 81% of all postings in 2019 had a duration of less than one month. Unfortunately, the data provided by the Spanish Social Security Administration do

not allow to extract differentiated information on the duration of posting by economic sector. This information would make it possible to know, for example, in which sectors of activity there is a longer duration of posting and to draw conclusions on the reasonableness of the reference duration incorporated into Directive 96/71/EC (Art. 3.1a) by Directive (EU) 2018/957: 12 months, or 18 months if a motivated notification is submitted, from which in addition to the terms and conditions of employment referred in Art. 3.1 all the applicable terms and conditions of employment which are established in the Member State where the work is carried out.

Figure 8. % Share of postings by duration in the main receiving Member States, 2019 (PDs A1, Art. 12.1)



	FRANCE	PORTUGAL	GERMANY
0-1 MONTH	59%	62%	81%
1-3 MONTHS	26%	23%	10%
3-6 MONTHS	7%	6%	3%
6-12 MONTHS	7%	7%	4%
12-24 MONTHS	1%	2%	1%

Source: Administrative data obtained from Spanish Social Security Administration in the framework of the project *POSTING.STAT*

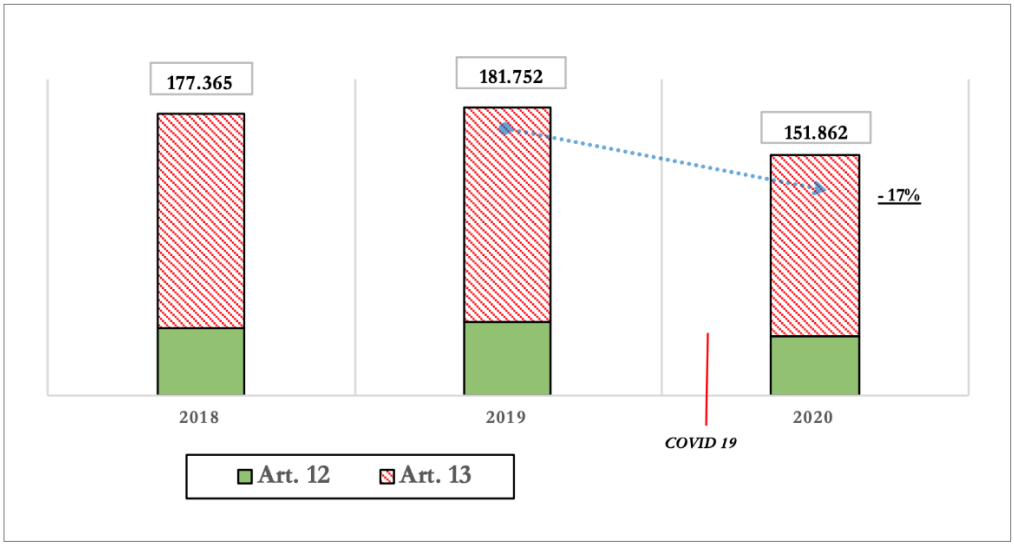
2.1.3 Postings to France

France has been the Member State to which most posted workers have been sent from Spain in the framework of a transnational provision in 2019 and 2020. The main reasons are, firstly, the sharing of borders and, secondly, the demand for labour required by the French labour market in certain sectors or activities: agriculture, construction, and international road transport.

Thanks to the data collection from the Spanish Social Security Administration, it was found that three out of four PDs A1 were requested and issued through Art. 13 BR, which is striking at first glance. As will be seen in the following section, this is because these PDs A1 were mostly requested for the international road transport sector and not to provide services exclusively on French territory, but to provide services, theoretically, both in France and other Member States at the same time.

As was expected and confirmed during the interviews and desk research a PD A1 under Art. 13 is much more flexible than a PD A1 under Art.12; Firstly, because of **the possibility of including all Member States** as potential destinations where services will be provided (regardless of whether they are actually provided or not). Secondly, because of the possibility offered by this type of PD A1 to renew it every 12 months without limits.

Figure 9. Number of PDs A1 issued by Spain for postings to France, 2018-2020 (Art. 12 & 13 BR)



Source: Administrative data obtained from Spanish Social Security Administration in the framework of the project *POSTING.STAT*

An analysis of the evolution during the period under research shows that, on average, about 170,000 PDs A1 (Art. 12 and 13) are requested annually to report a posting of workers to France or to other Member States at the same time (including France). What is most striking is that of all the PDs A1 issued by Spain in this period, only 25% were issued under Art. 12.1, i.e., issued for workers who provided services exclusively on French territory (42,000 PDs A1 Art. 12.1 on average per year). The rest were PDs A1 issued under Art. 13, in theory, to provide services in several Member States including France. Between 2019 and 2020, there was a reduction in the number of postings due to the COVID-19 pandemic (-17%). This exceptional event should not be taken into consideration when assessing the overall future trend of this type of international labour mobility. Therefore, the figures for 2018 and 2019 are a more plausible reflection of the total number of PDs A1 issued annually to send posted workers to France.

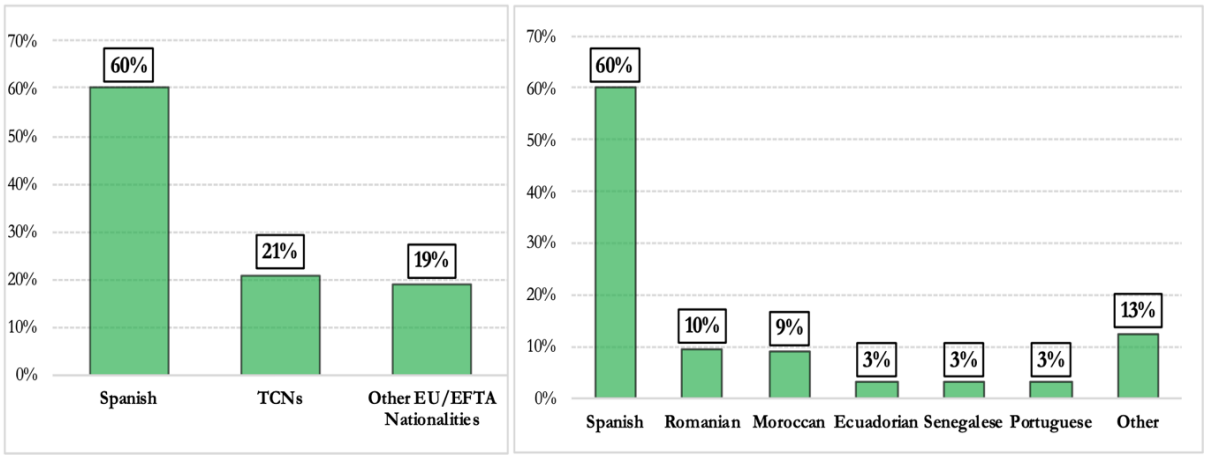
2.1.3.1 By nationality of the posted worker (Art. 12 & 13 BR)

The results obtained in relation to the nationality of posted workers who applied for a PD A1 (Art. 12 & 13 BR) in Spain to be posted to France or to France and other Member States simultaneously in 2020 show that 60% were Spanish, 19% were nationals of other EU/EFTA countries and 21% were TCNs (*Figure 10*).

If only PDs A1 issued under Art. 12 are taken into account, it can be seen that 69% of posted workers to France in 2020 were Spanish (25,611) and 31% were nationals of other EU Member States or third countries, with Morocco (10%), Romania (4%) and Ecuador (3%) being the main nationalities of those posted from Spain to France.

On the other hand, of those workers posted with a PD A1 issued under Art. 13 that included France as one of the receiving Member States during 2020, 51% were Spanish (58,115), 15% Romanian (17,759), 6% Bulgarian (7,214), 6% Moroccan (7,213), 4% Senegalese (4,739), 4% Portuguese (3,991), and 3% Ecuadorian (3,606). Although these data indicate that most posted workers from Spain to France were Spanish, it is true that EU workers from Romania, Bulgaria, and third countries, specifically from Morocco, have a prominent place in relation to the rest of the nationalities. The first group (posted workers sent from Romania) were mainly employed in the construction and international road transport sectors. The second (TCNs from Morocco and Ecuador) were primarily posted from Spain to France by a TEA, mostly to work in the agricultural sector.

Figure 10. Share in total % (PDs A1, Art. 12 &13) issued in Spain to postings to France, by nationality, 2020

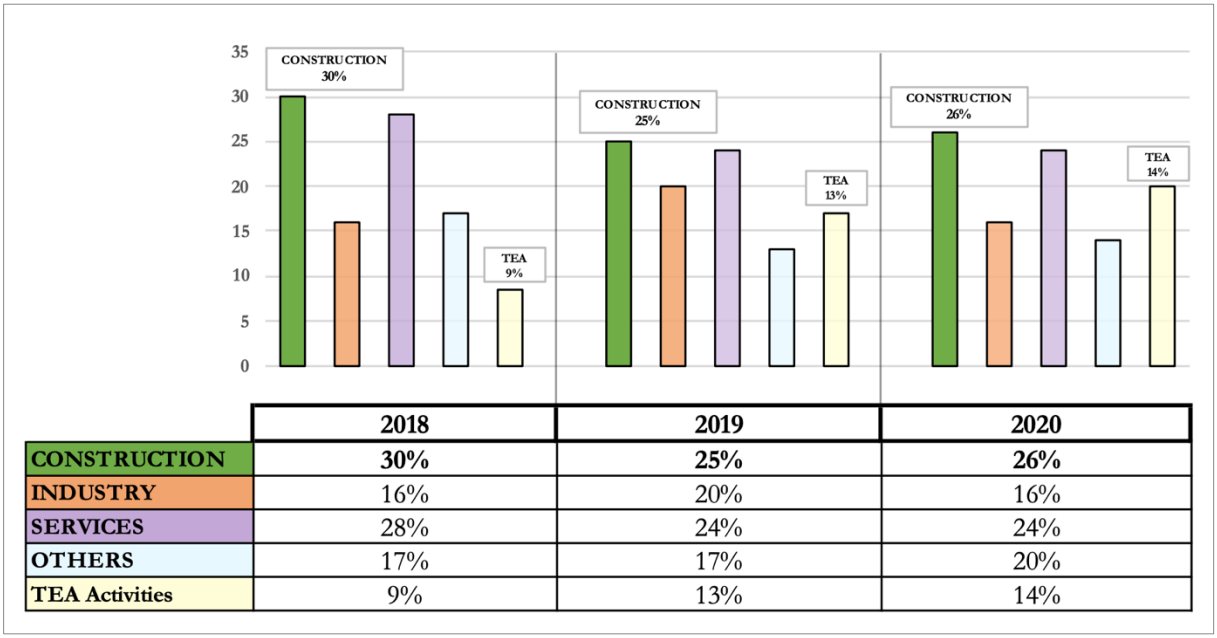


Source: Administrative data obtained from Spanish Social Security Administration in the framework of the project *POSTING.STAT*

2.1.3.2 By sector of activity (Art. 12 & 13 BR)

The distribution by sector of activity of companies that sent posted workers from Spain to France to carry out a provision of services (Art. 12 BR) shows that for the period 2018-2020 the construction sector (especially the subsector of construction of buildings and related activities) and the service sector (which includes multitude of activities) accounted for more than half of all postings of workers sent from Spain in the framework of a transnational provision of services (*Figure 11*). These two sectors are clearly prevalent, but the results show that there is a balanced distribution by activity. It can therefore be concluded that workers are posted from Spain to France to provide services in all sectors of activity, although to a greater extent, to carry out activities linked to construction, services, and agriculture (carried out by TEA).

Figure 11. Postings from Spain to France by sector of activity (% of total), 2018-2020 (PDs A1, Art. 12)



	2018	2019	2020
CONSTRUCTION	**30%**	**25%**	**26%**
INDUSTRY	16%	20%	16%
SERVICES	28%	24%	24%
OTHERS	17%	17%	20%
TEA Activities	9%	13%	14%

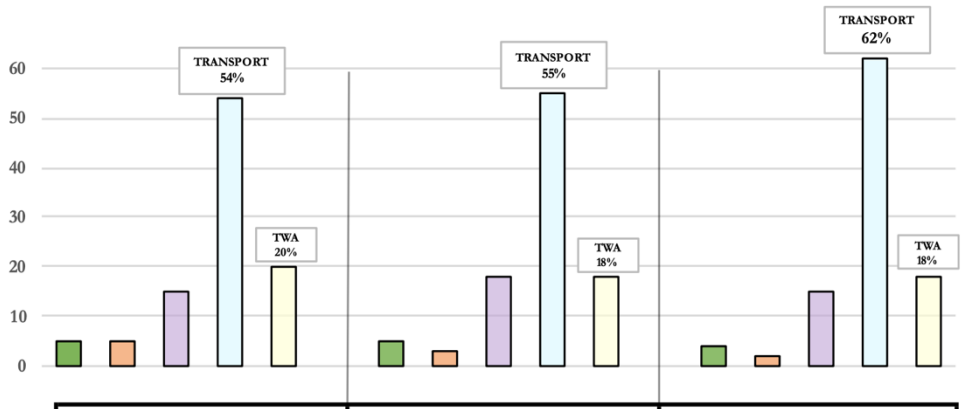
Source: Administrative data obtained from Spanish Social Security Administration in the framework of the project *POSTING.STAT*

The results obtained show that attention should be paid to the postings made by TEAs which, although they account at European level for a high percentage of postings from Portugal, Belgium, the Netherlands, and Luxembourg (Art. 12 BR), they represent barely 5.5% of all postings made in the EU/EFTA (De

Wispelaere, De Smedt, & Pacolet, 2020: 19). In 2020, more than 14% of all workers posted from Spain to France were sent by this type of companies. Most of them to provide services as seasonal workers in the agricultural sector. This is a singular characteristic that differs compared to the rest of the Member States to which workers are posted from Spain. As seen when analysing the sectors in which posted workers from Spain to Portugal, Germany, Italy, the United Kingdom, the Netherlands, and Belgium are active, the postings made by TEA barely represent 3% of the total (section 2.1.2.3). However, postings from Spain to France by these companies accounted for 12% of the total in the period 2018-2020 (on average). It must be recognised that concerning postings of seasonal workers in the agricultural sector by Spanish TEAs, there have been numerous inspections that led to the so-called *Terra Fecundis* case, which is analysed in *Chapter 3* of this report.

If we cross-check the results seen in this last section with the available data on the nationality of the posted workers who during 2018-2020 requested a PD A1 (Art. 12.1) for posting from Spain to France, we can observe that during this period 73% of them were issued to posted workers with Spanish nationality, 17% to workers with a third-country nationality (mostly Moroccan and Ecuadorian) and the remaining 10% to posted workers with a nationality of other EU/EFTA Member States (mainly Romanian, French, and Portuguese).

Figure 12. Postings to France and other Member States by sector of activity (%) 2018-2020 (PDs A1 under Art. 13.1)



	2018	2019	2020
CONSTRUCTION	5%	5%	4%
INDUSTRY	6%	3%	2%
SERVICES & OTHERS	15%	18%	15%
TRANSPORT by road	**54%**	**55%**	**62%**
TEA Activities	20%	18%	18%

Source: Administrative data obtained from Spanish Social Security in the framework of the project *POSTING.STAT*

The distribution by sector of activity of the companies that posted workers from Spain and applied for a PD A1 (Art. 13.1) to provide services in France and other Member States simultaneously shows that, for the period 2018-2020, the road transport activity is the absolute protagonist. More than half of all PDs A1 issued by the Spanish Social Security Administration under Art. 13, which included France as one of the host Member States, had this sector as their purpose of the posting. In 2020, the figure has risen to 62%, i.e., for every ten PD A1 issued, around six were linked to this sector. In absolute terms, this figure is equivalent to 71,452 PD A1 issued to posted workers who, from Spain, were sent to several Member States to carry out the activity of road transport and, among these countries, France was one of them.

In the period analysed (2018-2020) the services sector accounted for 16% (on average) of all postings to France. Postings made by TEAs accounted for almost 20% of the total, which makes it the second most prevalent activity just above the international road transport sector. As in the case of postings reported via Art. 12 BR, these results show a peculiarity of postings from Spain to France in contrast to postings to other Member States: the Spanish-based TEAs that send posted workers to an EU/EFTA countries do so mainly to France and mostly in the agricultural sector (according to the data reported by the TGSS, more than 20,000 PDs A1 under Art. 13 each year during the period 2018-2020).

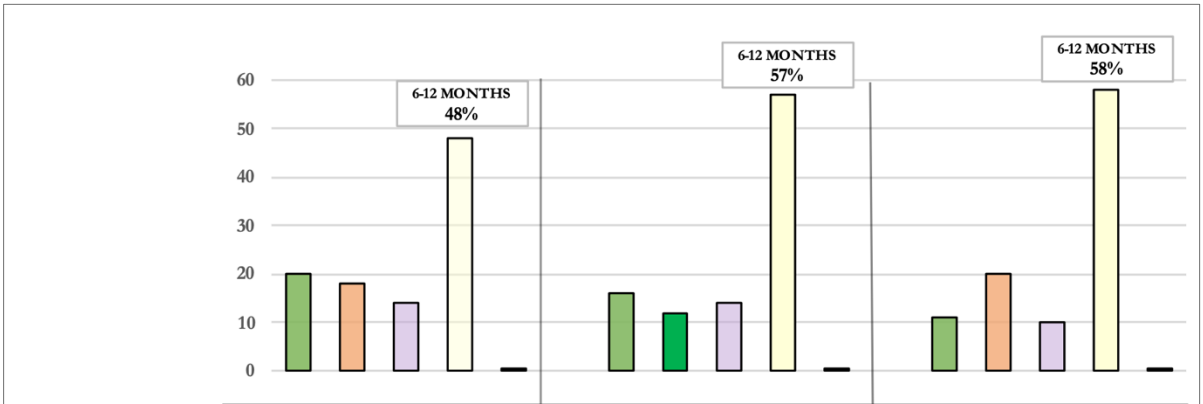
In contrast to the distribution by sector of activity of PDs A1 issued to provide services only in France (Art. 12 BR), which shows a certain balance, the results of PDs A1 issued under Art. 13 reveal an unequal distribution by activity. In 2020, most of them were issued to the international road transport sector (62%) or to posted workers by a TEA (18%). The interpretation of these results together with those obtained for the rest of the sectors shows that companies dedicated to the construction or industrial sectors hardly post workers through Art. 13. The prevailing activities under Art. 13 are the international transport of goods by road (truck drivers) and the assignment of workers by TEAs to provide services in the agricultural sector (seasonal workers). If, in addition, we look at the results offered in *Figure 10* and connect them with the available data on the nationality of the persons posted through this modality, it can be concluded that during the period analysed (2018-2020), the majority of the workers to whom these PDs A1 were issued (Art. 13) were, in this order, Spanish (55%), Romanian (41%), Moroccan (6%), Bulgarian (6%), Senegalese (4%), Portuguese (3%), and Ecuadorian (3%).

2.1.3.3 By duration of postings

Regarding the duration of posting to France (Art. 12), it has already been seen that, between 2018 and 2020, almost 60% of postings from Spain to France lasted less than one month (*Figure 8*). But what happened to the PDs A1 issued under Art. 13 BR? As can be seen in the *Figure 13*, during the period 2018-2020, most of the postings (54%) had a duration between six and 12 months. The results show that postings under Art. 13 BR have a significantly longer duration, which may be because PDs A1 under Art. 12 are requested for the performance of a specific activity with a limited duration in time, while those requested under Art. 13 do not have such an assignment, but can stay for a longer period outside the place of original recruitment and in several Member States.

The duration of the postings does not differ significantly between the years considered and shows that most of the PDs A1 (Art. 13) were requested for a period of stay outside the Member State of origin of between six and 12 months. Irrespective of the actual duration of these postings, a significant number of PDs A1 was obtained by reporting a foreseeable duration of 12 months. Perhaps the year 2020 stands out, where, although there was a general reduction of PDs A1 issued to France by Spanish companies because of COVID-19 (-17%), the number of PDs A1 (Art. 13) requested with a foreseeable duration of between six and 12months increased. If we compare *Figure 13* with *Figure 12*, we can see that there has been an increase in the total number of PDs A1 issued to companies dedicated to the international road transport sector, which allows us to conclude that this activity, as far as the transnational posting of Spanish workers is concerned, was less affected by the consequences of the COVID-19 pandemic during the year 2020.

Figure 13. Share of postings to France and other countries by duration, 2018-2020 (PDs A1, Art. 13)



	2018	2019	2020
0-1 MONTH	20%	16%	11%
1-3 MONTHS	18%	12%	20%
3-6 MONTHS	14%	14%	10%
6-12 MONTHS	**48%**	**57%**	**58%**
12-24 MONTHS	0,01%	0%	0,01%

Source: Administrative data obtained from Spanish Social Security Administration in the framework of the project *POSTING.STAT*

2.2 Postings to Spain based on the notifications done to Autonomous Communities

After analysing the volume and characteristics of the posting of workers from Spain to other Member State, the focus is now on intra-EU posting to Spain. The following sections summarise the stages followed to obtain the information and analyse the available data to provide an overview of the scale, characteristics, main sectors of activity, and evolution of postings to Spain during the period 2018-2020.

2.2.1 Previous situation, limitations, and direct data collection

Together with the PDs A1 issued by other Member States, the only source that makes it possible to have an approximate number of posted workers sent to Spain, from a receiving perspective, are the prior notifications made by employers to the labour authorities of the Autonomous Communities where they will provide services. Art. 5.1 Law 45/1999 imposes an obligation to notify the posting to Spain. Prior to the start of the activity, the competent labour authority of the territory where the services are to be provided must be notified. However, there is one exception to this general obligation: when the duration of the posting is less than eight days. In this case, there is no obligation to notify the posting (Art. 5.3 Law 45/1999) unless the posting is by a TEA which will always have to notify the posting regardless of its duration. The fact that posting activities less than eight days do not have to be notified to the Spanish institutions leads to an underestimation of the actual number of postings of workers to Spain. Very short postings (around five days) occur frequently in Spain, which means that this legal exception to the obligation of notifying is a significant shortcoming. It makes it impossible to have a complete picture of the actual number of posted workers sent to Spain and of the characteristics of this type of posting. Moreover, it makes it difficult for labour inspectorates to monitor them.

Due to the organisation of the Spanish State into 17 Autonomous Communities with competences in labour matters, in practice, this implies the submission of a notification to the competent labour authority of the first destination, although it cannot be ruled out that successive notifications will be made to other communities where the posted worker is sent to to provide services. In agreement with Art. 5.2 Law

45/1999 (amended in 2017 by Art. 9 Directive 2014/67/EU) the information to be included in the notification shall be:

- The identity of the service provider;
- The address of the company and its VAT identification number;
- The personal and professional data of posted workers;
- Identification of the undertaking(s) and, where appropriate, of the establishment(s);
- The planned start date and duration of the posting;
- Determination of the type of services that the posted workers are going to provide in Spain;
- The identification and contact details of a natural or legal person present in Spain who is designated by the company as its representative to liaise with the competent Spanish authorities and for the sending and receipt of documents or notifications, if necessary;
- The identification and contact details of a person who can act on behalf of the posting company in the information, consultation and negotiation procedures affecting those posted to Spain[116].

It is certain that the content of the communication is well detailed and precise regarding the information to be provided to the labour authorities by posting employers (Gárate, 2017; Contreras, 2020). Essentially, the information required in Spain coincides, to a large extent, with the information considered to be a minimum by its community reference (Art. 9.1 of Directive 2014/67/EU)[117].

Once the posting has been reported, the competent labour authority informs the Labour and Social Security Inspectorate (ITSS) and the State Tax Administration Agency (AEAT) of the corresponding Autonomous Community (not the central institutions of these administrations), but exclusively for notification purposes for the possible control of compliance with tax and labour regulations. Even though since 2017 there should have been a collaboration protocol between the Ministry of Labour and the Autonomous Communities for the establishment of a central/national electronic register of the notifications and thus guarantee adequate intercommunication and the availability of data about postings notified (Art. 5.1 and Additional Provision 6ª Law 45/1999), in reality this has not yet been implemented. As a result, there is no centralised and public data available for consultation on workers posted to Spanish territory.

Despite this relevant shortcoming, which depends on a regulatory development at the national level, the fact is that the Autonomous Communities do receive posting notifications to Spain. In order to try to solve an important limitation in Spain, we contacted the Ministry of Labour with the intention of initiating a process to collect these data directly from the competent institutions[118]. In February 2021, a request was made to them in order to report data included in the notifications received between 2018 and 2020. Specifically: 1) number, country of origin and sector of activity of the companies that reported posting of workers to Spain; 2) number and sector of activity of the companies receiving the provision of services; 3) duration of the reported postings; 4) number of workers posted, category or profession performed and nationality, and; 5) posting scenario (subcontracting, intra-company-intra-group, or posting through a TEA).

During the months of March to July 2021, contact was maintained with all the persons responsible for the Autonomous Communities to whom it was necessary to explain the reason, destination and required organisation of the information. A substantial number of them prepared databases to respond to the request

116 Pursuant to Art. 9(1)(f) of Directive 2014/67/EU, such a person need not be present in the host Member State, but must be available "upon reasonable and justified request".

117 On the problems arising from the practical application of these new administrative burdens, see Fekete (2020: 14-19).

118 At this point, we would like to thank again the Directorate General of Labour, specifically to the Director General Verónica Martinez Barbero who carried out a data request to the Autonomous Communities. We would also like to thank the work carried out by the officials of the labour authorities of the Autonomous Communities who, after preparing, compiling and exporting the data, provided us with the information we needed to undertake this project & National report.

for information, given that, although they had the notifications, these had not been unified, and they were not available for statistical use, nor were they, in most cases, in digital format. It should be noted that all the competent institutions answered to the request for data except the Canary Islands, Andalucía, Castilla y León, and Murcia, which did not provide the data. They argued that they did not have sufficient technical resources or staff to carry out *ad hoc* computer processing of the files and that it was not possible to comply with the request. They also reported the exceptional circumstances caused by the COVID-19 pandemic which resulted in an overload of work for these institutions due to the processing of files related to temporary suspensions of employment.

Once the data collection was completed in September 2021, it was collected in a single file to provide a unified treatment suitable for its statistical exploitation. This is one of the most significant features of this report: the availability of data and results connected with posting of workers to Spain. Specifically, we have information about the volume, origin, characteristics and the main sectors of activity where workers were sent. In any case, it should be noted that, although this is a step forward, the data have limitations and cannot offer a complete picture of intra-EU posting to Spain. Firstly, because data from four Autonomous Communities were not received, which represent aproximately 29% of the employed population in Spain[119]. Secondly, because the information reported is, in many cases, insufficient as it does not include all the data requested or is unclassifiable due to the way it has been organised. Thirdly, because not all companies that send posted workers to Spain report this to the competent institutions, especially short-term (less than eight days, Art. 5.3 Law 45/1999) and cross-border postings. This was verified during interviews with the Labour Inspectorate. Therefore, it is possible that the figures provided here are underestimated. However, it is also possible that, in certain cases, the figures are overestimated due to the existence of multiple notifications if the posting company has provided services in several Autonomous Communities which leads to double counting. In any case, we consider that the data collected, their analysis and results represent an improvement compared to the previous situation and, when compared with the PDs A1 issued by other Member States, they provide an overview of the volume, characteristics, and impact of the posting of workers to Spain.

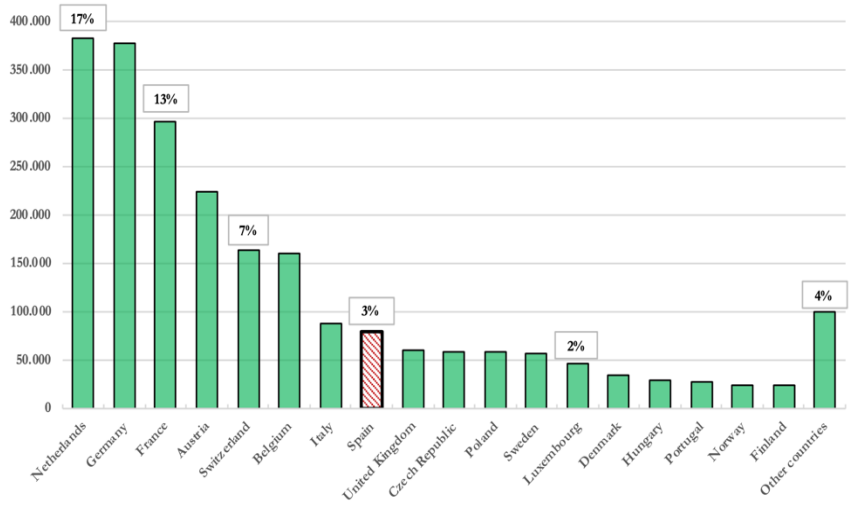
2.2.2 Measuring the volume of posting of workers to Spain

From the receiving perspective, in 2020 Spain ranked in eighth place of EU/EFTA countries that received the highest number of the posted workers. During the period between 2012 and 2018, the number of PDs A1 issued to send posted workers to Spain increased by 28%, between 2018 and 2019 this increase was 177%, having reached a number of 169,913 in 2019 (De Wispelaere, De Smedt, & Pacolet, 2020: 30-31). It is certain that the COVID-19 pandemic in 2020 and the exceptional measures introduced by the EU and Member States to contain the health crisis affected intra-EU postings, reducing their volume between 10% and 20% as we have seen in the results shown above. In the case of Spain, this figure has been much higher, as the number of workers posted from other countries to Spain has been reduced by more than half (-53%), namely from 169,913 in 2019 to 79,519 (PDs A1 Art. 12 BR) in 2020.

119 See, INE (Spanish statistical Institute): https://www.ine.es/dynt3/inebase/index.htm?padre=979&capsel=990

Figure 14. Posted workers in EU/EFTA Member State by receiving Member State, 2020 (PDs A1 Art. 12.1)

Receiving country	PDs A1	% of total
Netherlands	383.034	17%
Germany	376.935	16%
France	295.784	13%
Austria	224.229	10%
Switzerland	164.454	7%
Belgium	160.681	7%
Italy	87.923	4%
Spain	**79.519**	**3%**
United Kingdom	60.745	3%
Czech Republic	58.957	3%
Poland	58.093	3%
Sweden	57.724	3%
Luxembourg	45.909	2%
Denmark	34.429	2%
Hungary	28.564	1%
Portugal	28.083	1%
Norway	24.670	1%
Finland	24.117	1%
Other countries	99.959	4%



Source: Administrative data PD A1 questionnaire 2021 (De Wispelaere, De Smedt, & Pacolet, 2021: 32).

The figures included in *Figure 14* represent the total volume of PDs A1 issued to posted workers sent to a single Member State (Art. 12 BR). Seeing that self-employed workers do not fall within the scope of Directive 96/71/EC (and neither should their posting be notified through the prior notification tools available in Spain), they have not been included in these figures. As can be seen, a total of 79,519 PDs A1 were issued in 2020 for posted workers to Spanish territory. These figures are similar to figures of Italy (87,923) and the United Kingdom (60,745), but are far behind the figures for the countries that received the majority of PDs A1 in that year, which are the Netherlands (383,034), Germany (376,935), France (295,784), Austria (224,229), Switzerland (164,454), and Belgium (160,681). From a receiving perspective, these six countries account for 70% of the total number of postings in 2020. In this year, 3% of the total PDs A1 (Art. 12 BR) were issued to send posted workers to Spain from other EU/EFTA countries.

It can be noted that the impact of the 2008 financial crisis led to an increase in the number of postings from Spain and a decrease in the number of postings to Spain between 2010 and 2014. The most obvious consequence of this is that Spain has become an exporter of posted workers to other Member States rather than an importer (Voss, Faioli, Lhernould, & Iudicone, 2016: 17). During the period 2015-2019 the trend has been the same and, according to the PDs A1 issued, more posted workers are currently sent from Spain to other Member States than are received and this is likely to be the trend for the coming years.

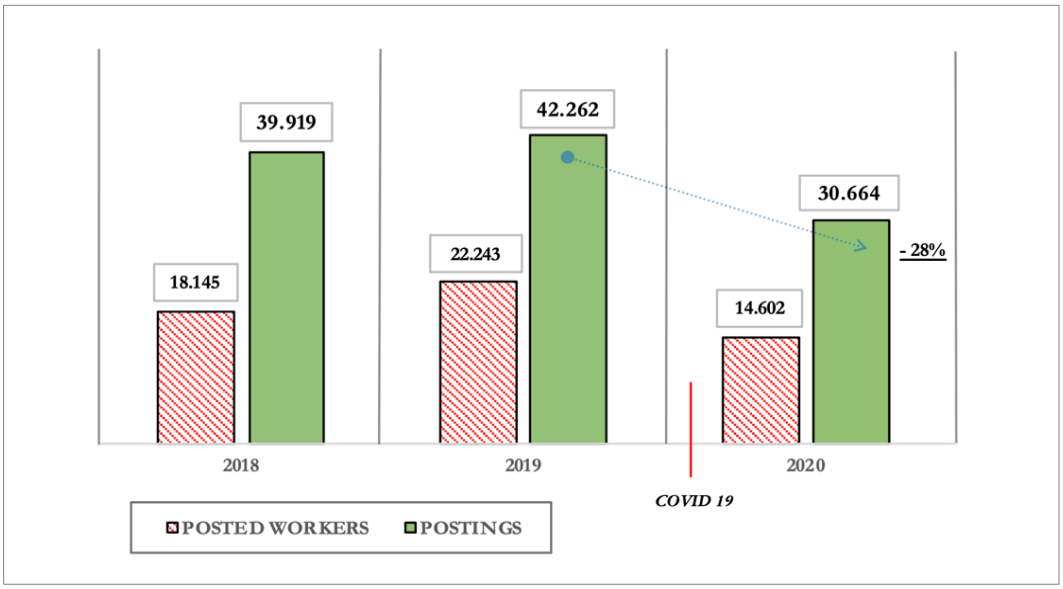
When the number of PDs A1 issued by other Member States to send workers to Spain is compared to the notifications received by the Autonomous Communities, significant differences are observed. As will be seen, only 30,664 postings were notified to the Spanish labour authorities in 2020, although a total of 79,519 PDs A1 (Art. 12 BR) were issued in the EU/EFTA countries to send posted workers to Spain**.** These differences may be due to several reasons: 1) We have not received data from four Autonomous Communities, which we estimate may account for approximately between 15,000-20,000 additional postings, but we have no proof of them, and it is merely an estimation; 2) We have evidence of non-compliance by some companies with the obligation to report the posting of workers to Spain; 3) Unless the posting is made by a TEA it is not necessary to notify the posting if the duration is not greater than eight days.

2.2.3 Notifications made to the competent institutions of Autonomous Communities

Between 2018 and 2020, a total of 23,347 notifications were made in Spain by 4,730 companies established in EU/EFTA countries. These companies sent posted workers to Spain in the framework of a transnational provision of services and, through the prior notification tools, notified 112,845 postings corresponding to 54,990 posted workers during the period considered.

These results come from the notifications made to the competent institutions of the Autonomous Communities by employers who reported the posting of employees to Spanish territory. Data on self-employed workers are not included as they do not fall within the scope of Directive 96/71/EC and it is not compulsory to report their posting to Spain (Art. 5.1 Law 45/1999).

Figure 15. Number and trend of posting of workers to Spain, 2018-2020



Source: Administrative data obtained from Autonomous Communities in the framework of the project *POSTING.STAT*

As can be seen in *Figure 15*, in 2020 a total number of 30,664 postings were reported through the prior notification tools in Spain. This figure represents 14,602 posted persons because many of the posted workers to Spain are sent several times during the same year[120]. According to the data collected and desk research, we observe that many posted workers to Spain are sent on more than one posting mission in the same year. This situation is better understood if we relate it, firstly, to the activities or sectors in which the posting undertaking and posted workers mainly provide services: construction and related sectors (building and infrastructure) and industry (installation of machinery, metallurgy, industrial assembly) and, secondly, to the average duration of the postings: three months on average for each posting/provision of services.

An analysis of the growth rate or trend shows that the number of postings increased between 2018 and 2019 by 6% but decreased by 28% between 2019 and 2020. Again, this reduction is explained by the crisis caused by the COVID-19 pandemic: the restrictions put in place by Member States and the public health measures imposed at workplaces and borders to combat the pandemic meant limitations on labour mobility, suspension of projects and, in many cases, repatriation of posted workers to their countries of origin.

Focusing the analysis on the year 2020, the most striking fact is that the total number of postings reported to the Autonomous Communities is significantly lower than the number of PDs A1 issued in other

120 This situation seems to be common in other Member States; the collection of data from the prior notification tools by De Wispelaere, De Smedt & Pacolet (2020: 18-19) shows that workers posted are sent between two and three times a year to the same Member State.

EU/EFTA countries to report a posting to Spain. Even if we were to estimate the number of notifications that may have been received by the Communities that did not report data to us (Andalusia, Castilla y León, Murcia, and the Canary Islands) and add them to the rest, the total volume of notifications for 2020 would probably not exceed 50,000 postings. This figure is far from the 79,519 PDs A1 (Art. 12 BR) issued in 2020 by the social security institutions of other Member States. One of the conclusions we can draw from this cross-analysis of data is that the obligation to notify the postings to the competent institutions in Spain is not always complied with. In addition to the non-obligation to notify postings of less than eight days and the small sanctions for non-compliance (see *section 3.3*), we consider that there are few *ad-hoc* control campaigns that regularly monitor postings and thus encourage compliance by foreign companies. Consequently, the information available in the prior notification tools of the Autonomous Communities may be underestimated. We believe that the actual number of posted workers to Spain is significantly higher than the number of notifications made. This conclusion was confirmed during interviews with the heads of the competent institutions of the Autonomous Communities and the Labour Inspectorate. They consider that only a part of the postings of workers to Spain is notified, so that many postings go unnoticed by the competent authorities, which prevents specific monitoring and control of compliance with the rest of the requirements of the Directive and the national transposition rules. As we will see in the *Chapter 3* on irregular postings, the random actions and inspections carried out in Spain by the ITSS during the period 2018-2021 led to the discovery that a large number of postings had not been declared, which resulted in the imposition of infringements for failure to comply with the legal obligation to report the posting (Art. 5.1 Law 45/1999).

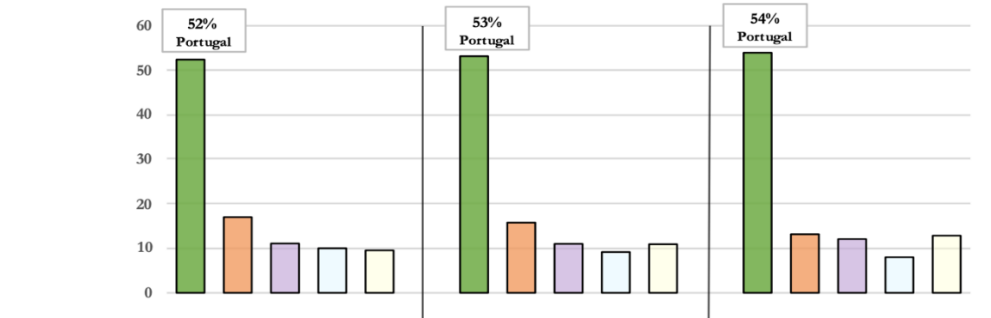
2.2.4 Characteristics of posted workers to Spain

This section focuses mainly on the results obtained from the analysis of notifications done by employers that sent posted workers to Spain during 2018-2020 and notified the posting through the prior notification tools available in the Autonomous Communities.

2.2.4.1 By sending Member State

The main 'sending' Member States of workers posted to Spain in 2020 were Portugal (54%), Germany (13%) and Italy (12%) (*Figure 16*). These three Member States account for a significant share of all postings, almost 80% of the total.

Figure 16. Share of postings to Spain by sending Member State (% of total), 2018-2020



	2018	2019	2020
PORTUGAL	**52%**	**53%**	**54%**
GERMANY	17%	16%	13%
ITALY	11%	11%	12%
FRANCE	10%	9%	8%
OTHERS	10%	11%	10%

Source: Administrative data obtained from Autonomous Communities in the framework of the project *POSTING.STAT*

As we can see in *Figure 16*, Spain annually receives posted workers mainly from one of its neighbouring Member States Portugal. During the period analysed (2018-2020), between 52% and 54% of total notifications were made by companies established in this Member State. Germany is the second largest sending Member State in terms of the number of postings notified to the Spanish Autonomous Communities, although on average it accounts for 'only' 15% of the total. Italy and France are the third and fourth Member States. However, in neither case do they represent a significant portion of notifications. Contrary to what we expected, France is not the main sending Member States of posted workers to Spain. In 2020, only 8% of total postings originates from this Member State.

Posted workers to Spain are sent from practically all EU/EFTA countries but only seven to eight countries represent a significant share. The main countries of origin (Portugal, Germany, Italy, and France) are followed by Romania, the United Kingdom (until 2020), and Poland, although none of them exceeded 5% of the total number of postings reported through the prior notification tools established in the Autonomous Communities in 2020.

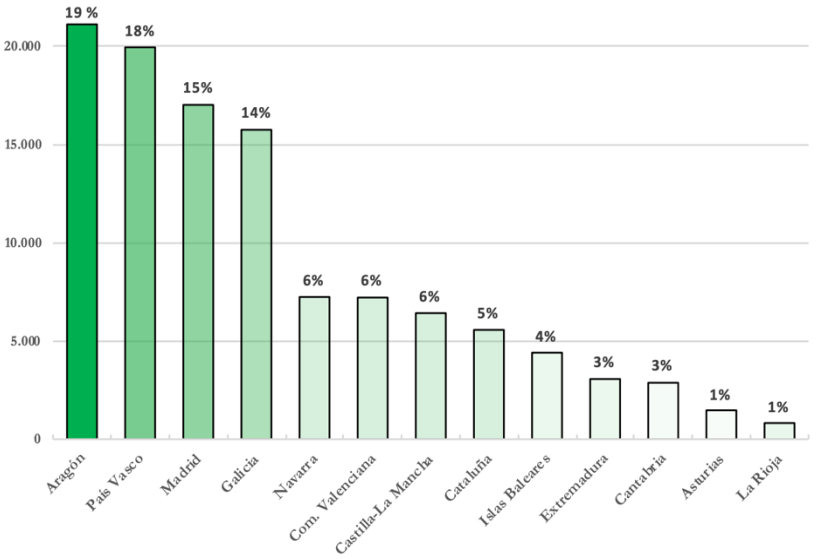
Although data about nationality of the posted workers were requested to the Autonomous Communities, very few reported this information. Therefore, representative and conclusive results on the nationality of persons posted to Spain cannot be provided. However, the data available confirms that in many cases the country of origin of the posted workers is similar to the nationality of the posted worker.

2.2.4.2 By Autonomous Community / region of destination

With the intention of finding out the characteristics of posting to Spain, it is interesting to identify the destination of posted workers within the Spanish territory and to relate it to the Member State from which they were sent (*Figure 16*). Although most of them come from Portugal and predominate in a most Autonomous Communities, this is not the situation in all cases and territories with clearly differentiated characteristics such as the sector of activity or geographic location.

Figure 17. Number of posting to Spain and % share of the total, by Autonomous Community (2018-2020)

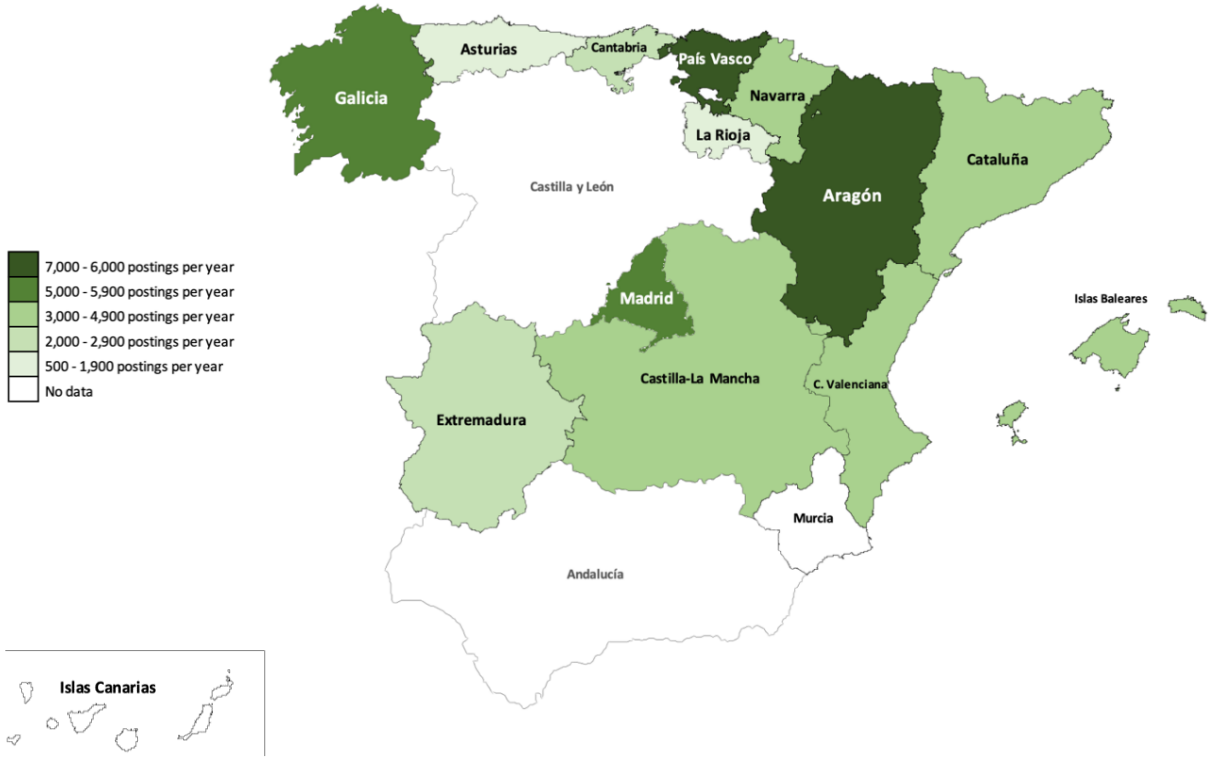
Receiving region	Postings	% of total
Aragón	21.093	**19%**
País Vasco	19.927	**18%**
Madrid	17.001	**15%**
Galicia	15.735	**14%**
Navarra	7.240	**6%**
Com. Valenciana	7.209	**6%**
Castilla-La Mancha	6.420	**6%**
Cataluña	5.567	**5%**
Islas Baleares	4.410	**4%**
Extremadura	3.070	**3%**
Cantabria	2.880	**3%**
Asturias	1.471	**1%**
La Rioja	822	**1%**
Castilla y León	No data	
Murcia	No data	
Islas Canarias	No data	
Andalucía	No data	



Source: Administrative data obtained from Autonomous Communities in the framework of the project *POSTING.STAT*

Between 2018 and 2020, Spain received a total of 112,845 notifications of posted workers who were sent to one Autonomous Community. As can be seen in *Figure 17*, Aragon, País Vasco, Madrid, and Galicia were the territories in which most postings were notified. These four Autonomous Communities accounted for 66% of the total. In a second group, we find Navarra, Comunidad Valenciana, Castilla-La Mancha, and Cataluña. Together they accounted for 24%. Lastly, the Communities of the Balearic Islands, Extremadura, Cantabria, Asturias and La Rioja represent 11% of all notifications of postings received in Spain. Of the regions that have not reported data, for Andalucia and Castilla y Leon (both bordering Portugal) it can be estimated that they could have a significant number of postings representing an additional 10-15%, however, they have not been included in the analysis of the distribution by destination as, unfortunately, there is no evidence to confirm this statement.

Figure 18. Spatial distribution in received postings, by regions 2018-2020



Source: Administrative data obtained from Autonomous Communities in the framework of the project *POSTING.STAT*

2.2.4.3 By sector of activity

The distribution by sector of activity of the companies that sent posted workers from any EU/EFTA countries to Spain and notified the posting shows that, for the 2018-2020 period, construction (52%) and industry (20%) were the predominant activities. The services sector accounted for approximately 16% to 18% of total postings and the agricultural sector did not reach more than 12%.

The sub-analysis by Autonomous Communities in 2019 (see *Table 3*) shows that in Asturias, Castilla-La Mancha, Extremadura, La Rioja, País Vasco, and Navarra, the sum of construction and industry activities account for between 70% and 85% of all postings notified. However, this is not the case in regions such as Aragon, where 52% of activities are in agriculture, and in the Islas Bleares and Comunidad Valencia, where respectively 70% and 32% of posting activities took place in the service sector.

Table 3. Share of posted workers to Spain by sector of activity and host Autonomous Community, 2019

AA.CC / SECTOR OF ACTIVITY	AGRICULTURE	CONSTRUCTION	INDUSTRY	SERVICES
Aragón	**52%**	30%	7%	11%
Asturias	2%	28%	**52%**	18%
Cantabria	2%	**61%**	15%	22%
Castilla-La Mancha	12%	**54%**	20%	14%
Cataluña	2%	**42%**	27%	29%
Extremadura	2%	**55%**	33%	10%
Galicia	1%	**49%**	38%	12%
Islas Baleares	2%	25%	3%	**70%**
La Rioja	2%	**65%**	19%	14%
Madrid	1%	**68%**	20%	11%
Navarra	8%	**68%**	18%	6%
País Vasco	1%	**52%**	32%	15%
Comunidad Valenciana	6%	**42%**	20%	32%

ACTIVITY SECTOR	AGRICULTURE	CONSTRUCTION	INDUSTRY	SERVICES
% OF TOTAL	**12%**	**52%**	**20%**	**16%**

Source: Administrative data obtained from Autonomous Communities in the framework of the project *POSTING.STAT*

It should be reiterated that most of the postings notified to the Autonomous Communities of Asturias, Cantabria, Galicia, Castilla-La Mancha, Extremadura, Madrid, País Vasco, La Rioja, Comunidad Valenciana, and Navarra originated from Portugal. In all these cases, the predominant sector or economic activity (between 40% and 80%) was construction (building and infrastructure) and industry (metallurgy, machinery installation, industrial assembly, and welding).

In Aragon, however, the posted workers mainly came from Romania (51%), Portugal (20%), Italy (8%), the United Kingdom (6%), Poland (4%), and Germany (3%). Although in the industrial sector (installation of wind and photovoltaic plants, among others), construction activities (infrastructure and metal constructions), and in the service sector there was a significant number of postings, the agricultural sector in this Autonomous Community (Aragon) was the one in which most postings were reported (52% of the total), almost all of them coming from Romania. These posted workers were mainly sent to the province of Zaragoza.

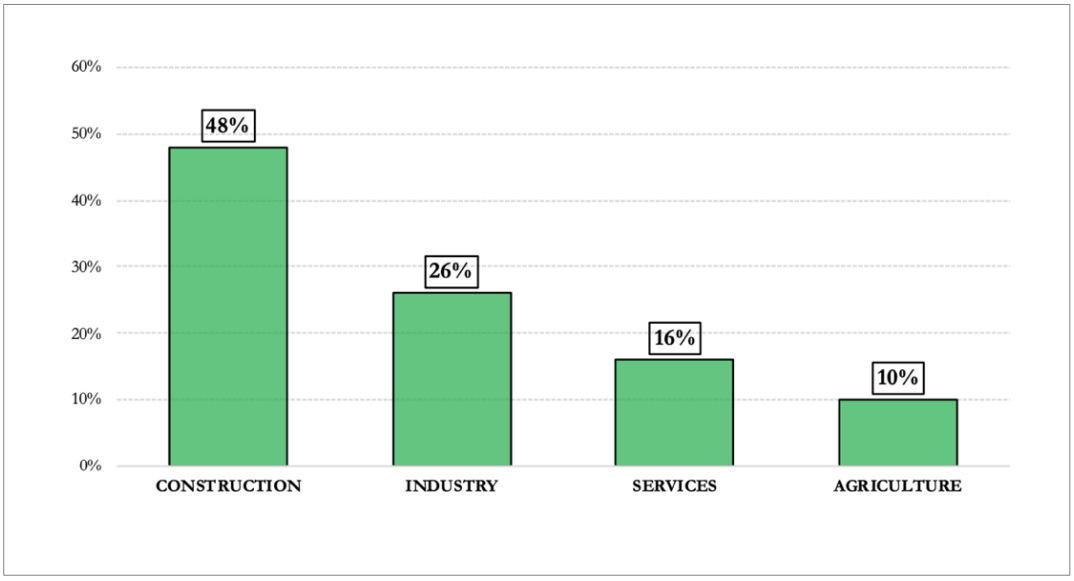
The situation is similar to that of the provinces of Huelva and Almeria (Autonomous Community of Andalucia) and also to the province of Murcia, where there is a great deal of agricultural activity, particularly for fruit and vegetable production. Unfortunately, there are no data available on the notifications received in these territories. However, the information received from the Labour Inspectorate shows that a significant number of infractions committed in Spain regarding posting of workers were imposed to employers from Romania who sent posted workers to Huelva in order to provide services in the agricultural sector.

Another singular case, which differs from the trend followed in the other Autonomous Communities, is that of the Islas Baleares. The companies and posted workers to this territory mainly come from Switzerland and Germany, although also from Portugal and Italy to a lesser extent. These postings priamilary take place in the service sector (hotel and catering activities and related services) (70%) and in construction (25%).

Finally, it should be noted that, although in the Autonomous Communities of Cantabria, País Vasco, Madrid, and Comunidad Valenciana the posting of workers from Portugal is most common (between 40% and 60%), postings from Germany, Italy, France, Poland, Romania, and the United Kingdom are numerous as well, although to a lesser extent, between 20% and 30% of the total.

Of the postings to the agricultural sector, the sub-analysis shows that most of them originated from Romania and their destination was Aragon (52%) and to a lesser extent Castilla-La Mancha (12%). It is foreseeable, however, that the distribution by sector of activity would be altered if we had received and analysed as a whole the data relating to the notifications issued to the Autonomous Communities of Andalucia and Murcia. According to interviews with the Labour Inspectorate and trade unions (CC.OO. & UGT), the posting of workers to these territories often involves the agricultural sector, which is a labour-intensive activity, and companies and seasonal workers from other Member States are often used. However, it must be taken into account that most of the seasonal workers are not posted workers; they are migrant workers exercising their free movement. They are often EU citizens, especially from Romania, Bulgaria, and Portugal or TCNs (mainly Morocco) hired by Spanish companies with pre-established labour and social conditions according to Law 4/2000[121].

Figure 19. Sectors of activity of posted workers to Spain, 2020 (% share of total)



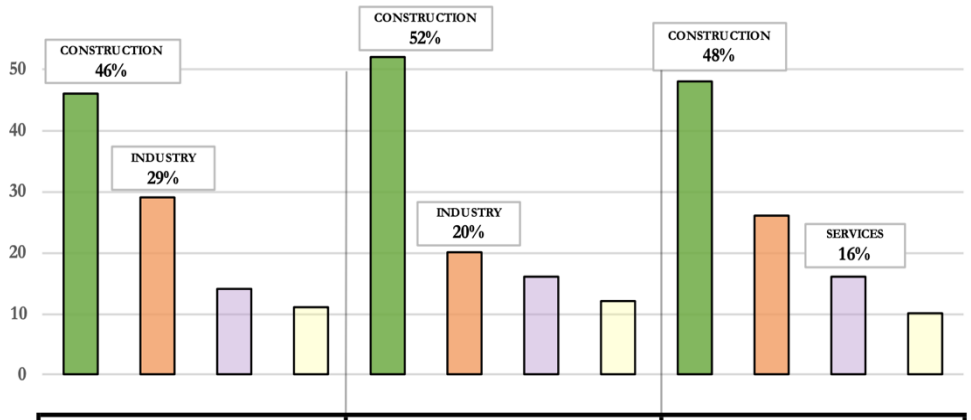
Source: Administrative data obtained from Autonomous Communities in the framework of the project *POSTING.STAT*

The data from the prior notification tools allow us to describe the sector of activity in which posted workers to Spain were employed in 2020. *Figure 19* shows the share for each sector activity, which indicates that 48% of postings were performed in the construction sector, 26% in the industrial sector, 16% in the service sector, and 10% in the agricultural sector. It is important to note that the construction activities carried out by posted workers sent to Spain are often contracted by companies whose main activity is not construction, for example intermediary companies in another sector, which contract a foreign company to build their

121 Although there are no statistics specifically recording the number of seasonal workers entering and leaving Spain each year, the figures for Social Security affiliations show that more than 226,000 foreign workers were included in the special agricultural system in November 2021, 75% of them from third countries (mainly Morocco) and 25% from EU Member States (mostly Romania). See https://www.seg-social.es/wps/portal/wss/internet/EstadisticasPresupuestosEstudios/Estadisticas/EST8/EST10/EST305/EST312

facilities or collaborate in other related activities. In this case, the postings are linked with the construction sector, but the client companies are not in the construction subsector. Furthermore, it is detected that a good number of clients contract activities that require the posting of workers from other Member States to carry out consultancy work, maintenance and/or installation of machinery. However some Autonomous Communities consider them indifferently as activities developed in the constructions sector, industrial sector, or service sector. This highlights the importance of distinguishing between the activity of the clients and the activity carried out by the posted workers in order to accurately measure the impact of the posting of workers in Spain, but this is not currently the case. There are still no common prior notification tools at the disposal of regional institutions to collect this information in a standardised and accurate way. Even after our request to the Autonomous Communities asking for information about which mode of posting was declared by the posting undertaking (subcontracting, intra-group, or transfer of workers by a TEA) in order to have more element for the analysis, most of them did not provide any data in this respect. However, for those that did, it can be concluded that posting linked to a service contract or an intra-group posting represents between 90% and 95% of the total number of posted workers to Spain. Postings by temporary employment or placement agencies range between 5% and 10%, which is therefore not a significant mode of posting in Spain.

Figure 20. Postings of workers to Spain, by sector of activity (% of total), 2018-2020



	2018	2019	2020
CONSTRUCTION	46%	52%	48%
INDUSTRY	29%	20%	26%
SERVICES	14%	16%	16%
AGRICULTURE	11%	12%	10%

Source: Administrative data obtained from Spanish Social Security Administration in the framework of the project *POSTING.STAT*

2.2.4.4 By duration of the posting

Regarding the duration of the posting declared through the prior notification tools between 2018 and 2020, it should be noted that most of them lasted less than six months. Postings with a duration higher than 12 months are limited to 5% of the total and do not reflect the existing pattern of posting of workers to Spain. The information provided by the competent institutions shows that the average duration of the postings to Spain did not exceed six months, with most postings lasting between two and four months. For the postings in the industrial sector (installation and maintenance of machinery: 10% of the total) the duration did not exceed 15 days in many cases. However, it is important to keep in mind that posting activities less than eight days do not have to be notified to the Spanish institutions (except TEA activities).

Therefore, the average duration of the posting calculated here does not include these postings. In other Member States where it is compulsory to report all postings regardless of their duration, this does of course not happen. Excluding these postings of less than eight days from notification in Spain leads to an underestimation of the real number of postings to Spain and, consequently, affects the calculation of some variables such as the average duration presented here.

Table 4. Average duration of the posting period notified to Autonomous Communities, 2020

DURATION	% SHARE OF TOTAL
Between 9 days and 1 month	15 %
Between 1 month and 3 months	36 %
Between 3 months and 6 months	32 %
Between 6 months and 12 months	12%
Longer than 12 months	5 %

Source: Administrative data obtained from Autonomous Communities in the framework of the project *POSTING.STAT*

In Spain most of the postings notified during 2020 had a duration between one and six months (68%) (*Table 4*). Only 17% of the postings lasted more than six months, of which postings of more than 12 months making up 5% of the total. On average, the postings in 2020 had a shorter duration than postings in 2019, namely an average of three months. Nevertheless, the figures for 2020 are clearly induced by the consequences of the COVID-19 pandemic, which led to the suspension of ongoing postings, reduced the duration and the number of total postings, as well as many transnational services which being cancelled or suspended.

The non-obligation to report postings of less than eight days prevents us from knowing the real average duration of all postings, as we understand that there are a significant number of postings with this duration. In any case, the average duration resulting from the analysis of the data received by the Autonomous Communities is relatively low (between two and four months). However, it coincides with the duration of postings between EU/EFTA countries which, for the years 2019-2020 and according to the research carried out by De Wispelaere, De Smedt, and Pacolet (2020: 34) based on the PDs A1 issued, was precisely 115 days for postings to a single Member State (Art. 12 BR). It should be noted that, as explained above, posted workers usually perform more than one posting per year in the same Member State, so the results regarding the duration of postings are consistent with this premise. Thus, it can be concluded that quite number of posted workers are sent to Spain between two and three times a year, with the average duration of each posting being between one and four months.

3. Irregular intra-EU posting from and to Spain

In the absence of a legal and consensual concept of **irregular posting**, in this report it is understood as any breach of the formal or substantive requirements established in the regulatory framework for posting (see *section 1.2*). Therefore, it may refer to breaches of the labour law requirements envisaged in the Posting and Enforcement Directives, and their national transposition, or of the social security requirements imposed by the Coordination Regulations. Among the formal infringements, we can for instance mention that the posted worker does not carry the PD A1 issued by the home Member State Social Security Administration or that the company has not communicated the posting to the host Member State (or Member State of destination).

This second type of non-compliance would generate the so-called *undeclared posting*, the relevance of which lies in the fact that it prevents, or at least does not facilitate, the specific control by the Labour Inspectorate of the Member State of destination of the basic social security or employment conditions that posted workers must enjoy, both the minimum labour law status for short-term postings and the extended status for long-term postings. Indeed, compliance with the formal requirements facilitates the control of posted workers in the Member State of posting as foreseen in the Enforcement Directive. Of course, the non-declaration of a posting may be due to a mistake or an oversight, but it can also be intentional to hide the failure to comply with certain employment guarantees at destination or even at origin. The concealed non-compliance can be as serious as the lack of insurance and/or social security contributions[122] for the posted worker, or even the absence of work authorisations for TCNs.

In periods of economic crisis, such as the current one due to the COVID-19 pandemic, the Inspectorate's control over undeclared work must be increased, as the counter-cyclical nature of the underground economy makes it increase in such periods (De Wispelaere & Gillis, 2021: 5). In addition, **intentionality** makes it possible to differentiate between levels of culpability for non-compliance[123] and, consequently, to graduate the liability of offending companies. A mere unintentional **error** or omission is not the same as **fraud**, which requires the concurrence of a subjective intentional element, i.e., a deliberate breach or conscious omission with the aim of obtaining a benefit or advantage. Finally, an **abuse of law** can also 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.

3.1 Delimitation of irregular posting in Spain

Attempting to analyse irregular posting through micro-data is extremely difficult, especially when it comes to undeclared postings. This report approaches the phenomenon in Spain from the data that emerge from the fight of labour institutions and authorities against irregular posting. For this, we identify the specific institutions aimed at controlling it and the system of infractions and administrative sanctions articulated, since in Spain there are no specific criminal offences aimed at irregular displacement. For instance, from the **receiving perspective**, we have used statistics on administrative sanctions imposed between 2018 to 2020 by the ITSS on companies that posted workers to Spain. This analysis has its limitations, as it is obvious

122 This is connected to undeclared work *stricto sensu*, which already involves evasion of contributions and taxes.

123 See in this regard, Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States (See p.15 https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52009DC0313). Some of these concepts are reiterated and clarified in another Commission Communication on the same subject 'Free movement of EU citizens and their families: five key measures'. Brussels, 25.11.2013 COM (2013) 837 final. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0837&from=HR

that the number of sanctions will depend on the intensity of the inspection activity deployed on these types of companies. As we will show in more detail, the Inspectorate's actions specifically aimed at posted workers only accounted for 0.3% of the total number of inspections carried out by the Spanish Inspectorate, with 315 sanctioning proceedings being opened affecting approximately 4,000 workers, and the penalties imposed did not even reach € 1 million in total, with an infringement rate of 20%. In our opinion, these figures are rather low, which could mean that either the supervisory activity of the ITSS in this respect is insufficient, and/or that, except in the agricultural and construction sector, irregular posting could be considered not to be a major problem in Spain.

The theory that (the fight against) irregular posting is of little importance in Spain is supported by the Commission's official statistics on the use of the Internal Market Information system (IMI[124]), which allows national Inspectorates to exchange information and to make requests for the recovery or notification of administrative penalties and/or fines. These statistics show an exponential growth in the number of requests for information related to the transnational posting of workers, with a total of 1,580 requests made in 2015 rising to a volume of 4,484 requests in 2019, the latest year for which public data are available. It is noteworthy that, of the total number of requests made in 2019, Spain only made 42 requests for information, while, for example, Austria and Belgium made 1,871 and 1,100 requests respectively, which shows that the control of posting is an absolute priority for the inspections of these Member States. From the perspective of the countries of destination of such requests, those that received the highest number of requests were Slovenia (817) and Poland (622). Spain only received 83 requests for information related to the posting of workers, which could indicate little conflict concerning postings from Spain. In relation to the **cross-border enforcement of** administrative **sanctions and fines** requested or required from Spanish labour authorities, there were no requests between competent authorities during the period 2018-2021, neither to perform notifications of decisions nor to execute requests for the recovery of sanctions[125]. However, two cooperation procedures were processed during this period, one with Romania, in 2019, and another one with France, in 2021.

On the same lines, showing the slight elevance of irregular posting in Spain we could mention the **very few** national **rulings** that exist on this matter and which denote, at least, a lack of controversy. After an exhaustive search in various legal databases[126], no supreme Court judgement on the matter has been found, nor has a preliminary ruling been made to the Court of Justice. This is not the case in Member States such as Belgium, France, the Netherlands, or Poland, where there are judgements by the supreme Courts and interpretative rulings by the Court of Justice, as shown, for instance, in the MoveS study on the application by the national Courts of ten Member States of Community legislation on mobility (including the Directives on posting) and the Coordination Regulations (Carrascosa & Lhernould, 2019). Similar conclusions are reached in another study on the recent activity of the national Courts of some Member States on posting (Rasnača & Bernaciak, 2020).

In Spain, there is only judicial doctrine by the Chambers of the Regional High Courts of Justice (*Tribunales Superiores de Justicia*)[127], and again in negligible numbers if we consider the number of posted workers moving to and from Spain (see *Chapter 2* of this report). From 2018 to 2021, only nine rulings were found, which is around two rulings per year on average. However, it could be said that the number of sentences has increased slightly with respect to previous years. Extending the period of analysis from 2008 to 2021 22 sentences are found, i.e., just 1.5 sentences on average per year (see a list of all of them in *Annex 1*, including brief comments on the content of these judgments).

124https://ec.europa.eu/internal_market/imi-net/statistics/2020/07/requests/index_en.htm

125https://ec.europa.eu/internal_market/imi-net/statistics/2020/10/posting-of-workers/index_en.htm

126 *El Derecho* database and the public database of CENDOJ

127 While there obviously have to be more judgments of "first" instance, unfortunately, these are not comprehensively collected in any Spanish legal database, and no relevant judgments of this type regarding irregular posting could be located in the broad period mentioned.

Most of the Spanish judgments have been issued by Social Chambers of the *Tribunales Superiores de Justicia* (13 out of the 22 judgements), which deal with labour matters, and, since the end of 2011, with the challenging of administrative labour sanctions. The nine rulings issued under the administrative jurisdiction (*contencioso-administrativa*) deal mainly with social security issues (payment of insurance and contributions). Six of these rulings involved letterbox companies, including two relating to the annulment of the companies' registration in the Spanish social security system, the annulment of the registration and insurance of workers under the Spanish social security and, consequently, the withdrawal of the issued PD A1. This type of control performed by the Spanish social security administration of companies that fraudulently post workers from Spain generates serious problems for the TCNs who were posted. Indeed, the Spanish Courts confirm the non-renewal of their work authorisations in the absence of insurance under the Spanish social security system. The Courts did not consider the alleged lack of collusion with the fraudulent actions of their employers. There is a total lack of protection for these TCNs, as there is no guarantee that they will be authorised to work in the host Member State, where they are not authorised to work, and retroactively insured under its social security system.

There are thirteen judgments on postings from Spain and nine on postings to Spain. This small sample of judgments corroborates some of the data previously provided in this report. In these judgements Portugal is the main State of origin of posting to Spain (eight out of nine judgements), while the main destination States being France (six out of the 13 judgements) and in second place Portugal (three out of 13). In some cases, construction is the main sector of activity targeted by the vast majority of the judgments (17 out of 22). In some cases (five out of 22) the lawsuit is related to accidents at work suffered by posted workers, while in most of the cases (15 out of 22) the Spanish Labour Inspectorate has played a very relevant role in the identification of non-compliance or fraud. In addition, in two judgments, a relevant intervention of the French inspectorate is recorded.

In the following sections, the analysis focuses, firstly, on the main aspects of the fight against irregular posting carried out by the Labour Inspectorate and its Special Coordination Unit on the fight against transnational labour fraud created in 2020[128]. Secondly, it shows the catalogue of offences and administrative sanctions aimed at companies that post workers to Spain, as there are no specific criminal offences associated with posting in Spain. Thirdly, the statistics on sanctions imposed on posting undertakings provided by the Inspectorate are analysed, all of it from the perspective as **receiving** State (*section 3.2*).

Regarding the sending perspective, i.e., Spain as the Member State of origin of the posting (*section 3.4*), two relevant aspects are addressed in relation to two rulings on the posting of workers to France by Spanish companies. We refer, on the one hand, to the binding force of the PD A1 in the case of fraud, focusing on the *Vueling* case on which the Court of Justice and the French Court of Cassation itself ruled. On the other hand, posting in the agricultural sector and the controversial case of posting through the Spanish TEA *Terra Fecundis*, for which there is only a first French criminal judgement, currently under appeal.

3.2 Receiving perspective: legal framework and the fight against irregular posting

The Spanish Labour and Social Security Inspectorate (ITSS) is particularly entrusted with monitoring and enforcing compliance with the Spanish law transposing the Posting of Workers Directives. The Posting Act and the regulations governing the ITSS itself refer to its central role regarding the obligations of cooperation and mutual assistance with other national administrations[129], even envisaging for the participation of EU or EEA bodies and the Labour Authority itself in its inspections[130]. Even before the transposition of the Enforcement Directive in Spain, the ITSS issued an exhaustive note on Technical Criteria 97/2016[131]

128 OM TES/967/2020: https://www.boe.es/eli/es/o/2020/10/06/tes967/con
129 Law 45/1999 Art. 8 and 9
130 Law 23/2015 Art. 13.2 -as of RDL 7/2021 Art. 14
131 https://www.mites.gob.es/itss/ITSS/ITSS_Descargas/Atencion_ciudadano/Criterios_tecnicos/CT_97_2016.pdf

identifying the elements on which the Spanish Inspectorate should focus its posting inspection activities (ex officio or based on complaints). This document differentiates the supervision of labour-related issues, which the ITSS could conduct directly, from the more limited control that can be carried out in the area of Social Security once it is established that a foreign PD A1 has been issued to post a worker. In fact, if there are doubts as to its correctness and/or validity, the ITSS must inform the Spanish social security institution (*Tesorería General de la Seguridad Social* - TGSS), which must contact the national institution that issued it. As mentioned before, the transposition of the Enforcement Directive made the work easier[132]: the obligation to identify a contact person to liaise with the Spanish authorities and get access to the documentation required, even after the posting has ended, is a clear improvement in that regard[133].

The **ITSS Master Plan for Decent Work** (2018-2020) already admitted that, although the increase in intra-European mobility was a good thing, the parallel growth in cases of fraud (such as letterbox companies, relocations in road transport or air transport) was "generating situations of social dumping that undermine both fair competition between companies and the protection of workers' rights. It also undermines the sustainability of our social protection system". Moreover, it considers that international fraud is becoming increasingly complex and specific structures must be created to combat it[134]. Collaboration between Member States is a priority to address fraud and enhance protection, and in this regard, Spain has focused on the signing of agreements with Inspectorates from **Portugal and France**. The main areas of focus are the fight against fraud by letterbox companies and improving the protection of posted workers. It also focused on improving the investigation of accidents at work of posted workers, carrying out transnational inspections, joint visits, and improving the exchange of data between national authorities.

Since 17 October 2020, there has been a **Special Coordination Unit for the fight against transnational labour fraud** attached to the National Anti-Fraud Office. In accordance with its regulations[135], this Unit coordinates all actions related to intra-Community labour mobility both when Spain is the Member State of origin and the Member State of destination. It is the visible leader and coordinates all the Spanish Administrations involved in posting, from the labour, tax, and Social Security points of view[136]. It is also the liaison office with the European Labour Authority (ELA), dealing with the exchange of information and administrative cooperation with other Member States through the IMI system. The staff assigned are mainly labour inspectors with expertise in transnational fraud who take part in and coordinate the ITSS's own interventions in this area, including joint or concerted inspections with other Member States.

The Unit is promoting the following projects that will improve the control and fight against irregular posting in Spain, also following the provisions of the **ITSS Strategic Plan 2021-2023**[137], which, once again, includes the fight against transnational fraud as an objective[138].

a) The creation, in collaboration with the Autonomous Communities, of a **Central Electronic Register**, or central database, for all the posting communications received by the Spanish Administrations. In this sense, it would also be interesting to create a national database on posting that could *"in the future be connected to the databases of other countries, which would facilitate the control of posting fraud"*[139]. In this context, it would be advisable to set up, in parallel, a single system for companies' notification of the extension of the deadline for considering the existence of a long-term posting, which would facilitate the

132 See Law 45/1999 Art. 5.1 and 2.

133 Law 45/1996 Art. 6

134 See page 36 et seq. https://www.boe.es/boe/dias/2018/07/28/pdfs/BOE-A-2018-10653.pdf

135 Order TES/967/2020. ELI: https://www.boe.es/eli/es/o/2020/10/06/tes967/con

136 The Autonomous Communities' own Labour Authorities or the Ministry of Labour, the Tax Agency, the Public Prosecutor's Office, the National Social Security Treasury TGSS (responsible for issuing the PD A1 and in charge of the affiliation and contribution of workers) but also the entities managing the benefits, such as the National Social Security Institute INSS or the Public Employment Service (SEPE).

137 Resolution of 29 November 2021, of the Secretary of State for Employment and Social Economy, publishing the Agreement of the Council of Ministers of 16 November 2021, approving the Strategic Plan for the Labour and Social Security Inspectorate 2021-2023. https://www.boe.es/eli/es/res/2021/11/29/(1)

138 See objective 4 under Axis 1.1. on decent, safe and healthy working conditions. ELI: https://www.boe.es/eli/es/res/2021/11/29/(1)

139 See Strategic Plan Objective 4.5º Objective 4.5º.

calculation of the period of 12 to 18 months to which the posting is subject. In this Central Electronic Register, the road transport communications through IMI system can be considered.[140] However, to know which of these IMI declarations or posting communications have taken place[141], it would be necessary to consider the Spanish competent road transport authorities notifications made to the Spanish Inspection itself[142]. In this sense, since 2 March 2022, implementing the road transport Posting Directive, the Inspection law purposely envisages the essential collaboration of the Spanish competent authorities in the field of land transport, which must provide the Labour Inspectorate with all relevant information, especially in relation to the posting of workers[143].

b) The update of the Technical Criteria of 2016[144] to adapt the inspection action to the new features of Directive (EU) 2018/957, including the existence and control of the long-term postings.

c) Improving coordination and cooperation between national institutions responsible for the fight against transnational fraud by improving ITSS resources[145] and signing agreements with certain regional and national public bodies involved in posting (TGSS, INSS, SEPE, Ministry of Transport, AEAT).[146]

d) Adaptation of the national regulations of the ITSS to the tasks set out in the European Labour Authority Regulation[147], which includes agreements and conventions with the inspection authorities of other Member States to carry out concerted and joint inspection actions. Specifically, the Strategic Plan foresees the signing of a collaboration agreement with the Inspectorate of Romania, a Member State that posts many workers to Spain, and the consolidation of the existing agreements (with France and Portugal)[148]. Regarding posted workers, the aim is to improve bilateral cooperation in the investigation of accidents at work, the exchange of information and data on companies and workers, to improve detection and inspection procedures regarding letterbox companies, and to reinforce the procedures for the enforcement of sanctions with these Member States.

e) Inspection campaigns are planned in the **international transport** (already started at the end of 2021) and **construction** sector, accounting for 80% of intra-European mobility[149].

f) In general terms, the Strategic Plan aims to **strengthen the Inspectorate itself** in Spain, as by the end of 2021 there were only 858 inspectors and 994 sub-inspectors[150]. At the transnational level, the Plan refers to enhance contact with the **European Labour Authority (ELA)**, but also the connection with the EU Senior Labour Inspectors' Committee (**SLIC**), aimed at improving the health and safety conditions of workers in the EU (OSHA). The Plan considers that the improvement of OSHA through SLIC needs to be re-launched, as it was dismissed when the fight against fraud was prioritised after the 2008 crisis. The information provided by both institutions is intended to promote the training of officials in transnational mobility at the ITSS School itself. Information should also be available on the ITSS website. The appointment of a posting expert Inspector in each territorial unit is also foreseen. The Plan aims to keep the ITSS alongside the European agenda on posting with the **objective** of reinforcing "the credibility of our inspection system and the role of the ITSS in the construction of social Europe, which is particularly important in view of the Spanish Presidency of the Council of the EU, which will take place in the second half of 2023"[151].

140 See new Art. 22 (1) of Posting Law 45/1999 amended by Royal Decree Law 3/2022.

141 IMI Regulation (EU) 2021/2179 allows "preventive notifications."

142 See Art. 16(7) of the Inspection Law (Law 23/2015 as amended by Royal Decree Law 3/2022.

143 See Art. 16.7 of the Law 23/2015 amended by RDL 3/2022.

144 See Action 4.4 of the ITSS Strategic Plan 2021-2023.

145 The ITSS Integra application and other anti-fraud tools that allow for massive data management.

146 See Action 4.2 and 4.3 of the ITSS Strategic Plan 2021-2023.

147 Regulation (EU) 2019/1149

148 See Axis 4 of the Strategic Plan on "International activity of the Labour and Social Security Inspectorate for the years 2021-2023: Promoting decent work and strengthening international cooperation in the fight against fraud".

149 Action 4.3

150 https://www.elindependiente.com/economia/2021/10/11/los-jovenes-no-quieren-ser-inspectores-de-trabajo-en-espana-poco-sueldo-y-cambios-constantes-en-la-legislacion/

151 See, ITSS Strategic Plan 2021-2023.

As mentioned in the current Strategic Plan, the fight against **letterbox companies** continues to be a priority, with inspection campaigns against both those "based in Spain and operating in other EU countries, as well as letterbox companies based in other countries and operating in Spain[152]". The posting Law[153] and the ITSS's own Technical Criteria identify the elements to be checked to determine whether companies carry out substantial activities in the Member State of origin. Regarding the control of compliance with the rules on posting and its temporality, with respect to workers, it is necessary to control the maintenance of the employment relationship with the employer[154] and the temporality of the work in Spain, considering the starting date, the Member State of origin where they usually work and where they are expected to return to, the nature of the activities, and whether the employer provides or reimburses the costs of travel, meals, and accommodation[155].

The Spanish legislation implementing Directive (EU) 2018/957 provides that, when as a result of the aforementioned global assessment, the ITSS finds that a company is **unduly or fraudulently** creating the impression that the situation of a worker falls within the scope of the posting regulations, the worker will be entitled to the application of Spanish labour and social security legislation, without prejudice to the responsibilities of any kind that may be demanded of the company. The worker may not be subject to less favourable conditions than those applicable to posted workers[156]. This new provision may be appropriate from an employment point of view, where it is easy to identify what is most favourable for the posted worker. From a social security perspective, they could only make sense when it is proven that there is no insurance in the Member State of origin. However, if there is a PD A1 issued by another national institution, it does not seem reasonable to impose unilaterally insurance in Spain if the PD A1 is not withdrawn, as provided for in the Coordination Regulations[157]. Interestingly, as will be seen, until 2 March 2022 there was no specific administrative sanction or fine associated with this type of fraudulent posting or the detection of a letterbox company. Until this moment, the Spanish legislation only envisaged the possible application of the Spanish labour law that said fraudulent behaviour is attempting to circumvent. Besides, serious infringements have been included regarding non-compliance with the requirements set out in the Coordination Regulations.

3.3 Infringements and sanctions related to intra-EU posting in Spain

The offences and penalties applicable to employers are set out in the consolidated text of the Law on offences and administrative penalties in the social order, known as LISOS (Royal Decree Legislative 5/2000)[158]. This act includes all the administrative offences and penalties of the social order, which has been amended as a result of the transposition of Directive (EU) 2018/957. Since 29 April 2021, LISOS also includes the administrative infringements and sanctions related to TEAs and user companies (established in Spain or in another Member State) which, before that date were covered by the specific legislation on TEAs (Law 14/1994)[159], which seems like an improvement. On 2 March 2022, a new reform of the LISOS

152 See Action 4.1 of the ITSS Strategic Plan 2021-2023.

153 To assess whether the posting company carries out substantive tasks in the Member State of establishment, beyond purely administrative or internal management tasks, and is not a letter-box company for guidance purposes, over a long period of time, the concurrence of, among others, the following criteria are checked: registered office, administrative headquarters, premises in Spain, place where taxes and social security contributions are paid, where the workers are hired and from where they are posted, legislation applicable to these employment contracts and to those signed with other companies. Ascertain whether it is registered in the home Member State with chambers of commerce or professional associations. The place where it has its main business activity and administrative staff, the volume of business and contracts at origin, assessing whether they are SMEs or recently created companies. The criteria mentioned in Law 45/1999, Art. 8 bis.1, are very similar to those established by jurisprudence in Social Security matters which were incorporated into Decision no. A2 of the Administrative Commission.

154 Basically, valuing the "performance of work, subordination and remuneration of the worker, regardless of how the parties have characterised their relationship in the contract or other type of agreement that they have signed".

155 The criteria are set out in a non-exhaustive manner in Law 45/1999 Art. 8 bis.3.

156 Law 45/1999 Art. 8 bis.6 as of RDL 7/2021 Art. 12.6

157 CJEU 11-7-18 Commission and Ireland v Belgium C-356/15

158 ELI: https://www.boe.es/eli/es/rdlg/2000/08/04/5/con

159 Art. 19a, 19b and 19c LISOS, amended by RDL 7/2021, comprise Section 5 on infringements by temporary work agencies established in other EU or EEA Member States and user undertakings included.

specifically affecting posting came into force[160], adding new and important offences linked to letterbox companies, by means of Royal Decree Law 3/2022, which implements road transport Posting Directive (EU) 2020/1057.

From an **objective point of view**, all infringements are classified as minor, serious, or very serious in Spain. The following types can be distinguished:

1. **Administrative offences specifically associated with intra-community posting**[161]**.** These administrative infringements are related to the fulfilment of formal requirements (documentation, notification of company representatives and, above all, **notification** of the posting itself). Specifically, non-compliance relating to the notification of the posting is graded as follows.

   A merely defective notification that does not prevent the inspection itself is a **minor** infringement, considering there is an infringement for each defective communication made.

   On the other hand, late communication, i.e., once the activity has started in Spain and failure to designate a representative for contact with the Administration and/or with the social partners, in the case of negotiation processes, are considered **serious** infringements.

   Finally, the absence of communication and the falsification or concealment of the data contained therein are considered **very serious** infringements. This type of omission is always penalised if the lack of communication is found out as a result of inspection activities. When the **falsehood or concealment** of data in the notification is punished, it is not the error or lack of information that is being punished, but rather the **fraudulent intent** of the company to prevent the mentioned control by the ITSS. This intentionality is part of the type of offence, so it cannot be used as an aggravating criterion. However, in principle, the number of posted workers affected is not relevant, although it may serve as a criterion for aggravating the penalty.

   The same infringements are to be considered in relation to the failure to notify posting in the road transport sector. However, the implementation of the specific directive provides for joint and several liability of certain parties (shippers, transport operators, passenger transport intermediaries)162 who must ensure compliance with the obligation to notify the postings of the drivers if they do not want to be held liable.[163]

   As a result of the transposition of Directive 2018/957, a **new serious offence** has been added which relates to long-term postings and considers the following offence: "giving the competent authorities an account of the reasons for the extension of the posting on the basis of facts and circumstances which are shown to be **false or inaccurate**"[164]. The wording of this new offence is somewhat unfortunate, as in no case does the employer seek to extend the posting, which continues to have no time limit, only to delay its classification as a long-term posting up to a maximum period of 18 months.
2. Although there is no specific treatment for non-compliance of **OSHA** obligations, it is worth noting that failure to report occupational accidents and occupational illnesses of a certain seriousness suffered by those posted workers is considered a serious offence (*see Table 5*). These preventive infringements, as will be seen, do have **specific penalties that** are higher than the rest of the labour infringements (*see Table 6*).
3. Regarding infringements of the **working conditions of posted workers** guaranteed by the Posting of Workers Directive, these are sanctioned in accordance with the specific working condition breached, i.e., in a similar way as a Spanish company would be sanctioned. This treatment guarantees the so-called **principle of equivalence**[165], as the infringement of EU law is punished in the same way as the

160 The December 2021 labour reform has also modified the LISOS (RDL 32/2021) indirectly affecting posting.
161 LISOS Art. 10-amended by RDL 9/2017 and RDL 7/2021
162 See the parties mentioned in the posting Law (Art. 22.4 of Law 45/1999)
163 See LISOS Ar. 42.4.
164 RDL 5/2000 Art. 10.2.a)
165 CJEU 10-2-22, Bezirkshauptmannschaft Hartberg-Fürstenfeld case C-219/20, ECLI:EU:C:2022:89

breach of a similar Spanish law, which undoubtedly prevents discriminatory treatment on the grounds of the nationality of the company. Thus, for example, non-compliance with working time regulations affecting posted workers is punished in the same way as non-compliance by a Spanish sedentary company, and the same type of sanction is applied. However, the ITSS records in its database whether the offender is a foreign employer of posted workers, which has allowed the statistical treatment of generic offences committed by foreign companies that post workers to Spain. Also, because of the transposition of Directive (EU) 2020/1057 (road sector Posting Directive) new very serious infringements regarding posting (not only regarding the road transport sector) were included to combat letterbox companies. Fraudulent posting of workers by companies that do not carry out substantive activities in their Member State of establishment is considered a **very serious** infringement. This type of infringement also penalises the fraudulent posting of workers who do not normally carry out their work in the Member State of origin in accordance with the provisions of the Posting of Workers Law[166] (Art. 10 of the LISOS as amended by RDL 3/2022). This new type of offence seems to target the fraudulent posted workers that Spain may receive, forgetting the letterbox companies established in Spain from a labour law perspective.

4. With regard to **Social Security** conditions, firstly, it should be pointed out that Spain does not sanction posted workers who do not have their corresponding PD A1, since, as it was already pointed out, these can be issued retroactively if there is insurance at the Member State of origin and the requirements are fulfilled. It should be kept in mind that the issuing of these forms is increasingly subject to more and more requirements, and it is logical that they are not always fulfilled before the posting, especially if there is a certain urgency. As mentioned above, if the ITSS observes irregularities in the PD A1 themselves or considers that they do not meet the requirements envisaged in Art. 12 or 13 BR for their issue, it must contact the Social Security General Fund (TGSS) so that it can connect with the governing bodies of the issuing Member States and decide whether to withdraw or maintain the PD A1. In the event of withdrawal by the foreign institutions or in the total absence of a PD A1, due to lack of insurance in the home Member State system, the posted workers must be insured in Spain and contributions should be paid retrospectively, applying the general rule of *lex loci laboris*. As will be seen, failure to comply with these obligations is associated with specific penalties that are linked to certain percentages of the unpaid contributions[167]. As a result of the transposition of Directive (EU) 2020/1057 two new very serious infringements regarding social security have been created for non-compliance with the provisions of EU Coordination Regulations, also related to **letterbox companies** not only in the road transport sector. These infringements have a double fold objective: the foreign letterbox companies operating in Spain (when the outcome of the infringement is that they do not insure and pay contributions to the Spanish social security system) but also the Spanish letterbox companies that post workers, when non-compliance of EU Regulations generates undue insurance under the Spanish social security system (LISOS Art. 23.1.l and amended by RDL 3/2022).
5. Regarding **temporary employment agencies** established in another EU or EEA Member State, the LISOS envisages some of the infringements already stated for Spanish TEAs operating in Spain[168]. Concerning "**user companies**" established or carrying out their activity in Spain, there are infringements regarding the failure to provide certain information about the posting[169]. Not providing information on the total wage envisaged in the contract for the provision of services is considered a **minor** infringement. Failure to give sufficient advance notice of the start of a posting of the temporary worker to another Member State is considered a **serious infringement**. Finally, when a foreign user company does not notify a TEA, also established in another EU or EFTA country, of the start of the

166 See Art. 8 bis Law 45/1999.
167 LISOS Art. 40.1.d and e. 2 and 3
168 See LISOS Art. 18 (Spanish TEAs) and Art. 19 bis (foreign TEAs).
169 See LISOS Art. 19 ter

posting to Spain in sufficient time for them to be able to notify the Spanish authorities of the posting is also considered a serious offence[170].

Table 5. Overview of infringements related to intra-EU posting in Spain

INFRINGEMENTS ASSOCIATED WITH POSTING (LISOS Art. 10)
Minor infringements (LISOS Art. 10.1)
Formal defects in the communication of the posting
Failure to notify the labour authority in due time and inform them about declared minor occupational accidents and occupational diseases, when they are classified as minor.
Serious infringements (LISOS Art. 10.2)
Issuing communication: - Late, i.e., after the start of the provision of services in Spain. - Without designating the company's representative vis-à-vis the authorities or for information, consultation, or negotiation processes. Inform the competent authorities of the reasons for the extension of the posting on the basis of facts and circumstances which are shown to be false or inaccurate.
Failure to have available, in Spain (during the posting), the posting documentation in the legally established terms[171].
Failure to notify the labour authority in due time and inform about declared serious, very serious, or fatal occupational accidents and occupational diseases.
Failure to submit the documentation required by the Labour and Social Security Inspectorate or submission of any of the documents without translation.
Very serious infringement (LISOS Art. 10.3)
Failure to communicate the displacement, as well as the falsification or concealment of the data contained therein.
Fraudulent posting of workers by companies that do not carry out substantive activities in their Member State of establishment (i.e., letterbox companies) and related to workers who do not normally carry out their work in the Member State of origin.

Source: Own elaboration mainly based on LISOS

Administrative sanctions for companies committing posting offences must be proportionate, effective, and dissuasive. In Spain, sanctions are basically fines, although there are some specific sanctions for TEAs. The amount of the fines was increased in October 2021. These fines are the same as the ones imposed on Spanish companies so that the principle of equivalence, as already mentioned, is respected. Considering the significant differences in living standards between Member States, mere equivalence does not prevent those fines to be extremely high for small or medium companies (SMEs) established in less developed Member States. In this context, the question arises whether equal treatment suffices to ensure freedom to provide services on equal terms, or whether a possible indexation of penalties would be more effective.

Spanish legislation expressly provides that a sanction cannot be imposed in Spain if an administrative and/or criminal sanction has already been imposed in the Member State of origin, provided that the subject, facts, and grounds are identical (*non bis in idem*)[172]. *Table 6* sets out the penalties applicable to breaches of labour relations and employment[173], and for infringements in preventive matters, which are associated with higher penalties. In the area of social security, serious and very serious infringements for failure to pay contributions are penalised with a percentage of the amounts due for unpaid contributions, including surcharges, interest,

170 See LISOS Art. 19 quater

171 Law 45/1999 Art. 6

172 Law 45/1999 add. 1º4

173 LISOS Art.40.1. However, there are different penalties for infringements arising from infringement and settlement reports, migratory movements, and work of foreigners and for obstruction.

and costs. If the infringement is serious, the percentage ranges from 50% to 100%, and for very serious infringements from 100% to 150%[174].

Table 6. Fines for labour relations infringements

	Common labour fines (LISOS art, 40.1)	**Fines for occupational risk prevention OSHA** (LISOS Art. 40.2)
Minor infringement	**Amount of the fine**	**Amount of the fine**
Minimum grade	from € 70 to € 150	from € 45 to € 485
Medium grade	from € 151 to € 370	from € 486 to € 975
Maximum degree	from € 371 to € 750	from € 976 to € 2,450
Serious infringement	**Amount of the fine**	**Amount of the fine**
Minimum grade	from € 751 to € 1,500	from € 2,451 to € 9,830
Medium grade	from € 1,501 to € 3,750	from € 9,831 to € 24,585
Maximum degree	from € 3,751 to € 7,500	from € 24,586 to € 49,180
Very serious infringement	**Amount of the fine**	**Amount of the fine**
Minimum grade	from € 7,501 to € 30,000	from € 49,181 to € 196,745
Medium grade	from € 30,001 to € 120,005	from € 196,746 to € 491,865
Maximum degree	from € 120,006 to € 225,018	from € 491,866 to € 983,736

Source: Own elaboration mainly based on LISOS

As can be seen in *Table 6*, the minor, serious and very serious penalties are graded in three levels (minimum, medium and maximum), considering criteria not included in the type of offence itself[175] such as negligence or intention of the offender, fraud or connivance, and failure to comply with prior warnings and requirements of the Inspectorate itself or even agreements signed with the ITSS. Objective elements are also considered, such as the company's turnover, the number of workers affected, the damage caused and the amount defrauded, whether from workers, social security, or others.

If there is continued persistence carrying out an infringement, the maximum sanction must be imposed. When the penalties correspond to serious and very serious offences regarding failure to pay contributions, the amount not paid, including surcharges and interest, must be considered for their calibration[176]. Specifically, it is foreseen that TEAs established in the EU and EEA that commit infringements classified as very serious[177] may be sanctioned with a **one-year ban on providing workers to user companies** established or carrying out their activity in Spain. Furthermore, if such sanctions are imposed on two occasions, the prohibition may be for an **indefinite period of time**. The latter sanction, due to its relevance,

174 LISOS Art.22.2 and 23.1.b and k

175 LISOS Art. 39

176 LISOS Art.22.2 and 23.1.b and k) If the amount not paid does not exceed € 10,000: minimum degree; if the amount is between € 10,001 and € 25,000: medium degree; if the amount is higher than € 25,001: maximum degree.

177 See LISOS Art. 19 bis.2 which refers to the following three very serious infringements: a) Formalising contracts of provision without being validly constituted as a temporary employment agency according to the legislation of the Member State of establishment or without meeting the requirements demanded by the aforementioned legislation to provide user companies, on a temporary basis, with workers hired by it; b) Formalising contracts of provision for the performance of activities and work which, due to their special danger to safety or health, are determined by regulation; c) Assigning workers under temporary contracts to another temporary employment agency or to other companies for subsequent assignment to third parties.

is imposed by the Minister of Labour and Social Economy or the equivalent authority of the Autonomous Communities with competence for the enforcement of labour legislation[178]. Besides, the recent labour reform has stated specific and higher fines regarding **serious infringements** committed by the temporary employment agencies and user companies (not only posting undertaking)[179]. The fines are increased to the following amounts: for the minimum grade from € 1,000 to € 2,000, for the medium grade from € 2,001 to € 5,000, and for the maximum grade from € 5,001 to € 10,000.

3.3.1 Data collection from the competent inspection services

During the research carried out in the framework of the *POSTING.STAT* project, several interviews were conducted with the authorities of the ITSS in Spain who are responsible for monitoring compliance with the regulations on the posting of workers. In particular, a face-to-face interview was conducted with members of the Special Coordination Unit on Combating Transnational Labour Fraud. This unit was created by Order TES/967/2020 of 6 October 2020 with the aim of improving the coordination of surveillance and control of posting undertakings who send workers to Spain in the framework of the provision of services respect and guarantee their labour rights, regardless of the legislation applicable to the contract[180].

During these interviews, we requested administrative data on the number of inspections carried out in Spain regarding the posting of workers and, specifically, on the infringements and sanctions imposed for non-compliances discovered during the period 2018-2021. In March 2021, the formal request was made with the intention of obtaining (1) the number of proceedings initiated and infringements sanctioned in the area of posting of workers; (2) the main issue that motivated the labour inspection; (3) the origin and sector of activity of the companies that committed infringements or sanctions; and (4) the workers affected.

Between the months of May and November 2021, the information was received and compiled in two files to provide a unified treatment suitable for statistical use. The results offered are interesting, as they provide information on the number of inspections carried out by Spanish labour inspectorates on the compliance with the posting rules and the outcome of these inspections. Specifically, data are provided on the number of infringements sanctioned, the Autonomous Community or province where they were committed, the nationality and sector of activity of the companies, the matter for which the inspection was initiated, the reason for the sanction, the grading and amount of the infringements and the number of workers affected. The data only show a partial picture of the infringements committed in Spain. It should be noted that a large number of them will escape the control of the inspection services. The figures provided here are probably underestimated for this reason, but they do provide an indication of the scale, characteristics and non-compliance detected by the labour inspection services in Spain in relation to the posting of workers.

3.3.2 Inspections and infringements due to non-compliances in Spain, 2018-2020

3.3.2.1 By Member State of origin of the company

Between 2018 and 2020, the Spanish labour inspection carried out a total of 469,185 inspections to control compliance with legal obligations in the field of labour relations (hiring, dismissals, discrimination, wages, overtime, professional classification, working hours, working time, subcontracting, posted workers, among

178 LISOS Art. 41.4

179 These specific sanctions apply, among other, to infringements established in LISOS Art. 19.2.b), 19.2.e), 19 bis.1.b), 19 ter.2.b) and 19 ter.2.e). See the amendment including a new Art. 40.1.c bis under the LISOS by RDL 32/2021 Art. 5. ELI: https://www.boe.es/eli/es/rdl/2021/12/28/32

180 We must thank at this point the collaboration of the members of the Special Unit, specifically Manuel Velazquez Fernandez, Sergio Bescos Rubio, and Juan Pablo Parra Gutierrez, who in several phases carried out a work of preparation, compilation and export of data relating to procedures developed by the ITSS between 2018 and 2021 and made them available to us to undertake this project.

others)[181]. Only 0.3% of the total number of inspections (i.e., 1,543) were aimed at controlling compliance with the labour and social security obligations of posted workers. These actions resulted in the imposition of 315 sanctions imposed by the ITSS for infractions committed by companies (foreign or Spanish) that sent or received posted workers and failed to comply with some of the obligations established in Spanish legislation[182] (*Table 7*). Behind these infractions there are 3,793 posted workers and a total amount for the fines imposed amounting to € 967,419.

The infringement rate, i.e., the number of infringements divided by the total number of inspections on posting of workers (315/1,543) was over 20%. This figure means that, in one out of every five inspections, a non-compliance was detected that resulted in the imposition of a fine.

Table 7. Infringements related to intra-EU posting, by Member State of origin of the company, 2018-2020

MEMBER STATE OF ORIGIN OF THE COMPANY	Number of infringements	% of the total	Posted workers affected	% of the total
Portugal	95	30%	1,116	29.4%
Spain	75	24%	746	19.7%
Italy	27	9%	50	1.3%
Germany	24	8%	69	1.8%
Romania	17	5%	1,572	41.4%
France	14	4%	21	0.6%
Switzerland	11	4%	14	0.4%
Czech Republic	10	3%	18	0.5%
Poland	10	3%	84	2.2%
Austria	7	2%	10	0.3%
United Kingdom	7	2%	19	0.5%
Luxembourg	6	2%	38	1.0%
Belgium	3	1%	5	0.1%
Other countries (Slovenia, The Netherlands, Finland & Croatia)	9	3%	31	0.8%
TOTAL	**315**	**100%**	**3,793**	**100%**

Source: Administrative data obtained from ITSS in the framework of the project *POSTING.STAT*

As can be seen in *Table 7*, 95 of the 315 sanctions (30% of the total) were imposed on posting undertakings established in Portugal. This is somewhat coherent if we take into account that more than 50% of intra-EU postings to Spain during the period 2018-2020 came from this Member State. Approximately one out of two infringements committed by Portuguese companies that sent posted workers to Spain were serious and very serious, mostly for late submission of the posting notification, for not having the required documentation or for not guaranteeing the posted workers the working conditions set out by legislation or collective agreements (LISOS, Art. 10). The rest of the sanctions imposed were either for failure to register

181 ITSS action statistics are available at: https://www.mites.gob.es/itss/web/Que_hacemos/Estadisticas/index.html

182 In accordance with Law 45/1999 (Additional Provision 1, paragraphs 3, 4 and 5), the ITSS can act with respect to Spanish companies that move to other Member States, either for violating the legislation of the host Member State or for violating Spanish legislation (applicable during the posting). For this purpose, the possible offences committed must be typified and sanctioned by the Law on Offences and Sanctions in the Social Order (RD. 5/2000) and the non bis in idem principle must be respected: breaches already sanctioned by the authorities of the host Member State cannot be sanctioned. The ITSS is also empowered to issue settlement reports for non-payment of contributions if, for example, the actions carried out in the host Member State reveal the existence of wage differences.

posted workers in any Social Security System (LISOS, Art. 22.2) or for failing to comply with obligations in terms of occupational risk prevention (LISOS, Art. 11, 12 and 13).

The second highest number of infringements found in Spain regarding the posting of workers was committed by Spanish companies which, in the framework of a transnational provision of services, infringed the legislation of the host Member State of posting or failed to comply with any of the obligations set out in Spanish legislation. During the period analysed, a total of 75 infringements were detected, carried out by ten companies that committed serious breaches, above all for not complying with the rules on working hours, overtime, rest breaks and, in general, working time (LISOS Art. 7.5); for not guaranteeing posted workers the working conditions established in legislation or collective agreements (Art. 10.4); for failing to comply with obligations in terms of occupational risk prevention (Art. 11, 12 and 13); or for violating Social Security regulations such as failure to register (Art. 22.2) or for acting fraudulently to obtain unemployment benefits (LISOS, Art. 26).

Although companies established in Romania only committed the fifth highest number of infringements related to intra-EU posting in Spain, the number of workers affected in these cases is the highest of all Member States of origin, namely 1,572. This figure represents 41% of the total number of sanctions imposed on all companies that posted workers to Spain between 2018 and 2021. As seen in the *section 2.2.4*. Romania also ranks fifth by Member State of origin in terms of number of posted workers to Spain (5% of the total, around 5,600 postings in this period), however, they rank first in terms of infringements by workers affected, which indicates that the posting undertakings from Romania commit more infringements than those of other EU/EFTA countries.

An analysis of the data related to the infringements carried out by these Romanian companies shows that nine sanctions (very serious) were imposed for not applying the working conditions set by legislation or collective agreements (LISOS, Art. 10.4) and for breaches related to working hours, breaks and working time (Art. 7.5). It was also found that most of these companies and workers were posted to the Autonomous Community of Andalucía, specifically to Huelva and in the agricultural sector (90%).

Based on data available from the Autonomous Community as well as interviews carried out with the ITSS and other stakeholders, it was found that except in two provinces (Zaragoza and Huelva) the presence of posted workers in the agricultural sector is less than 5% of the total number of foreign workers employed in Spain in this sector. It should be noted that the hiring of EU citizens or TCNs employed in the agricultural sector in Spain is mainly carried out through direct hiring by the owners of the farm or by Spanish agricultural companies in the workers' countries of origin. Even so, it has been found that non-compliance coincides to a large extent with that of agricultural workers posted in the framework of a transnational provision of services. Of the agricultural campaigns carried out by the Spanish labour inspectorate in this sector during 2020, the most widespread infringements were those related to undeclared or irregular work situations (lack of registration or insurance with the Social Security and lack of authorisation to work in Spain for non-EU citizens specifically); undeclared work (partial non-payment of wages and deficiencies in social security contributions); and irregularities in occupational risk prevention (lack of risk assessment, lack of protective equipment and prevention measures related to the COVID-19 pandemic).

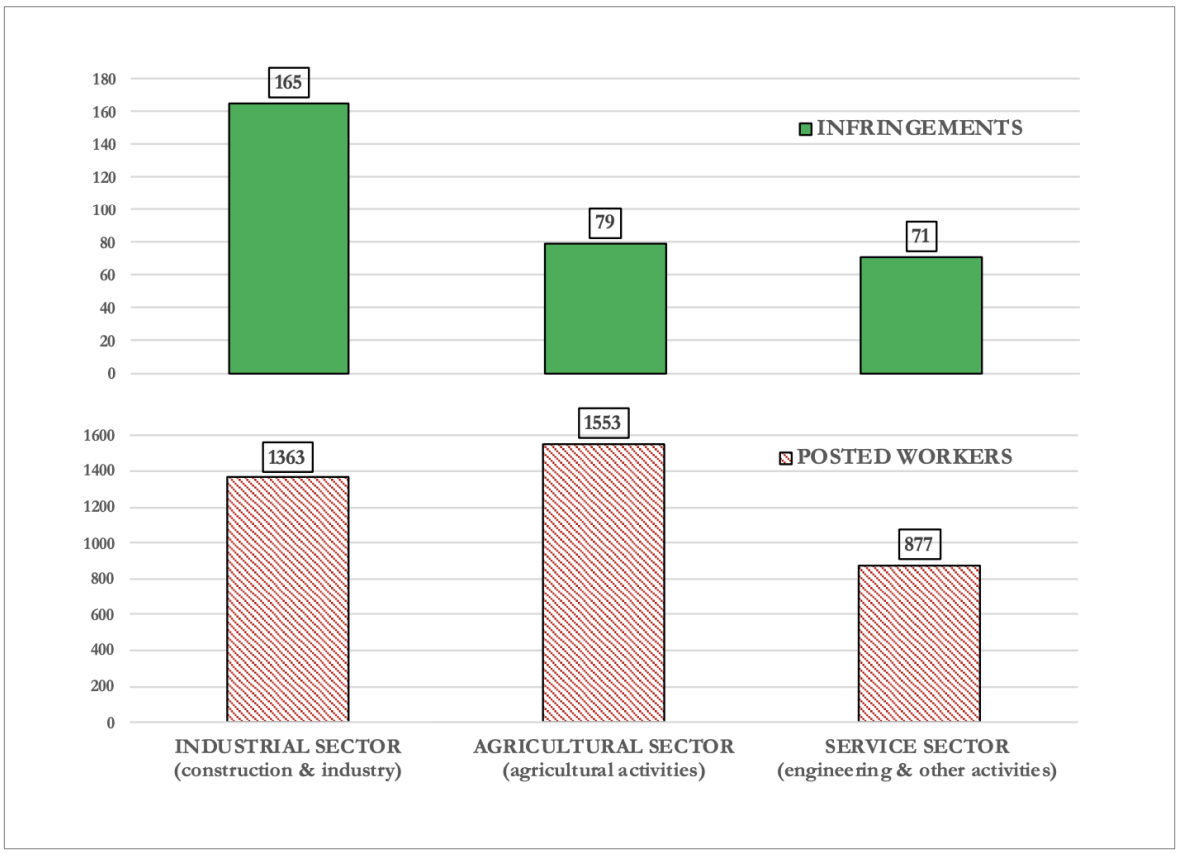
Finally, the reasons for which companies that posted workers to Spain were sanctioned were, firstly (50%) for non-compliance with obligations relating to the posting (defects in the notification of the posting or late notification, failure to have the required documentation, failure to report accidents at work, or failure to guarantee the posted workers working conditions set out in collective bargaining agreements or applicable awards). Secondly (22%), for non-compliance with social security obligations (failure to register or improperly obtaining benefits). The third and fourth most common reasons were for committing irregularities related to occupational risk prevention (16%): safety conditions, training and information for workers or subcontracting; and for not guaranteeing the applicable working conditions (10%), specifically in terms of working time, salary, or discrimination. The remaining sanctions (3%) were imposed for

obstructing the work of inspectors (LISOS, Art. 50), for illegal assignment of workers, or because the workers posted by their companies did not have the required work permit to work in Spain (LISOS, Art. 37).

3.3.2.2 By sector of activity of the company

The analysis of the infringements by sector of activity of the companies that were sanctioned provides information on the activities in which most breaches of the legal obligations imposed on the posting of workers were found (labour and social security).

Figure 1. Infringements related to intra EU-posting in Spain, by sector of activity, 2018-2020



Source: Administrative data obtained from ITSS in the framework of the project *POSTING.STAT*

As shown in *Figure 21*, the industry sector, especially construction and its related activities (infrastructures, renovation of buildings, other specialised construction activities) concentrated the highest number of infringements committed in Spain related to intra EU-posting of workers between 2018 and 2020. A total of 165 infringements cases in this sector were detected, which represent 52% of the total. These affected a total of 1,363 posted workers, most of them sent from Portugal to practically all the Spanish Autonomous Communities. The agricultural sector, with 25%, was in second place in terms of the total number of infringements and sanctions imposed in Spain related to workers posted in the framework of a transnational provision of services. It is significant in this sector that the infringements found affected to 1,553 posted workers, which represents 40% of the total and, of these, 1,486 were posted from Romania to the province of Huelva (Andalucía). In third place by number of infringements detected and sanctioned in Spain between 2018 and 2021, we find companies that sent posted workers to or from Spain and carried out their activity in the service sector (23% of total) and related activities, such as civil engineering or others business support

activities. In this sector, 71 infringements were detected affecting 877 posted workers who were mainly sent from Portugal, Germany, Austria, France, and Italy.

3.4 Sending perspective and the *Vueling* and *Terra Fecundis* case studies

This section deals with two relevant issues that are linked to two judgments on the posting of workers to France by Spanish companies. On the one hand, the binding force of PDs A1 in the case of fraud, focusing briefly on the well-known *Vueling* case on which the Court of Justice and the Criminal and Civil French Court of Cassation ruled. On the other hand, posting in the agricultural sector and the controversial case of the Spanish TEA *Terra Fecundis*, focusing on the French criminal judgement, handed down at first instance and currently under appeal.

3.4.1 The binding value of PD A1 and their non-consideration by foreign Courts

As mentioned, when dealing with the legal framework, to prove that the posted worker is insured under a national social security system, this competent Member State issues a PD A1 (Art. 12 or 13) and more importantly to make sure that they are exempted from the general rule or *lex loci laboris* and pay contributions in the host Member State. In order to avoid fraud, the procedure has become increasingly demanding. The issuing national Administration not only has to check certain non-exhaustive information contained in the CACSS Recommendation A1, but also, according to the principle of loyal cooperation, must keep the supporting documents of such information in order to be able to quickly confirm and verify the accuracy of the information on which the issuance was based if it is required by the social security Administration of the host Member State. In addition, communications via EESSI and the procedures established in Art. 15 and 16 of the implementing Regulation must be followed.

In the case of PD A1 under Art. 12, the requisites and information requirements envisaged in the Regulations aim to identify the existence of the so-called letterbox company[183], those without any substantial activity in the Member State of origin, only seeking to take advantage of the cost savings derived from maintaining insurance to the social security system of the Member State of origin. This information requirements are linked to criteria already identified by the Court of Justice itself[184] and which are now also included in the CACSS Decision No A2[185]. Once the existence of a letterbox company has been detected, the Administration of the Member State of origin must refuse the request for a PD A1 or withdraw it retroactively[186]. Logically, in these cases, the general rule, *lex loci laboris*, should be applied and the posted workers must be insured in the social security system of the host Member State and their employer(s) must pay contributions there. In the case of TCNs, it is necessary that they apply for authorisation to work there beforehand, as they lack the right to free movement.

Recent preliminary rulings of the CJEU deal with posting companies challenging the refusal of the Administration of the Member State of origin to issue the requested PD A1. On one hand, the restrictive criterion of the Bulgarian administration, refusing to issue a PD A1 to a TEA which did not assign workers to any significant extent on its territory and merely posted them to other Member States, was confirmed by the CJEU. As the Court of Justice states, this practice could lead to forum shopping, which could even exert downward pressure on the social security systems of the Member States or ultimately lead to a reduction in

183 See Annex V and point 4 of Recommendation A1.

184 See ECJ 9-11-00 Plum case C-404/98 and 10-2-00 FTS case C-202/97.

185 See point 1.5 of this Decision, which states that the following criteria can be considered, without ruling out other criteria: the place where the company has its registered office and administration, the number of administrative staff working in the Member State of origin and in the Member State of posting, where the posted workers are recruited, where the company's clients are located, where most contracts with other companies are concluded, the law applicable to the employment and commercial contracts concluded by the company, turnover in the Member State of origin and in the Member State of posting.

186 This recommendation advises to inform the company of the possibility of future controls that could lead to its retroactive withdrawal (Recommendation A1 point 5).

the level of protection offered by these systems[187]. On the other hand, in another judgement, the CJEU also confirmed that the Polish authorities were right to refuse to issue a PD A1 (Art. 13) in favour of the works subcontractor Format when the successive provision of services in different Member States exceeded 12 months[188].

When the ITSS reports the existence of a letterbox company, the Spanish administration (TGSS) cancel the company registration under the Spanish social security system[189]. This decision leads to the nullity of the posted workers insurance, the withdrawal of the PD A1, and the communication to the host Member State authorities[190]. Under some Spanish judgements the plaintiffs are posted TCNs who, as a result of the detection of a letterbox company, lose their authorisations to work in Spain. In these judgements, the workers claimed, unsuccessfully, the absence of collusion with the letterbox company, but the administrative decision was confirmed considering that the labour contract was not valid and the PD A1 was null and void[191]. Letterbox companies are sometimes merely an establishment of a French company with no substantial activity in Spain[192], or have been set up in Portugal by a Spanish company[193]. On another occasion, the Spanish Inspectorate proved that it was not a letterbox company, and that the refusal of the PD A1 by the Social Security Administration was erroneous because, although the workers were hired to be posted, they had previously been insured in Spain and could therefore be posted in accordance with the Coordination Regulations[194].

The increase in the requirements and control obligations of the issuing Member States relates to the binding effect that PDs A1 have for the receiving administrations, as long as they are not withdrawn by the administration of the Member State of origin[195]. This important virtuality of foreign PDs A1 also applies to those issued retroactively[196]. That binding effect is also applicable to the Courts of justice of the Member State of destination.[197] The legislation of the host Member State cannot authorise its own administration to dissociate itself from foreign PDs A1, even if it considers them to be fraudulent, by insuring posted persons to its own social security legislation[198]. Only the Courts of the Member State of origin, which issued the PD A1, can invalidate or withdraw them if they are not correct[199]. It should be noted that the judgement of a Court of the host Member State obliging to insure and contribute to its national system would not bind the Administration of origin in the home Member State, which could maintain the insurance of the posted workers demanding the due contributions. In this situation the employer would be obliged to pay double contributions, which is contrary to the uniqueness of the applicable law and the legal certainty (Carrascosa, 2019: 58).

In the event of a dispute between national Administrations, for example, if the inspectorate of the Member State of destination considers that there is an irregular posting and doubts the authenticity or accuracy of the PD A1 provided, or even when it considers that there is fraud, abuse of rights, or manifest error, the dialogue and conciliation procedure with the issuing national administration[200] should be initiated without

187 See CJEU 3-6-21, case Team Power C-784/19, ECLI:EU:C:2021:427. A commentary on this judgment in Parra (2022).

188 See CJEU 20-5-21, case Format II C-879/19 ECLI:EU:C:2021:409, there was already a previous judgement on this company, CJEU 4-10-12, case Format I C-115/11. Commenting on both see Martín-Pozuelo (2021)

189 TSJ Com. Valenciana (Administrative chamber) 26 October 2021, it is found that all construction activity is carried out in Belgium and the Netherlands, and it has no activity in Spain. In addition, it owes contributions of € 60,000.

190 TSJ Com. Valenciana (Administrative chamber) 9 December 2019, it is confirmed that the construction company is only carried out in France, furthermore it is confirmed that it owes Spanish social security contributions.

191 TSJ País Vasco (Administrative chamber) 20 March 2018, alleging that the workers did carry out the activity in France of construction and painting and were paid.

192 It is a non-active establishment of a French company created exclusively for the purpose of saving contributions TSJ Baleares (Administrative chamber).

193 TSJ Castilla-León (Burgos) (Administrative chamber) 31 October 2013.

194 TSJ Castilla-León (Administrative chamber) 1 April 2019 19.

195 EC Reg. 987/2009 Art. 5.1; CJEU 10-2-00 FTS case C-202/97 para 53 and ECJ 26-106, Herboshch Kiere case C-2/05 para 24.

196 CJEU 30-3-00, Banks case C-178/97 paragraphs 52-57 and CJEU 6-9-18 Alpenrind case even when the application of the law of destination has already been determined or the posting itself has been terminated.

197 From any kind of national Court or tribunal (criminal, civil, penal…) CJEU 24-10-17 Case Nikless C-474/16 para 17.

198 CJEU 11-7-18, Commission and Ireland v. Kingdom of Belgium C-356/165 paragraph 86.

199 CJEU Alpenrind C-527/16 paragraph 61.

200 CJEU 11-7-18, Commission and Ireland v. Kingdom of Belgium C-356/15 paragraphs 97 and 98.

delay[201]. It is true that this dialogue procedure is considered unanimously by all the authors to be excessively long and not very decisive, as it starts with a dialogue between institutions, which can then be passed on to administrations and, if one of them so requests, it could reach the conciliation phase before the CACSS, for six months. However, even if a final decision is taken by its Conciliation Committee, it would not be legally binding for the issuing national Administration, which could still refuse to withdraw the PD A1[202]. The proposal to reform the Regulations sought to transfer part of the procedure to the Regulations themselves, making it normative and shortening the deadlines (Carrascosa, 2019). The dissatisfied host Administration, again, could only seek its invalidation and withdrawal in the Courts of the host Member State. However, it seems that this possibility is not happening in practice, at least in Spain. There are no known cases of foreign social security institutions challenging a Spanish PD A1. Besides, from a procedural point of view, there could be problems as it is not envisaged expressly that these foreign institutions would be considered "interested parties". Another option, also not used, would be to bring the issuing national Administration before the CJEU for a ruling in infringement of EU-law on the validity of the PD A1 in question (TFEU Art. 259). In view of the length of such proceedings and the need for a binding solution to be reached quickly (as entitlements to social security benefits may also arise in the meantime), it has been suggested that there should be an ad-hoc fast-track procedure before the CJEU or that ELA could rule in the framework of preferably binding arbitration (Carrascosa, 2019: 61-65; Contreras, 2020: 57).

The general rule of binding the Courts of the Member State of destination to foreign PDs A1 was significantly softened, in cases of fraudulent issuance, by the CJEU judgment of 06-02-18 Altun and others C-359/16, reference for a preliminary ruling by the Belgian Court of Cassation. The Court of Justice, provided the following conditions were met, allowed the national Court to disregard the Bulgarian PD A1 to punish offenders under criminal cases. However, it must be outlined that it did not allow its invalidation or withdrawal, which remains in the hands of the Bulgarian Administration of the issuing Member State (Carrascosa, 2019: 59). The possibility to disregard a PD A1 requires, on one hand, that the administration of origin, from the home Member State, did not carry out the control required by the administration of destination, from the host Member State, within a reasonable period of time.[203] On the other hand, the fraudulent nature of the issuance of the PD A1 must be proven in a fair lawsuit where the evidence can be refuted with all the procedural guarantees. In this lawsuit must be proved, not only that the objective requirements for the issuance of the PD A1 were not met (objective requirement), but also that the company that requested it, through a deliberate action or omission, circumvented the requirements in order to obtain an economic advantage (subjective requirement). This important change in CJEU doctrine is based on the idea that EU Regulations cannot cover fraudulent or abusive operations. However, in no case does this doctrine endorse a change in the applicable social security regulations as long as the PDs A1 are not withdrawn, it only allows for the sanctioning of the employers of origin and destination involved in the fraud (Carrascosa, 2019: 60; Verschueren, 2020: 494).

The Altun doctrine was confirmed in the recent Vueling judgment (CJEU 2-4-20, joined cases C-370/17 and C-37/18)[204] concerning PDs A1 issued by the Spanish Administration in favour of Spanish airline flight personnel, based in Barcelona, which since May 2007 had been operating scheduled flights between several Spanish cities and Roissy airport in France, where it had opened a base of operations. The dispute in the

201 See EC Reg. 987/2009 Art. 5, with the procedure being detailed in CACSS Decision No. A-1 which, as noted, is not legally binding.
202 See CJEU 6-9-18 Alpenrind case -527/16 paragraph 64.
203 Judgment of the CJEU of 6-2-18 Altun and others C-359/16, paragraph 56.
204 ECLI:EU:C: 2020:260

main proceedings dealt with civil liability for damages derived from a criminal offence[205] . In a ruling of 11 March 2014, the French Criminal Court of Cassation condemned the Spanish company for illegal (undeclared) work arguing that it had not declared its permanent activity in France and therefore was carrying out undercover work. The Court disregarded the PDs A1 issued by Spain (former E-101) without due guarantees, under this criminal judgement. It was applauded by Posting Directive experts[206] and criticised by experts in social security coordination[207] (Lhernould, 2014b: 1051).

In January 2008, the French inspectorate sanctioned Vueling for concealed employment and for not having declared these activities to the relevant social security French institutions[208]. Only the ground personnel were declared, while the members of the flight and cabin crew were insured in Spain as they had PDs A1 (Art. 12) issued by Spain. However, it was understood that the requirements for their correct issuance were not met. The labour inspectorate found out that 48 employees had been engaged less than 30 days before the actual date of their posting to France, some of them either the day before or on the same day they were posted and concluded that they had been recruited with a view to being posted. However, from our point of view, these findings do not suffice to withdraw a PD A1. Under the Coordination Regulations, it is required that the posted workers had been subjected previously to the Spanish social security at least for one month, not that they had been employed by Vueling a month before posting them. The labour inspectorate also noted that, for 21 of those employees their pay slips mentioned an address in France and that a significant number of declarations of posting contained false declarations of residence[209], hiding the fact that many of the posted workers did not have the status of Spanish residents, some of them never having even lived in Spain.

Despite such Inspectorate actions, it was not until 4 April 2012 when the French Social Security administration, the URSSAF, communicated the facts to the Spanish institution, the TGSS, which had issued the disputed E 101 certificates (previous PD A1) and requested that they be annulled. The Spanish institution, although it initially annulled these certificates on 17 April 2014, reinstated them (on 5 December 2014). In fact, it finally decided not to declare the improper affiliation to the Spanish system, considering the time that had elapsed, the impossibility of refunding the contributions paid due to the legal limitations, and the possibility that many of these workers had enjoyed or were enjoying Spanish benefits based on those contributions, which could leave them without social protection.

The CJEU resolved the question for a preliminary ruling in a judgment which, although based on the previous Coordination Regulations (Regulations 1408/71 and 574/72), is clearly applicable to those in force. It reiterates the *Altun* doctrine and the possibility of not considering PDs A1 to be fraudulent, in order to impose civil liability for damages, if certain conditions are met. Again, it is clear that the foreign PDs A1 cannot be annulled, as the French Courts cannot oblige the Spanish administration to such an annulment,

205 The original lawsuits were twofold: on the one hand, the lawsuit brought by a French supplementary social security fund (the CRPNPAC) which brought a civil action for damages against Vueling seeking compensation for the loss caused by the absence of contributions to the French supplementary pension scheme. However, this lawsuit had to be suspended when criminal proceedings were opened for the offence of disguised employment. It was when the civil suit brought by the fund, which had been suspended by the criminal suit, was reactivated that the Court of First Instance of Bobigny decided on the validity of the Spanish PD A1, which had already been ignored by the French criminal Courts. On the other hand, there was the lawsuit brought by a Vueling co-pilot, posted by the Spanish company for a year at Roissy airport. This co-pilot brought an action before the French Courts for the termination of his employment contract for serious irregularity and sought from Vueling flat-rate compensation for disguised work and compensation for the loss suffered due to the lack of contributions to the French social security system during the period of posting. However, the Paris Court of Appeal, based on the criminal judgment of the Court of Cassation of 11 March 2014, decided to convict Vueling. In the appeal against this judgment before the French Court of Cassation, the case stayed and a reference for a preliminary ruling was made, which was joined to that of the abovementioned Pension Fund, as it dealt with the same subject matter.

206 Muller (2014: 788) and Guichaoua (2014: 385).

207 Fillon (2014: 5) and Lhernould (2014: 307).

208 "In that report, the labour inspectorate stated that Vueling occupied, at the Paris-Charles de Gaulle Airport at Roissy, commercial operational and management premises, rest rooms and flight preparation rooms for the flight and cabin crew, and a supervising office for ticket counter and passenger registration, and that it employed there, on the one hand, 50 individuals as cabin crew and 25 individuals as flight crew, whose contracts were subject to Spanish law, and on the other hand, ground personnel, including a commercial manager, whose contracts were subject to French law."

209 Some of the workers have no domicile in Spain, but in France. However, Vueling's own domicile in Barcelona has been stated for all of them.

which could only result from a judgment handed down by a Spanish Court or a judgment of the CJEU (Carrascosa, 2020).

The Vueling judgment restates that in order for a foreign PD A1 not to be considered by a Court of the Member State of destination, it is necessary to make quick use of the dialogue and mediation procedure between the administrations involved (Regulation 987/2009 Art. 5). This first requirement is not met in the case under analysis, because the French Administration did not contact the Spanish authorities until more than four years after the first inspection and, therefore, the Spanish institution was not given the opportunity to review the validity of the issuance of the PD A1 considering the information provided by the French institution on their fraudulent issuance.

The second requirement, also established in Altun, is that within the framework of this dialogue, the Administration of origin does not withdraw or cancel the PD A1 or does not even make a decision within a reasonable period of time. It is clear, therefore, that the non-application at destination is subsidiary to the refusal of the issuing entity to withdraw them. In this case, it is true that the TGSS did not accept the arguments of the French administration, but to a large extent its response was due to the tremendous delay in communicating the problem.

Lastly, it is pointed out that the EU Coordination Regulations preclude a final criminal conviction in the Member State of destination of the posting (France), assuming the fraud, from allowing a civil body of that same Member State - on the basis of the principle of the binding effect of "res judicata" in the civil sphere - to impose on Vueling the obligation to compensate the workers or a pension institution of that same Member State which are victims of the fraud. In short, the effect of criminal "res judicata" does not in itself allow corporate liability for fraud in PD A1, if the mediation and cooperation procedures between national Administrations required by EU Coordination Regulations, which must be complied with in order to ensure a certain degree of legal certainty, have not been followed in good time. Even more so if these previous criminal judgments were issued without considering the binding value of PDs A1 that had not been withdrawn or disregarded following the right procedure.

In the framework of the Coordination Regulations, the unilateralism of the host Member State makes no sense. Fraud is not sufficient to disregard the PD A1 if no dialogue procedure was conducted in due time. Moreover, the protection of workers must take precedence and, with so much time having elapsed, the most reasonable thing to do would have been to reach an agreement between both social security administration seeking the most favourable outcome for the posted workers in each case (under Art. 16 of Regulation 883/2004). This agreement was offered by the Spanish authorities, although it was rejected by the French authorities in view of the imminent ruling of the CJEU.

In *Bouygues travaux* public judgement, the European Court clarified that the PDs A1 are binding for the host Member State Courts as far as social security is concerned. If the PDA1 are not withdrawn and the host Member State Courts have not fulfilled the requirements mentioned for disregarding them in case of fraud, it is impossible to condemn the posting company for not insuring or declaring its workers at the Social Security Administration of the host Member State. It seems logical that no foreign employer covered by a PD A1 is going to submit such a declaration or insure his workers if he considers that he is covered by the PD A1 issued by the administration of the Member State of origin. Moreover, it does not seem possible to claim a lump sum compensation for the damages for the absence of social security contributions in France. This latter point has been clarified by the Social Chamber of the French Supreme Court regarding the pilot involved in Vueling Case.[210]

Criminal prosecution for undeclared work (*travail dissimulé*) without disregarding properly the PD A1 is possible but must be based on labour grounds different than social security.[211] The host Member State's Courts can only rule regarding other issues such as the conditions of employment that have not been

210 See Judgement of Social Chamber Supreme Court 31 March 2021, 16-16.713. Commented by Lhernould 2021a.
211 See the judgement of the French Criminal Court of Cassation 2 March 2021 nº 19-80.991 commented by Lhernould 2021b.

respected by the employer. In this respect, it has been pointed out that whether a French Court concludes that there is no actual posting, as the foreign posting company must be established in France, the rules of the Posting Directive must be considered irrelevant and non-applicable. In this case, the host Member State Court would have to analyse whether French law applies in accordance with the Rome I Regulation[212] (Lhernould, 2021a).

3.4.2. Seasonal workers and posting to the French agricultural sector

According to the Commission report of March 2021, the mobility of seasonal workers in the EU, including in the agricultural sector, lacks an intra-EU registration that would allow a systematic statistical analysis (Fries-Tersch, Siöland, Jones, Mariotti, & Malecka, 2021: 21)[213]. This report states that the group of mobile seasonal workers is made up of the following types of employed workers:[214] TCNs who return to their country at the end of the seasonal activity[215], EU workers under the protection of their freedom of movement[216], and posted workers who may be EU nationals or TCNs who, being authorised in the Member State of origin, do not have to apply for such an authorisation in the Member State of destination. The rules on posting, as already explained in this report, allow posting through TEAs established in another Member State. This practice is particularly widespread in the French agricultural sector (Fries-Tersch et al., 2021: 24).

According to another report carried out by the MoveS network of legal experts at the Commission's request, based on reports issued in the summer of 2020 by experts from 11 Member States[217], Spain and France are Member States where agriculture plays an important role, accounting for 4% and 3% respectively of their total economic activity. The report states that in Spain, in 2019, there were around 300,000 seasonal workers, 50% of whom were TCNs[218]. In France, it is estimated that around 270,000 seasonal agricultural workers are recruited each year, 60-80% of whom are TCNs. Presumably around 70,000 of these workers are posted, which is not new, as the report states that in 2015, Spanish companies (not TEAs) posted 19,000 EU and/or non-EU agricultural workers. On the other hand, every year around 14,000 residents in Spain (not necessarily Spanish citizens) work in certain areas of France for five or six weeks to harvest grapes. These figures seem much lower than those of the French employment service (Pôle Emploi), which estimates that "seasonal work accounts for more than 800,000 contracts per year, although the period of the contracts varies according to the region and the species to be harvested, mainly from April to October, with a peak of activity in the summer". Moreover, according to the French National Association for Employment and Training in Agriculture (ANEFA), the harvest accounts for 45% of seasonal employment, with 336,000 contracts signed[219].

The MoveS and Commission 2021 reports notify the existence of numerous non-compliances and abuses in seasonal work in the EU agricultural sector. On one hand, there is the so-called undeclared or

212 Regulation EC/593/2008 the Regulation gives priority to the application of the law of the habitual place of work or the law of the Member State with which there are closer connections.

213 *Intra-EU mobility of Seasonal Workers: Trends and challenges. Final Report March 2021*. European Commission. Brussels. Available at: https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8400&

214 Self-employment is in the minority and bogus self-employment cannot be ruled out.

215 This group is covered by Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of TCNs for the purpose of employment as seasonal workers.

216 Spain and Italy have the highest proportion of this type of workers among agricultural workers. In Spain in 2020, according to surveys on labour mobility in agricultural work, seasonal workers were EU workers (mainly from Romania, Bulgaria, or Portugal), some of them already resident in Spain (34.17%), who were hired directly by the owners of the farms. These also resort to recruiting TCNs at source (38.29%). Temporary employment agencies or subcontractors are also used to move EU seasonal workers (6.37%), but mainly non-EU workers (19.14%). See results of the survey of OEITSS inspectors on seasonal agricultural work 2020 published on 29December 2020 with the collaboration of the Special Coordination Unit in the fight against transnational labour fraud.

217 The unpublished report analyses the situation in Austria, Belgium, Czech Republic, France, Germany, Italy, Luxembourg, the Netherlands, Poland, Romania, and Spain. See, Garcia, Giacumacatos, Hauben & Waeyaert (2020).

218 They also mention that according to the 2019 Social Security statistics, 222,968 migrants were insured in the agricultural social security system: 72,085 from other Member States, 2,510 Europeans from other non-Member States, 82,394 from Morocco, 11,686 from Ecuador, 10,645 from Senegal and 4,505 from Bolivia.

219 See page 4 of the information sheet on the 2021 fruit harvest and grape harvest campaign published by the Ministry of Labour and Social Economy: https://www.mites.gob.es/ficheros/ministerio/mundo/consejerias/francia_archivos/Recoleccion_fruta_y_verdura.pdf

undocumented work, without social security registration, or without a work permit in the case of TCNs.[220] Among the various reasons why agricultural employers opt for undeclared work is the extreme pressure to keep costs low, strong competition, as well as the existence of a high demand for these low-skilled jobs.[221] Non-compliance does not only occur in undeclared work. Even in regular work it is found that in many cases "the number of hours worked and the wages do not correspond to reality", piecework is carried out, breaks[222] are not respected and fewer hours are declared, partly in order to pay less contributions (Fries-Tersch et al., 2021: 52). In addition to these breaches of occupational risk prevention regarding working time, unhealthy accommodation by employers has also been reported[223]. The monitoring of these situations has increased during the pandemic, when it has been considered that COVID-19 infections spread, in some cases, due to the mobility of seasonal workers.[224] The Commission, while advocating controlled mobility, launched and financed the reports mentioned at the beginning of this section, to understand in more detail the actual problems in the sector, and the European Parliament also pronounced itself in favour of the protection of this vulnerable group of workers[225]. Moreover, in the seasonal agricultural sector, being unskilled work, extremely low wages are paid. In France, the Commission's report finds seasonal workers received only € 20 per day or € 800 per month, and on top of that, deductions in salary for travel and accommodation expenses were carried out.[226] Both reports also agree that seasonal workers have problems asserting their rights and are even unaware of them due to a lack of information. The short period of time spent in the destination Member State, the language barriers, and the lack of affiliation to trade unions, which are not specialised in their specific problems, do also not work in their favour.

In Spain, the poor conditions of seasonal workers in the countryside have also been denounced, especially those in an irregular situation and it mainly concerns female workers[227]. To combat this situation, in May 2020 precise instructions were given to the Spanish Labour Inspectorate regarding the control to be carried out in the agricultural sector[228], measures that were strongly criticised by the sector's employers[229]. The increase in the inspection intensity of seasonal agricultural work in 2020 is shown in the report of 29 December 2020 in which the ITSS collected the results of a survey carried out among the inspectors

220 Although these are only estimates of the informal economy in the agricultural, forestry and fishing sectors in the Member States studied: France had 6% underreporting of the estimated 70,000 workers in the informal economy and Spain had 11% of the 72,850 seasonal workers in the informal economy (Fries-Tersch et al., 2021: 37-38).

221 See, Fries-Tersch et al. (2021: 52) where this concern about undeclared work is mentioned especially in Spain and Italy.

222 The MoveS report (page 41) reports the case of 36 Afghan seasonal workers who picked grapes in the Champagne region of France from 5:30 am to 10:30 pm and were served only one meal a day.

223 MoveS's executive Summary Report refers to *"long daily working hours, overtime, limited rest and/or night breaks, weekend work and consecutive working days are common practice"*. It also establishes that *"Country reports and interviews repeatedly call for attention to health and safety requirements and standards which are being challenged during the outbreak of Covid-19, especially in the agricultural /horticultural sector. The issues are often related to the substandard housing conditions imposing small shared rooms and common facilities for seasonal workers"*.

224 See for example an outbreak in Lleida (Catalonia) where health workers note that 10 to 20 people live together in crowded conditions, which is not conducive to controlling the COVID-19 virus. See on the request for controls in Murcia due to the arrival of seasonal workers returning to the region after working in France https://www.eldiario.es/murcia/region-de-murcia-lorca-totana-francia-covid-19-noticia_1_6025030.html. See also the warning by the French Minister of Labour, Elisabeth Borne, of criminal proceedings against the Spanish company Terra Fecundis for its possible responsibility in the appearance of outbreaks of coronavirus with seasonal workers. https://fyh.es/francia-actuara-por-la-via-penal-contra-la-empresa-espanola-terra-fecundis/ - :~:text=En una entrevista publicada este,a la covid-19»

225 See Commission Guidelines for seasonal workers in the EU in the context of the COVID-19 pandemic 2020/C 235 I/01, C/2020/4813 & European Parliament resolution of 19 June 2020 on European protection of frontier and seasonal workers in the context of the COVID-19 pandemic, 2020/2664(RSP)

226 See Fries-Tersch et al. (2021: 54) where serious wage violations in Italy and Germany are also reported as examples.

227 See on the problems on the ground regarding the situation of agricultural workers in Huelva (Spain), especially with regard to Moroccan women: Filigrana García, Pastora; Lalana Alonso, Begoña, Martínez Moreno, Carolina; Ramos Antuñano Teresa (Feminist Observation Brigade). "La situación de las jornaleras en los campos de fresa de Huelva. Informe jurídico." May 2021. http://laboratoria.red/wp-content/uploads/2021/07/InformeJuridicoHuelvaFINAL12_07_2021.pdf See on the general vulnerability of migrant women in the European agricultural sector the works of Palumbo and Sciurba (2018), and Martínez (2020). Also, in the blog of Antonio Baylos, see: https://baylos.blogspot.com/2021/07/jornaleras-en-lucha-una-cronica-de.html

228 See, reproducing the Note for the inspection action in agricultural campaigns, https://www.agroejido.com/es/detalle-noticias-68/nota-para-la-actuacion-inspectora-campac3b1as-agricolas-mayo2fjunio-2020. On actions against the specific protection of women in the agricultural sector, see point 5.5 of the Strategic Plan of the Labour and Social Security Inspectorate 2021-2023. https://www.boe.es/eli/es/res/2021/11/29/(1)

229 Maestre, Romualdo "La patronal agraria exige la dimisión de la ministra de Trabajo por pedir que se investigará si hay esclavitud en el campo". ABC newspaper. Sevilla 14 May 2020 https://sevilla.abc.es/andalucia/sevi-ministra-trabajo-manda-inspectores-campo-buscar-alambradas-y-malos-tratos-temporeros-202005132332_noticia.html

themselves with the collaboration of the already mentioned Special Coordination Unit for the fight against transnational labour fraud[230]. Regarding agricultural work in France, Spain has also launched an information campaign which covers recruitment possibilities, workers' rights, information on wages, health and social security rights, good health and safety practices, and even the emergency telephone numbers of the French Inspectorate[231]. In addition, an agreement was signed for the period 2020-2024 to monitor and improve working conditions between the Ministry of Inclusion and Social Security, the social partners in the sector and local authorities[232].

In France, steps have also been taken to improve compliance with occupational health and safety standards. These measures have been intensified since the COVID-19 pandemic and focused on the precarious working conditions, transport, and accommodation of seasonal workers in the French agricultural sector[233]. Organisations such as ANEFA, which brings together agricultural employers and entrepreneurs, also provide interesting practical information for seasonal workers, very similar to the information given by Spain, and this information has been translated into five languages[234].

3.4.4 The Terra Fecundis case

This section analyses the extensive judgment of 8 July 2021 (92 pages) handed down in first instance by a French criminal Court (*Tribunal correctionnel de Marseille*) on the so-called Terra Fecundis case[235]. This judgement has been appealed and, according to the sources consulted, it will take approximately two years for the appeal judgement to be issued. Just as this report went to press, the Criminal Court of Nimes handed down a second criminal judgment on 1 April 2022, sentencing the company Terra Fecundis. Although the text of the sentence has not been made available, the company was reportedly fined € 375,000 for "disguised work" and "employment of foreigners without authorisation". The TEA was also banned from operating in France. On this occasion, seven French farmers who had used the services of the Spanish company were ordered to pay fines of € 10,000. In one of the cases, a six month prison sentence is suspended for having housed workers in undignified conditions. Each employee would have cost the employers between € 14 and € 15 per hour, compared to € 22 in France[236].

The lawsuit analyses the criminal liability associated with the activity of the Spanish TEA Terra Fecundis[237] and its administrators during the years 2012-2015. According to the judgment, the activity in France of this company, based in Murcia, dates back to 2002 and the inspection activity on it began in 2004.[238] This inspection was intensified in 2011 following a fatal accident on a French farm. Furthermore, according to the judgment, Terra Fecundis' activity was the subject of a subsequent joint Spanish-French inspection (on French territory) after 2017, although the date was not specified.

230 State Agency for labour and social security (OEITSS) and special unit for coordination in the fight against transnational labour fraud. National office for fight against fraud (ONLF). "Survey among OEITSS Inspectors on seasonal agricultural work -2020", not published.

231 See for example the extensive information sheet on the 2021 fruit harvest and grape harvest campaign published by the Ministry of Labour and the Social Economy and the Ministry of Inclusion, Social Security and Migration together with the French Ministry of Labour, Migration and Social Security https://www.mites.gob.es/ficheros/ministerio/mundo/consejerias/francia_archivos/Recoleccion_fruta_y_verdura.pdf

232 See Resolution of 20 October 2020, of the General Technical Secretariat, publishing the Agreement with Asaja, Coag-Ir, Upa, Fepex, CCOO-Industria, UGT-Fica and FEMP, for the organisation, coordination and socio-labour integration of migratory labour flows in seasonal agricultural campaigns. BOE 30-10-2020 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-13290

233 On the measures adopted in France on 20 May 2020 on the entry of agricultural workers into France at https://www.legifrance.gouv.fr/download/pdf/circ?id=44977. In addition, on 26 May 20 the French Ministry of Agriculture launched a guide on good practice in animal husbandry and housing https://agriculture.gouv.fr/covid-19-les-conditions-dentree-sur-le-territoire-des-travailleurs-saisonniers-agricole

234 https://www.anefa.org/qui-etes-vous/travailleurs-saisonniers-en-agriculture/ose-devenir-saisonnier-avec-lanefa/

235 Although this judgment has been made available through another channel, its full text can be consulted on the blog of Hervé Guichaoua, who has been following the case: https://www.herveguichaoua.fr/IMG/pdf/jgt_tf_in_extenso_marseille_080721.pdf.

236 See, https://www.lemonde.fr/politique/article/2022/04/04/fraude-au-travail-detache-terra-fecundis-et-sept-agriculteurs-francais-condamnes_6120471_823448.html

237 It is now called "Work for all".

238 See page 26 of the judgment.

During the four years analysed (2012-2015), the judgment describes the growing activity of this TEA in the posting of seasonal workers, mostly TCNs of Ecuadorian origin, recruited in Spain and authorised to work and reside in Spain[239] who were working in hundreds of French agricultural user undertakings[240]. The judgment reflects the impressive growing turnover of Terra Fecundis in France, which reached € 53 million and 558 French clients in 2015 (the last year analysed). In 2012, it assigned 4,497 workers to 286 user companies, although later, considering the VAT declarations, it is stated that it invoiced 434 clients a little over € 41,504,046. In 2013, reference is made to 2,281 temporary workers, without identifying the number of user companies, but a turnover of € 45,472,457 is mentioned. In 2014, the data collected refers to 2,342 temporary workers and a turnover of € 50,260,072 with respect to 516 clients. The judgement does not reflect the profits, probably much lower considering the narrow margins that are usual in the sector. Terra Fecundis always approached its activity under the freedom to provide services and, as will be seen, from the point of view of Social Security, the company registered its workers in Spain where it paid contributions for them, requesting the Spanish authorities to issue thousands of PDs A1, mostly based on Art. 13 (18,041), but also based on Art. 12 (2,006)[241].

The defendants, who were later convicted, were the Spanish company Terra Fecundis itself and its three Spanish administrators. In addition, as accomplices, a company of the group[242], Terra Bus Mediterráneo, which transported the workers to and from Spain, and four workers who operated from France for Terra Fecundis, three of them French and another of Spanish-Ecuadorian nationality, were convicted. None of the defendants had a criminal record in France. The Spanish Social Security is not a party to this lawsuit. Nor are any French agricultural undertakings being prosecuted, although it has been pointed out that there will be other future trials in which they will be co-defendants[243]. "Letterbox companies frequently involve French nationals or established French companies that engage in illegal operations for profit-making purposes. Although monitoring and control shed light on this kind of operation, criminal prosecution seems less prompt by comparison to the abuse of the freedom of establishment" (Palli, 2020: 87).

The defendants were convicted of the offences charged by the public prosecutor (*Procureur de la Republique*), which we understand to be the equivalent in Spain to the *Ministerio Fiscal*, who finally lowered the initial proposed penalties[244]. The offences charged were concealed labour (*travail dissimulé*) and illegal trafficking of labour for profit, which would amount to illegal transfer of labour (*furniture illegale de main d'oeuvre a but lucrative ou marchandage de main-d'oeuvre*), in both cases with the aggravating circumstance of acting as an organised gang or group (*en bande organisée*).

The judgement does not analyse the possible civil liability *ex delicto*, which is to be settled in another lawsuit due to be held on 19 November 2021[245] and from which we are not aware that a judgement has been issued. However, the plaintiffs in this case are identified: several French trade unions[246], the social security institutions responsible for collecting contributions (URSSAF)[247] and the central agency for social security bodies (ACOSS). However, the Court rejected as claimers of the civil liability the members of the

239 There is no irregular work, in the sense of TCNs without authorisation to work in Spain.

240 See pages 36 to 38 of the judgment.

241 On the systematic issuing of such certificates to all its employees see page 56 of the judgment.

242 JIJMAF Grupo Mediterraneo SL, a company belonging to the Terra Fecundis group, is mentioned but not condemned.

243 "Another case will be tried by the Nîme Court on 18 March 2022: the indictment is based on the same facts, but for the period between 2016 and 2019 and also involves a small number of French farmers who benefited from the exploitation of the workers". Robin-Olivier, Sophie. "Le marché du détachement international de travailleurs dans l'Union européenne : une institution esclavagiste ?" footnote 61, in press, collective work in honour of Pr Marie Ange Moreau. As noted at the beginning of this *section 3.4.6*, this case has already been decided in a judgement issued on 1 April 2022.

244 It requested the closure of Terra Fecundis and a fine of € 500,000, a five-year prison sentence for the administrators and a fine of € 80,000 and a definitive ban on managing a company and operating in the TEA sector.

245 See pages 90 and 91 of the judgment.

246 Syndicat professionnel confédération paysanne; le syndicat général agro-alimentaire CFDT, la Fédération Générale agroalimentaire CFDT and le syndicat Prism'emploi (Professionnels dur recrutement et de 'intérim).

247 L'Union de Recouvrement des cotisations de Sécurité Sociale et d'allocations familiales (URSSAF) PACA claims € 80,394,029 plus € 23,157,612 in interest for late payment. See page 56 of the judgment.

Maldonado Granada family and another URSSAF delegation in Alsace[248]. This lawsuit caused a lot of media attention. One of the URSSAF lawyers spoke of "the most important lawsuit on social security fraud ever tried in France[249]". Likewise, one of the trade union plaintiffs for civil liability has referred to the case as the "biggest trial in the history of displaced labour in French agriculture"[250].

The judgement condemned the three Spanish managers to four years imprisonment, a fine of € 100,000, a definitive ban on business management and on operating as a TEA. In addition, the TEA Terra Fecundis itself (now 'Work for All') was sentenced to a fine of € 500,000 and a definitive ban from working as a TEA. *Terra Bus Mediterraneo* was also sentenced to a fine of € 200,000 and a prohibition to carry out transport activities. In all cases, all its assets and bank accounts in France were seized to cover its respective civil liability. Regarding those persons responsible for the French branch of Terra Fecundis who acted as accomplices, the sentences vary according to their involvement, from one year to two years in prison and fines of € 5,000 to € 10,000, and they are definitively banned from managing the company and, in particular, from carrying out the activity of a TEA.

In order to simplify the analysis of the judgement, we will try to differentiate between the labour liability of the company (private law) and the social security aspects, in which the national administrations of both Member States are involved (public law), although the two levels are sometimes intermingled by the Court itself.

Regarding **labour liability**, the criminal Court convicted the defendants of the **offence of concealed employment** "*execution d'un travail dissimulé*". This offence is mainly based on the fact that it is considered proven that the activity of the Spanish TEA was not covered by the rules of posting, i.e., by the freedom to provide services. The Court considers that the company carried out an undeclared permanent activity in France, which could have been covered by the right of establishment. It is considered proven that there was a permanent structure (in Châteaurenard) where ten Terra Fecundis employees worked on a permanent basis. These employees, most of whom were French, carried out commercial tasks, but also controlled the activity of the seasonal workers through local "managers" and provided their accommodation when the farm had no facilities[251]. The Court considered certain case law of the Court of Justice on the distinction between the freedom to provide services and the freedom of establishment and the criteria set out in Art. 4 of the Enforcement Directive to determine that there is no posting[252]. The Court considers that this offence, which was committed for profit, was carried out as an organised gang with the collaboration of the various defendants involved.

The absence of an establishment in France and the absence of a subsidiary declared in the French Trade Register, where the ten permanent workers (many of them French residents in France) should undoubtedly

248 Subjects claiming as relatives of a Terra Fecundis worker (Mr. Elio Ibán Maldonado Granda) who died in 2011 in a French farm. The judgement rejects them as a civil party as the deceased does not appear on the list of workers and they have not proved their status as successors (see pages 72 and 90 of the judgement). A magistrate in Tarascon qualified these facts as involuntary homicide for breach of a particular obligation of safety and prudence, as well as failure to comply with health and safety regulations. The French agricultural businessman and owner of the farm "Les sources", Julien Perez, has been prosecuted for his responsibility in terms of prevention. Terra Fecundis' contact persons in France were just witnesses of this procedure. The press reports that Mr. Pérez forced the Terra Fecundis contact persons to attend for transferring the injured worker to the hospital, without notifying the emergency services, a delay which could have been fatal. According to the same source, the investigation also revealed that the owner of the French farm was the husband of Anne Perez, the visible head of Terra Fecundis in the French subsidiary. See CANETTO, Sidonie "Marseille : procès Terra Fecundis sur le travail détaché dans l'agriculture française, la fin du dumping social ?", 17 May 2021.https://france3-regions.francetvinfo.fr/provence-alpes-cote-d-azur/bouches-du-rhone/marseille/marseille-proces-du-travail-detache-dans-l-agriculture-francaise-la-fin-du-dumping-social-2092549.html

249 "This is the most important case of social security fraud ever made in France", says Jean-Victor Borel, head of Urssaf Provence-Alpes-Côte d'Azur, the organisation that collects the contributions financing the social system, which is a civil party. CANETTO, Sidonie "Marseille : procès Terra Fecundis sur le travail détaché dans l'agriculture française, la fin du dumping social ? " 17 May 2021 https://france3-regions.francetvinfo.fr/provence-alpes-cote-d-azur/bouches-du-rhone/marseille/marseille-proces-du-travail-detache-dans-l-agriculture-francaise-la-fin-du-dumping-social-2092549.html

250 "According to the Collectif de défense des travailleurs étrangers dans l'agriculture provençale (Codetras), this is "the greatest process in the history of labour in French agriculture. " *Ibidem*

251 See contracts with campsites pages 42 and 43 of the judgment.

252 Although the transposition period for this Directive had not yet ended in the period under analysis, it is understood that an interpretation in accordance with the Directive is possible, especially as this Directive is only intended to promote the correct application of the Posting of Workers Directive.

have been employed under French labour and social security law, is the source of all the company's concealed activity in France. As the French doctrine points out, "the prosecution of Terra Fecundis has been facilitated by the express inclusion, in the categories of **disguised employment** by concealment of activity, of the case where a person avails himself of "*the provisions applicable to the posting of workers when their employer carries out in the [Member] State in which he is established activities relating solely to internal or administrative management, or when his activity is carried out in the national territory on a regular, stable and continuous basis*"[253]. Therefore, the concealment does not appear to refer to the activity of transferring workers, since the Spanish company appeared in the intra-Community VAT declarations, publicly advertised its activity, used buses with its name and was well known in the sector, and by the French Inspectorate itself, with which it had been in contact since 2004. The main assessment is that, although the agricultural activity was temporary, the activity in France was continuous. Furthermore, in the declarations of 178 seasonal workers who were TCNs employed by Terra Fecundis, "the majority" stated that they had not worked for this company in Spain, although some admitted having carried out marginal work in Spain (it is not known in what proportion) and that they had been specifically recruited by Terra Fecundis to be sent to France.

In this last regard, it seems relevant to highlight that the transposition of the Posting Directive in France seems to require that the person works for the employer who posts him "habitually" before the posting (Art. L 1261-3 of the Labour Code), whereas in Spain and according to the case law of the Court of Justice it seems possible to hire workers to be posted. The judgment does not deny the company's activity in Spain, but considers it proven that 95% of the company's business activity takes place in France. In order to reach this conclusion, the Court mentions different sources of evidence and admits that it uses figures that do not correspond to those presented by the Spanish authorities[254]. Although this expression is not mentioned, it seems to be deduced that the French Court considers Terra Fecundis to be a letterbox company, which will be relevant for Social Security purposes.

The judgment does not distinguish between the obligation of establishment of the subsidiary and the provision of services carried out by the Spanish TEA from Spain, with regard to the workers assigned to the French farmers. The subsidiary could hardly have assigned/displaced, during the four years analysed, Ecuadorian workers without authorisation to reside and/or work in France, who travelled from Spain and who were only authorised to work in Spain. In our opinion, as it has been outlined at the end of the previous section whether a French Court concludes that there is no actual posting, as the Spanish company must be established in France, the rules of the Posting Directive must be considered irrelevant and non-applicable. Under this situation, the application of the French labour law could also be controversial considering Rome I Regulation.

Terra Fecundis is also convicted for the offence of **trafficking in labour for profit** ("*furniture illegale de main d'oeuvre a but lucrative*") which is considered an offence of illegal transfer ("*de marchandage*"). Offences were again carried out as an organised gang**.** This charge is based on certain labour offences and some specific preventive offences committed by the Spanish TEA[255]. The French Court states that Terra Fecundis pays

253 In France, proceedings against Terra Fecundis have been facilitated by the express inclusion, in the categories of disguised work by dissimulation of activity; "du cas dans lequel une personne se prévaut des dispositions applicables au détachement de salariés lorsque l'employeur de ces derniers exerce dans l'Etat sur le territoire duquel il est établi des activités relevant uniquement de la gestion interne ou administrative, ou lorsque son activité est réalisée sur le territoire national de façon habituelle, stable et continue (Loi n° 2018-771 du 5 sept. 2018 sur la liberté de choisir son avenir professionnel, modifiant l'Art. L. 8221-3-3° du code du travail) " Robin-Olivier, Sophie. "Le marché du détachement international de travailleurs dans l'Union européenne : une institution esclavagiste ?" p. 11 and 12, in press, collective work in honour of Prof. Marie Ange Moreau.

254 The testimonies were contradictory, one partner said that the turnover in France ranged from 60% to 80% of total turnover and another from 20% to 40%, a list of the French subsidiary's best clients was also mentioned, and finally, a report by the international private company Ellisphere was mentioned which referred to a turnover in Spain of € 431,047 in 2014 and € 1,286,495 in 2015, but only considering the data that the company Terra Fecundis declared in France.

255 The Court accepts all the allegations except for the allegation of under-declaration of working days and prejudice to workers' unemployment rights. See page 63 of the judgment.

the French minimum wage to all its employees[256], but considers that it fails to pay overtime[257]. Moreover, Terra Fecundis did not pay specific compensation for holidays not taken[258] and failed to comply with its preventive obligation to carry out medical examinations of its employees, as required by the French legislation applicable, to the extent that it improves on the Spanish legislation[259].

With regard to unpaid **overtime**, although the investigations show that the weekly working time limits were not exceeded for the most part, it is vaguely stated that on certain farms and at certain periods they were exceeded, reaching 60 or even 70 hours per week[260], without non-payment (the debt) being quantified. It is considered proven that no worker was paid overtime and that, according to the French inspectorate, workers were instructed to lie about this. Furthermore, it is deduced that there was a system of double invoicing of bands ("des franges") whereby overtime would not be declared, thus saving costs. The judgment explicitly states that some French employers admit that "nature and weather" dictate the schedules and that the additional time worked was recovered, although it is not specified how[261]. In both France and Spain, working and rest time is a matter of occupational risk prevention that falls to the responsibility of the user company under EU law[262]. In fact, only the so-called health surveillance or "surveillance medicale" is a direct responsibility of the TEA. It is therefore striking that there is no reference to the liability of French employers for such serious breaches of working time.

Finally, Terra Fecundis was condemned for a breach of **health surveillance**, namely for failing to carry out **medical examinations** at the start of the activity ("l'absence de visite médicale"). In Spain, it is compulsory to offer such medical examinations, but the worker may decline the medical examination. In the case in question, it seems that only some of the examinations were carried out before leaving Spain[263]. However, as can be deduced from the French judgment, such medical examinations are compulsory for the Spanish company prior to the posting, as it is a requirement for working in France[264] which the TEA should have respected. The judgment does not refer to whether compliance with this requirement for working in France should have been subject to control by the French user undertakings.

With regard to the social security duties, in order to be able to condemn the Spanish company, the French Court is aware of the link between the more than 20,000 PDs A1 issued by the Spanish authority mainly under Art. 13[265]. The PDs A1 in question have not been withdrawn at any time by the Spanish authorities, so the insurance and the social security protection of these workers continues to be provided by Spain for these periods. This circumstance has certainly preserved the Spanish work and residence temporary authorisations of the TCNs concerned. According to the latest news received from the Spanish authorities, the controversial PDs A1 of these 178 workers are to be maintained in the light of a report carried out by the labour inspectorate of the Murcia region.

The URSSAF requested formally, on 14 March 2017 for the first time, the withdrawal of the PDs A1 issued by the Spanish Administration to 178 workers considering that in cases of pluri-activity (Art. 13) there was no division of activity between the two Member States, as in fact, it was denied that the employees had worked in Spain. In the case of posting under Art. 12 it was considered that Terra Fecundis did not have a main activity in Spain since, as was proven in the procedure, the Spanish company did not post workers to any significant extent in Spain. It seems clear that the activity of a foreign company in its Member State of origin and the employment of workers is very difficult to prove in the Member State of destination.

256 See page 48 and 62 of the judgment.
257 The non-payment of salaries may be of interest to the Spanish authorities, as Terra Fecundis should have paid higher amounts in Spain, although these are not determined in the judgement.
258 Due to the temporary nature of the contract, which should have been prorated with an additional 10% in the monthly pay.
259 Page 49 and 62 of the judgment.
260 Page 47 and 63 of the judgment.
261 Page 48 of the judgment.
262 Directive 91/383 Art. 8https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:01991L0383-20070628&qid=1642980144904&from=ES
263 Page 39 of the judgment.
264 See page 62 of the judgment.
265 Most of PDs A1 issued by the Spanish Administration in the years analysed (2012-2015) were PDs A1 under Art. 13 (18,041).

The Spanish social security Administration responded on 17 July 2017 refusing to withdraw the PDs A1, pointing out that, according to the data obtained by the Spanish Inspectorate, all workers with a PD A1 under Art. 13 were mainly active in Spain in the agricultural sector and that, regarding workers with a PD A1 under Art. 12, it was understood that Terra Fecundis did carry out a substantial part of its activity in Spain. It seems that the dialogue process continued until 2019, with two meetings being held in Madrid between institutions on the PDs A1 issued to those 178 employees. According to the sources consulted, Spain admitted that most of the PDs A1 should have been issued under Art. 13, not under Art. 12[266]. Spanish authorities considered that the list of 178 workers should be refined, as it understood that the specific circumstances of each worker's work and residence should be clarified in order to identify the competent Member State. The dialogue process between national institutions did not progress to the stage of dialogue between Administrations (the Ministry of Inclusion on the Spanish side) and France has not brought it to mediation before the Mediation Committee of the Administrative Commission. On the other hand, France has never initiated a lawsuit in Spain to invalidate the PDs A1 issued by Spain, nor has it sued Spain before the CJEU for non-compliance with the rules set out in the Coordination Regulations.

Terra Fecundis judgment **dismisses the binding nature of the PD A1** in the context of the criminal proceedings and considers that they should not be taken into consideration (*écarté*), as they are fraudulent, on the basis of the CJEU's doctrine in Altun judgment, already explained in this report. Indeed, it considers it to be established that the posted workers only worked in France and that no PD A1 could have been issued for any reason (Art. 12 or 13). Regarding the intentional fraudulent element, the subjective element, is not deeply analysed but linked with the labour infringements as previously stated. The Court states that the Spanish Administration did not provide a satisfactory response in 2017 on the specific elements essential to the consideration of a possible fraudulent obtaining of the PD A1[267]. Nor does it assess positively the process of dialogue followed until December 2019, where the Spanish administration did not reassess its position in the light of the factors communicated by the French authorities. In short, the French Court considers that there was no loyal cooperation.

Going **beyond** the disregard of the PD A1 that the Altun judgment supports, the French Court also declares the mandatory application of French social security and the payment of contributions by Terra Fecundis in France. It should be recalled that the Altun judgment does not provide a legal basis for the invalidation or withdrawal of PD A1 by the host Member State. Such actions can only be taken by the issuing administration, i.e., the TGSS, whose position could only be reviewed by Spanish Courts or by the CJEU itself. The French Court, ignoring this relevant question, goes on to assess that PDs A1 under Art. 12 should be withdrawn by Spain if it is considered that Art. 13 was applicable. Regarding Art. 13(1)(b), which is the Article that Spain was alleging for the correct issuance of the PD A1, the Court states that Terra Fecundis did not carry out a substantial part of its activity as a TEA in Spain during the period 2012-2015. Here, the Criminal French Court confuses the Articles, since, as has already been pointed out in this report, this requirement can only be imposed in the context of Art. 12, and Art. 13 BR is not subjected to this limitation.

The Criminal Court also states that many of the workers have declared that they only worked in France and only a minority of them admit to having worked in Spain on a marginal basis, so that PDs A1 under Art. 13 would not be valid either. In this case, it is necessary to determine on a case-by-case basis what their relationship with the Spanish social security system has been and to determine the exact proportion of this insurance with Terra Fecundis or any other company in Spain and its habituality. Indeed, if PDs A1 under Art. 12 could be rejected jointly, for example, on the grounds that the TEA was not active in Spain, the fraudulent nature of PDs A1 under Art. 13 would have to be determined on a case-by-case basis according to the social security situation of the specific worker for whom it was issued and considering, for instance, the Member State where they reside. It is true that the connections established by Art. 13.b) do not work

266 On the contrary, in the framework of the joint Spanish-French inspection carried out in France on Terra Fecundis, the Spanish inspectorate was of the opinion that the PDs A1 should have been issued on the basis of Art. 12 and not Art. 13. See page 40 of the judgement and page 57 of the judgement which could denote a difference of criteria between the Spanish institutions (TGSS and ITSS).

267 See Art. 5.3 of Regulation 987/2009.

very well in the case of a TEA. However, if the applicable connection to identify the competent Member State is where the company's registered office or place of business is located, it is controversial that the judgement states[268] that the fraudulent French establishment of the Spanish TEA would take precedence over its central administration in Murcia, Spain. This second option seems more in line with the definition of headquarters used in Art. 14.5 (a) Regulation 987/2009, which states that the headquarters coincides with the central administration in Spain where the administrators convicted of labour offences reside[269].

In order to eliminate the binding nature of the PDs A1 issued in Spain, the French judgment mentions the Altun case without referring, surprisingly, to the recent judgment of the CJEU on the Vueling case, handed down on 2 April 2020 at the request of a French criminal Court. This CJEU judgement emphasises that the dialogue procedure must be initiated without delay which was not the case in the Vueling case where the dialogue was initiated very late. The national Court does not deal with the crucial question whether there was a delay in the action of the URSSAF. Perhaps it might have been appropriate to consider that the PDs A1 in the Terra Fecundis case were issued in the period 2012 to 2015 and that the company had been acting in this way, in terms of social security since 2004. It would have been necessary to assess, before not considering the binding nature of the PDs A1, whether the URSSAF had acted with the required speed when it contacted the Spanish Administration in 2017. It would also have been necessary to assess whether fraud had been committed in their issuance, as it is not clear that labour fraud can necessarily imply social security fraud in the issuance of PDs A1. It should be noted that PDs A1 are only binding in the field of social security[270] and it seems logical that fraud should be assessed in the same field.

This requirement to start, at due time, the dialogue with the issuing administration must be linked to the difficulty of regularising social security situations after a few years. This is not the first time that this problem has occurred between the Spanish and French administrations, and it is known that there are debts in both directions that should be the subject to compensation agreements[271]. After more than four years of insurance in Spain, the Spanish administration is obliged to start a specific lawsuit before Court in order to review the situation. However, how can you compensate and review possible social security entitlements unilaterally? How can you review an insurance record and workers' expectations of future pensions? Is it the most protective approach for the workers? Moreover, as we have mentioned before, the annulment of the PDs A1 could lead to the loss of the authorisations to work and residence in Spain for TCNs affected by company fraud, even though they were not in collusion with the Spanish TEA that carried out the fraudulent employment activities. A reflection is needed on the measures that protect the social security rights of the workers involved and it seems necessary for the national administrations to apply the agreements that should facilitate a solution for workers involved.

For clarifying the situation and checking whether the company is fulfilling the Coordination Regulation objective requirements, some joint or concerted French and Spanish inspections should have been carried out.[272]. It should also be recalled that excessive delay may be relevant even regarding civil liability, because in the Vueling case it was pointed out that the effect of "res judicata" does not in itself allow imposing corporate liability for PD A1 fraud if the follow-up of the dialogue and mediation procedures between administrations imposed by the Regulations has been ignored for too long (Carrascosa, 2020: 59).

268 See page 61 of the judgment.

269 "For the purposes of the application of Title II of the basic Regulation, 'registered office or place of business' shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out".

270 See judgment CJEU 14-5-20, case Bouygues Travaux Public C-17/19.

271 For example, no reimbursement of contributions was made by the French authorities to Spain after the Administrative Commission determined on 27 November 2017 that the Spanish interpretation of Art. 11 (4) of Regulation 883/2004 was appropriate. Thus, the insurance in France of the seafarers concerned was maintained and Spain did not receive any compensation for the absence of contributions in favour of the disadvantaged seafarers.

272 Such as those offered, perhaps belatedly, by the Spanish ITSS to the French ITSS on this case, which rejected it, probably because the opening of criminal proceedings was already imminent.

The Terra Fecundis case highlights, once again, the need for the monitoring of PDs A1 to be carried out more quickly. The issuance procedures followed under Art. 15 and 16 of the Regulation 987/2009 and the information provided via EESSI should allow for a quicker reaction by the Member State of destination in case of disconformity. In the future digitalisation and pilot programmes such as a European Social Security Pass[273] could be a solution. In any case, dialogue and mediation procedures must be sped up and made more effective. The amendment of the Regulations proposed by the Commission in 2016 in its initial version[274] was largely intended to do so. Either way, it seems necessary that disputes over the applicable national social security law are settled by a neutral body apart from the Member States involved. The Terra Fecundis judgement can curb fraudulent behaviour of the company but does not protect at all the situations of the workers. Among the possible options, it is again stressed that this neutral body could be the Administrative Commission or ELA itself, in a voluntary or compulsory arbitration. Another, option, even more guaranteeing, would be the establishment of an express procedure before the CJEU that would clarify the correct application of the Coordination Regulations, without jeopardising legal certainty and the uniqueness of the applicable rules (Carrascosa, 2020: 59; Contreras, 2020: 57). The unilateral action of national Courts obviously does not bind the foreign social security administration, and the lack of social security protection for workers should be avoided regardless of the labour breaches committed by the Spanish company. As noted at the beginning of this analysis, the Terra Fecundis judgment has been handed down at first instance and is currently under appeal, and it cannot be ruled out that it may be referred to the Court of Justice for a preliminary ruling.

273 https://ec.europa.eu/social/main.jsp?catId=1545&langId=en

274 It has been stated that the provisional agreement reached in 2019 between the Council of Ministers and the European Parliament together with the Commission "watered down the Commission Proposals" (Verschueren 2020: 500).

4. Implementation and impact of Directive 2018/957

In this chapter, the **most important elements** of the transposition of the Directives in Spain are analysed, with emphasis on the most relevant and novel aspects of the transposition of **Directive (EU) 2018/957**. Like the Enforcement Directive, this regulation was implemented with some delay[275], and through emergency regulations it was approved by the Government in order to simultaneously implement many other Directives[276]. Information on the transposition rules can be found in *Table 8*.

Table 8. National transposition legislation

DIRECTIVES	MAIN NATIONAL TRANSPOSING LEGISLATION
Posting of Workers Directive 96/71/EC	Posting Act (Law 45/1999): https://www.boe.es/eli/es/l/1999/11/29/45/con Effective from 1 December 1999
Directive 2014/67/EU (Enforcement Directive)	Royal Decree-Law 9/2017 Title IV https://www.boe.es/eli/es/rdl/2017/05/26/9 Effective from 27 May 2017
Directive (EU) 2018/957 (amending Posting of Workers Directive)	Royal Decree-Law 7/2021 Title VI https://www.boe.es/eli/es/rdl/2021/04/27/7 Effective from 29 April 2021
Road transport posting Directive 2020/1057/EU	Royal Decree-law 3/2022 https://www.boe.es/eli/es/rdl/2022/03/01/3 Effective from 2 March 2022[277]

Source: Own elaboration based on LISOS.

The main Spanish legislation on posting is the Posting Law (Law 45/1999), but the transposition of these directives has also had an impact on other legislation, listed in *Table 9*.

Table 9. Impact on other national legislation

OTHER MATTERS CONCERNED	REGULATIONS
Temporary employment agencies	Law 14/1994 Art. 22, 23 and 26. https://www.boe.es/eli/es/l/1994/06/01/14/con
Social administrative offences and penalties	Royal Legislative Decree 5/2000 (LISOS). Art. 2.11; 3.1;10: 19b and 19c. https://www.boe.es/eli/es/rdlg/2000/08/04/5/con
Labour inspection system and social security **Special Unit Coordination on the fight against transnational labour fraud ***	Law 23/2015 Art. 12.1.4º, 13.2, and 16 https://www.boe.es/eli/es/l/2015/07/21/23/con (*) OM TES/967/2020 https://www.boe.es/eli/es/o/2020/10/06/tes967/con

Source: Own elaboration

275 Directive 2014/67 had a deadline for transposition on 18 June 2016, but despite this, Spain transposed it almost one year later, the urgent Regulation was published on 27 May 2017 and came into force on the same day.

276 In the case of the last transposition, the inclusion in the omnibus regulation took place after the urgent approval of a Preliminary Draft Law in January 2021. Finally, the Council of Ministers approved Royal Decree-Law 7/2021 of 27 April (RDL) to transpose Directive 2018/957.

277 Only Art. 1. RDL 3/2012 will be in force after 2 September 2022.

In general, the three main Directives regulating the posting of workers in Spain have been **correctly transposed**, except for some specific issues mentioned in this report. Regarding Directive 96/71/EC, Spain passed the Commission's scrutiny and its rules have never been challenged before the CJEU. Regarding the Enforcement Directive (Directive 2014/67/EU), Spain is one of the three Member States - together with Portugal and Sweden - that did not receive a letter from the Commission on 15 July 2021 questioning its implementation[278]. This massive sending of requests is an example of the excesses that may have been committed in the national implementation of this Directive, which has multiplied the administrative obligations of companies that post workers. The Commission questions the adequacy and proportionality of the national measures adopted mainly regarding "the administrative requirements and control measures", such as the obligation to communicate the posting, to keep certain documentation available and the measures to ensure compliance and, finally, the system of national sanctions established. Concerning the last point, the CJEU itself has already ruled that certain sanctions imposed on Croatian[279] companies by the Austrian administration following a posting were disproportionate.

The Commission's monitoring of the implementation of Directive (EU) 2018/957 has just begun with the collaboration of the MoveS Network, whose national experts drafted an initial report on the implementation in each Member State. Dolores Carrascosa, co-author of this report, carried out the analysis of the Spanish transposition in May 2021 and, in general, considered that the transposition had been correct. This opinion coincides with the Spanish scientific doctrine that had also unanimously highlighted that many issues were already incorporated into the national Law (Fernández-Costales, 2018; Basterra, 2019; Marchal, 2019; Carrascosa, 2019; Gárate, 2019; Fotinopoulou, 2019; Romero, 2019; Calvo Gallego, 2020; Pérez & Quintero, 2020; Rodríguez, 2021b; Contreras, 2021b; Velázquez, 2021; Llobera, 2021).

The only thing missing could be more specificity regarding the rules for calculating the deadlines for identifying a long-term posting, and maybe specific rules for certain sectors. As we have seen in this report, the posting of workers to Spain is recurrent in some sectors that could be considered more susceptible to unequal treatment and unfair competition, such as the agri-food sector, the construction sector, and the international road transport sector. Precisely, this latter sector now has specific rules in the posting Law since 2 March 2022 which transposing Directive (EU) 2020/1057[280] one month late. Law 45/1999 includes a new Chapter V with special rules for road transport drivers which defines and classifies the different types of international transport operations, excluding in some specific cases the existence of a real posting situation due to lack of connection with the Member State of destination[281]. Where posting is deemed to take place, the special rules of this new Chapter only apply to the transport of goods and passengers when there is a contract for the provision of services between undertakings, even where an undertaking is established in a third country and has access to the European market under certain international agreements.[282] Therefore, they are not relevant for intra-group posting or the drivers employed and posted by a TEA. The main peculiarity for posting drivers is that employers' obligations with regard to their wages and paid annual leave are required in any case, irrespective of the duration of the posting[283], from the first day of posting.

From a general point of view, posting in Spain is not a controversial matter, and it has not generated much litigation. In fact, there is no case law from the Supreme Court on the application of Law 45/1999. Undoubtedly, the application of the Directive in Spain has been facilitated by the collective bargaining system in force, which allows the *erga omnes* application of statutory agreements, i.e., those that meet the

278 All Member States except Spain, Sweden, and Portugal received this letter which focused mainly on the flawed implementation of Art. 9, 11, 12 and 20 of this Directive, as well as the measures contained in Chapter IV of the Directive.

279 Judgment of the CJEU 12-9-2019, Maksimovic and Joined Cases C-64/18, C-140/18, C-146/18 and C-148/18, ECLI:EU:C:2019:723.

280 See RD-L 3/2022. Available on https://www.boe.es/eli/es/rdl/2022/03/01/3

281 See Art. 19, 20 and 21 of Law 45/1999 as amended by Royal Decree Law 3/2022.

282 See Art. 18 1 and 3 of Law 45/1999 as amended by Royal Decree Law 3/2022.

283 See Art. 18 1.3º of Law 45/1999 as amended by Royal Decree Law 3/2022.

requirements of Title III of the Workers' Statute[284] and, recently, by the labour reform preventing the priority application of the company collective agreement regarding wages[285].

4.1 Postings by temporary employment agencies and in chain by user companies to Spain

Spanish law differentiates between the three types of posting defined in Directive 96/71: contract or subcontract; mobility within the group of companies, and mobility carried out by a TEA that posts the worker to a Spanish employer. In the latter case, more restrictive or protective conditions apply to the posted workers. For example, the exception to consider the salary and holiday conditions in Spain, even if they last less than eight days, does not apply.

Spanish legislation has always envisaged, regarding TEAs that post temporary workers to Spain, that, in addition to guaranteeing the hard core of conditions and those associated with long-term postings, they must also comply with the conditions established in the general law applicable on TEA in Spain[286]. This law imposes equal treatment of the posted workers considering the rights of the workers of the user company (Art. 11 and 22 of Law 14/1994), in accordance with the Spanish transposition of the Directive on temporary agency work (Directive 2008/104/EC). If a Spanish TEA posts workers to Iceland, Norway, Liechtenstein, or Switzerland, where the TEA Directive does not apply, the solution sought is the application of the TEA legislation of the Member State of origin, in the example, the Spanish one, Law 14/1994[287].

Although national regulations already provided for it (Gárate, 2019: 387), Directive (EU) 957/2018 clarified that if within this third type of TEA posting there is chain posting (which affects a worker posted to Spain by a user company located in another Member State), the TEA that assigned the worker to this undertaking assumes full responsibility for the fulfilment of the obligations associated with the Posting Directive. In sum, this TEA is considered responsible for the posting, even if:

a) The user undertaking has signed a service contract with a Spanish company where the posted worker, employed by the TEA will eventually work;

b) The posted person provides services in a workplace in Spain of the user undertaking or in favour of another company of the group of which the undertake is part[288].

In any case, if the person posted by the user undertaking to Spain, despite the formal appearance of posting, becomes subject to the management power of the Spanish company/s, i.e., loses the link with the foreign user company, the rules of posting specific to the case of the TEA will continue to apply, without prejudice to the appropriate responsibilities being demanded in the event of the illegal transfer of workers[289].

In this case of chain posting of temporary workers, additional information must be provided in the communication to be made by the TEA to the Spanish authorities. In addition, it is noted that both the TEA and the user undertaking must comply with the Spanish labour conditions guaranteed in the event of posting, making explicit reference to the national prevention regulations that refer to the distribution of

284 This made the transposition of Art. 3.8 of Directive (EU) 96/71 unnecessary. The ET are included in RDL. 2/2015. https://www.boe.es/eli/es/rdlg/2015/10/23/2/con

285 RDL 32/2021 https://www.boe.es/eli/es/rdl/2021/12/28/32/con

286 Law 45/1999 Art. 3.2, which transposes Directive 2018/957, Art, 1.b).

287 See Law 14/1994 Art. 26.2 drafted by RDL 7/2021 Art. 11.2.

288 The concept of a group of companies for these purposes is that of a group formed by a controlling company and the controlled companies in the terms of Law 10/1997 Art. 4, on information and consultation rights of employees in companies and groups of companies with a Community dimension (Law 45/1999 Art. 1.1.1 b) 2º).

289 Law 45/1999 Art. 2.1.1º.c.

preventive obligations in such cases, with the TEA being responsible for health surveillance (Law 31/1995, Art. 8.5)[290].

This chain posting of temporary workers is envisaged in Spain in both possible directions, i.e., when Spain is the host Member State but also when it is the sending Member State[291]. The user undertaking operating or established in Spain which posts the temporary worker to another Member State is obliged to state the periods of posting in the contract for the provision of services signed with the receiving company. It is also obliged to inform the TEA, in sufficient time, so that it can make the corresponding communication "within the period provided for that purpose by that other State"[292]. In this sense, employers who post temporary workers to Spain must notify the TEA of such posting so that it can notify the Spanish authorities in due time. Failure to comply with these reporting obligations constitutes a punishable administrative offence[293].

4.2 Notification of posting of workers to Spain and documentation required

From the very beginning, since 1 December 1999, the date of entry into force of the first transposition of the Posting of Workers Directive, Spanish Law, in order to ensure compliance with the Directive, requires employers who post workers to Spain to notify the regional Spanish labour authority of the territory where the posting services are to be provided. This obligation must be fulfilled **prior to the start of the posting** and irrespective of its duration. However, if the posting did not exceed eight days, only TEAs were required to report the posting, while companies that carried out the other two types of posting were exempt[294].

Later on, since 27 May 2017, the transposition of the Enforcement Directive clarified that such communication must be made by **electronic means**, in the manner to be determined by a specific Regulation. It also provided that the Ministry of Labour would establish, in agreement with the Autonomous Communities, a central electronic register for such communications. Despite these legal provisions, and as we have already mentioned, at the time this report went to press, there is still no regulatory development establishing a single, or at least coordinated, **system of notification** at national level. On the contrary, posting companies are obliged to consult the system established for this purpose in each of the 17 Autonomous Communities[295] (or the autonomous cities of Ceuta and Melilla) where they intend to post workers to provide a service. Furthermore, none of the labour authorities of these aforementioned Administrations have established an ad hoc procedure for the reasoned notification stating that the consideration of long-term posting be delayed by a maximum of six months and, nowadays, it cannot be done electronically in all cases. Moreover, when the company posts the same worker to several Autonomous Communities, it is not clear whether the first notification is sufficient or whether it must be sent to each and every one of the Autonomous Communities involved in the posting.

On the other hand, the **Central Electronic Register** has not been set up yet, in collaboration with the Autonomous Communities[296]. This register would allow statistical monitoring of posting, as required by the EU legislation, and would facilitate informed decision-making. It could also be a tool to facilitate monitoring of posting by the Labour and Social Security Inspectorate itself, even facilitating the identification of the recently introduced long-term posting. Even though its development is envisaged since 1999, the Spanish legislation has not yet clarified the terms under which the labour authorities of the Autonomous Communities must inform the ITSS and the State Tax Administration Agency of any communication of posting they may have received, for the appropriate purposes. In fact, nowadays, it appears that this

290 Law 45/1999 Art. 3.7.

291 Law 14/1994 Art. 23 (posting in both directions) and 26 (obligations of the posting Spanish TEA) both amended by RDL 7/2021.

292 LE 14/1994 Art. 23. 2-Redacc DL 7/2021Art. 21.1.

293 Royal Legislative Decree 5/2000 (LISOS) Art. 19 ter and quater.

294 Law 45/1999, Art. 5.3.

295 See list of contact details of the 17 Autonomous Communities: https://www.mites.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores/datoscontacto-autlaborales/index.htm

296 Highlighting this shortcoming, Contreras (2021a) and Velazquez (2021).

information is transmitted by some Autonomous Communities to the provincial offices of the ITSS, without any centralisation.

It is true that the Special Coordination Unit on the fight against transnational labour fraud created in the Spanish Labour and Social Security Inspectorate on 17 October 2020 is pushing forward the aforementioned pending regulations, but they have not yet become definite.

The **content** of the communication, already defined in 1999 and updated in 2017, has only undergone some nuances in 2021 regarding the TEAs, and concerning the following issues:

a) Identification of the company posting the worker;
b) Tax domicile of that company and VAT identification number;
c) Personal and professional data of the posted workers;
d) Identification of the undertaking(s) of the posting and, where appropriate, of the establishment(s) where the posted workers will provide their services;
e) Start date and expected duration of the posting;
f) Identification of the services that the posted workers are going to provide in Spain, indicating the type of posting (contracts and subcontracts, mobility within the group, or through a TEA). In the latter case, administrative accreditation/authorisation to operate as a TEA in the Member State of origin must be included and express reference must be made to the specific temporary needs of the company of destination[297]. In addition, since 29 April 2021, the transposition of Directive (EU) 2018/957 clarifies that in cases of posting to Spain of temporary workers (referred to in the previous section), the TEA is responsible for the posting and must make the communication to the 17 Autonomous Communities (or the autonomous cities of Ceuta and Melilla). In such a case, the communication must clearly identify the foreign user company that is sending the worker to Spain, and the services that the posted workers are going to provide in Spain, indicating whether the mobility is part of a contract between the user and a Spanish company or whether it is mobility to a company belonging to the user undertaking or to the user's group of companies[298]. This information must logically be provided by the user to the employing TEA sufficiently in advance so that the due communication can be made in time[299]. Failure to comply with these information obligations constitutes a punishable administrative offence[300]. In addition, since 25 July 2017 (due to the transposition of the Enforcement Directive), it is required in Spain that the communication contains the identification and contact details of a natural or legal person present in Spain who is designated by the company as its representative to liaise with the competent Spanish authorities and to send and receive documents or notifications, if necessary. This natural person would act in Spain on behalf of the service provider in the procedures of information and consultation of workers, and in the possible negotiation affecting workers posted to Spain.

Generally, employers must also notify the labour authority in writing of any health problem affecting the posted workers arising out of or in connection with the work carried out in Spain[301].

Regarding the **documentation** that the company in Spain must provide to the ITSS, this was clarified by the transposition of the Enforcement Directive. The transposition of the 2018 Directive has not had any impact on this issue. Logically, the ITSS can require the employer to attend to the ITSS premises in order to present all the documentation it deems appropriate. However, the following documentation must be available at the workplace, physically in paper, or in electronic format during the posting duration (always

297 Law 14/1994T Art. 5.4.
298 Law 45/1999 Art. 5.7 drafted by RDL 7/2021.
299 Law 14/1994 Art. 23.3 - redrafted by RDL 7/2021 Art. 12.1.
300 Royal Legislative Decree 5/2000 (LISOS) Art. 19 ter and quater.
301 This obligation, which was also subject to a regulatory development that has not taken place, is included in Art. 6.4 of Law 45/1999.

translated into Spanish or the co-official languages of the Autonomous Communities where services are to be provided)[302]:

- Employment contracts of the posted workers or equivalent document[303];
- Wage slips, pay slips and proof of payment;
- Timetable (start and end), as is already required for any employee of a Spanish company;
- Work/residence authorisations in origin of foreign displaced persons.

Once the posting has been completed, the ITSS may require the listed documents to be provided. The Spanish transposition standard does not expressly mention the PDs A1 proving insurance in the Member State of origin of the posting, although it could also be explicitly requested by the ITSS.

The Posting Directives do not address the **information to be provided by the employer to the posted worker**, which is addressed by Directive (EU) 2019/1152 aiming at more transparency and predictability in working conditions, a Directive that must be transposed into national legislation by 1 August 2022. Art. 6 and 7 of the Directive impose new elements to be reported in writing in the event of posting. These conditions would be in addition to the information already required to be provided for in the existing national legislation which must be given in the case of a posting abroad - not necessarily intra-European mobility - that exceeds four weeks. This Directive requires the employer to provide additional information, among many other issues, on the Member State(s) of destination of the posting and on the additional remuneration to which the posted person may be entitled under the rules of the Member State of destination; the existence of a specific allowance for posting and reimbursement of travel, accommodation and subsistence expenses; as well as the official website where to consult the rules applicable in the Member State of destination and the identification of the Administration to which contributions are paid and which provides the insurance cover[304].

4.3 Hard core working conditions to be respected in case of posting of workers to Spain

Since 29 April 2021, the hard core of working conditions to be respected in Spain in the event of intra-Community posting of workers refers to the conditions listed below in the national legislation but also in sectoral statutory collective agreements and applicable arbitration awards[305]. Spain has already envisaged that conditions on a general basis from the very beginning, since 1999, affecting all sectors and not only the construction sector. The new provisions refer to the matters contained in letters j and k of the following list of labour conditions (Art. 3.1 of the Law 45/1999). It is important to remember that these conditions are considerably extended when the posting has a longer duration (see *section 4.4*).

(a) Working time, although the transposition law refers only to the legal regulation of this matter, it should obviously consider the conventional improvements in the sector.

(b) The **amount of the salary**. From its initial transposition in 1999, the Spanish posting law already referred to the **salary**[306] (not the legal or conventional minimum wage) as a form of remuneration for posted workers. Art. 4 of the same law specifies that the salary to be considered for the comparison is the salary corresponding to the professional group or category attributable to the posted worker, in accordance with the service to be performed. In addition, all salary concepts must be included (basic salary, allowances, extraordinary bonuses, overtime, complementary hours, and night work), with the express exclusion of complementary social security schemes relating to retirement. Moreover, regarding the comparison to be

302 Art. 6 of Law 45/1999.

303 The written declaration of the employer with all the information required by RD 1659/1998 Art. 2, 3 and 5 https://www.boe.es/eli/es/rd/1998/07/24/1659 is considered as such.

304 About this Directive, see Miranda (2019).

305 Law 45/1999 Art. 3.4.

306 Law 45/1999 Art. 3.1b)

made, the transposition now makes it clear that **allowances for posting,** that are considered salary, must be included. They would therefore not be considered if they were reimbursement of expenses (e.g., for travel, board, and lodging). This is also the case when it is not clear if certain complements are salary or not under the applicable legislation to the employment contract (i.e., there are doubts about their nature). Those complements must not be considered part of the wage[307].

From the initial transposition of the Posting Directive in 1999, a **special rule** has been set **for Temporary Employment Agencies** that post workers to Spain, obliging them to compare the worker's salary (in accordance with their contract or agreement/foreign law) with the total remuneration established for the job to be performed according to the Spanish collective agreement applicable to the user company, calculated per unit of time. This remuneration must include, where applicable, the proportional share of weekly rest, special payments, public holidays, and holidays. The user company is responsible for the quantification of the worker's final earnings. The user company operating in Spain must include this salary in the contract for the provision of services.[308]

(c) Equality of treatment and non-discrimination, whether direct or indirect, on grounds of sex, origin, including racial or ethnic origin, marital status, age within the legal limits, social status, religion or belief, political opinion, sexual orientation, membership or non-membership of a trade union and its agreements, family ties with other workers in the undertaking, language, or disability, provided that the workers are fit and able to perform the work or job in question.[309]

(d) Child labour[310].

(e) Prevention of occupational risks (OSHA) including maternity and childcare rules.

(f) Non-discrimination of temporary and part-time workers.

(g) Respect for the privacy and dignity of workers.

(h) Freedom of association and the rights to strike and assemble. This provision was also included since the very beginning in the original transposition of the posting directive under the protection of our public order, as the fundamental rights that they are. Although Spain stated in its communication to the Commission of 9 December 2020, that this minimum condition guaranteed to posted persons was the transposition of the so-called "Monti clause"[311], contained in Art. 1.1a of Directive (EU) 2018/957[312]. This provision can hardly be the correct transposition of that clause, which does not refer to the rights of the posted person but rather seeks to ensure that the Directive does not have any negative effect on the fundamental rights to strike, nor on the right to collective bargaining or collective conflict of Spanish trade unions and legal representatives, not of the posted workers.

(i) The conditions for the posting of workers, also when there are chains of posting of workers, especially the prevention rules and all those contained in the specific law on TEA.

(j) The conditions of accommodation of workers, where the employer must provide them to employees away from their normal place of work[313]. The virtuality of this condition depends on whether the employer must grant this right to his workers. In Spain, this obligation only derives from certain prevention rules when the outdoor work of place is very distant from the workers' place of residence, which makes return

307 Law 45/1999 Art. 4.3.2º-as of RDL 7/2021 Art. 12.4.

308 Law 45/1999 Art. 4.2.

309 This list was updated by Law 62/2003 transposing Directives 2000/43/EC and 2000/78/EC.

310 According to ET Art. 6).

311 On the exercise of the right to take collective action in the context of the freedom of establishment and the freedom to provide services and the proposed "Monti II Regulation", see Castelli (2012).

312 This article states that "this Directive shall in no way affect the exercise of fundamental rights recognised in the Member States and at Union level, including the right or freedom to strike or to take other action provided for in the specific industrial relations systems of the Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, conclude and enforce collective agreements or take collective action in accordance with national law and/or practice."

313 Law 45/1999 Art. 3.1.j drafted by RDL 7/2021 Art. 12.2.

impossible[314], and from the regulations on collective management of recruitment at source, especially in the agricultural sector[315] (Velázquez, 2021: 84). The scarcity of autonomous regulations means that the importance of sectoral collective agreements is key in this field.

(k) Subsistence allowances or reimbursements to cover the travel, accommodation, and subsistence expenses of posted workers that are away from their (temporary) usual residence in Spain for work purposes or because they are temporarily posted to another place of work in Spain or abroad[316]. This novel inclusion makes it clear that it only refers to mobility from or within Spain, so it does not seem to cover travel to and from Spain as the Member State of destination of the posting. Within Spain, in the absence of a more beneficial agreement, the provisions of Spanish labour law would apply[317].

It should be recalled that the initial transposition did not require a comparison regarding pay and paid leave conditions for postings of less than eight days, except when it is carried out by a TEA[318].

4.4 Long-term postings to Spain

As a general rule, Spanish law considers that there is a long-term posting when the actual duration of the posting (not the foreseeable duration as it was envisaged under social security coordination) exceeds 12 months. In this case, irrespective of the law applicable to the posted worker's contract, all the higher working conditions provided for in the host Member State (established in national legislation, agreements, and awards) must be guaranteed, with the exception of **two conditions** that will continue to be governed by the *lex causae* (the one that rules the employment contract of the posted worker), although the conditions established were less protective than the Spanish ones: a) the procedures, formalities and conditions for the conclusion and termination of the employment contract, including non-competition clauses and, b) supplementary pension schemes.

If the posting company considers that the **12 months of posting will be exceeded**, it can send a reasoned notification to the labour authority to delay the posting by up to six more months (up to a total of 18 months). No time limit or procedure is set for the notification, it is only clear that it has to be made before the initial 12 months expire. The competent authority must be that of the Autonomous Community where the posting was notified (the Ministry of Labour in the case of Ceuta and Melilla). If the posting is made to more than one Autonomous Community, it is not clear to whom the notification must be presented, although a logical option would be to notify the last one where the work is performed. In this case, it cannot be ruled out that if only the initial arrival was notified, this Administration starts to be aware of the existence of the posted workers in its territory at that time. In any case, it might be necessary for a national authority to decide in cases of posting to different Autonomous Communities (multi-location). It would seem advisable to create a centralised notification system or at least a coordinated system, always with a national register that allows access to complete information from the notification of arrival to the notification of an extended duration regarding long-term posting. It would be unreasonable for the mere division of the posted person's work in different Autonomous Communities (as workplaces, perhaps of the same company) to allow the counter to be reset to zero.

In any case, the notification regarding long term posting is understood to be a mere declaratory procedure and not an administrative authorisation, and, in accordance with European case law, the labour authorities do not have the power to deny the extension, as this could represent an unjustified restriction of the freedom

314 RD 486/1997 Annex V.A). 4.2º which regulates the conditions of such accommodation and the sectors where it is relevant (mobile construction sites, extractive industries, fishing vessels, means of transport, agricultural and forestry companies).

315 Order ISM1289/2020 Art. 3.2.b and Annex XI.

316 Law 45/1999 Art. 3.1.k drafted by RDL 7/2021 Art. 12.2.

317 ET Art. 40.1.3 on relocation expenses or, more likely, the provisions of Art. 40.6 on travel.

318 Law 45/1999 Art. 3.4.

to provide services under Art. 56 TFEU[319]. Nevertheless, it seems that the Spanish authority should take this into account and perhaps carry out some kind of control, since the LISOS included as a new serious administrative offence "giving an account to the competent authorities of the reasons for the extension of the posting, alleging facts and circumstances that are proven to be false or inaccurate"[320].

In the **calculation of** the months that change a common posting into a long-term posting, which happens in social security, the following must be included: paid annual leave and other short interruptions such as other breaks or paid leave provided for in the Spanish labour legislation (also in the sectoral agreements and awards) or those based on the same causes, even if they are regulated by the *lex causae*, which continues to be applicable because it were more beneficial[321]. In the Spanish transposition of this issue, there is a lack of identification of the period of time that must elapse for the posting of a worker not to be considered a replacement of a previous one. As has already been pointed out, in Social Security matters, according to the Administrative Commission's interpretation, two months were established. But in the labour field, under the Posting Directive, nothing is said about the time that must elapse for the counter to be reset to zero[322].

Conversion to a long-term posting involves a change in the employment status of a particular worker. However, for the purposes of calculating the necessary time limits, the focus must be put on the work performed, i.e., in the job position. In other words, if the service is prolonged beyond 12 months (or 18 months if such prolongation was previously notified) in the same job, even if it has not been carried out by the same worker the whole time. It can be understood that the posted worker who occupies this job position at the end of the maximum period (12+6=18 months) will be the beneficiary of the change in conditions associated with the long-term posting, for instance, by accumulating the posting periods of all the workers who preceded him/her carrying out the same activity. The guidelines for identifying "same work at the same place" should consider the nature of the service being provided transnationally, the work being performed, and the address(es) of the place of work.

Long-term posting will continue for as long as the service is provided, as there is no time limit on posting. What will happen with a posting that continues after the mentioned period (12+6=18 months) is that it can go on, surely with higher costs for the company, which may have to increase its working conditions until nearly equal treatment (excluding the two aforementioned conditions). Posted workers by companies established in the richer Member States will not notice the change to a long-term posting. For them, posting rules will remain neutral, as they will maintain their original working conditions that do not lead to social dumping.

4.5 The single official national website

As required by the Enforcement Directive[323], Spain has the obligation to create and maintain an updated single national website containing the information on the terms and conditions of employment applicable to workers posted to Spain, as well as to maintain updated information in the country fiche on the European Commission's website[324]. The aim is to provide to the posting undertakings an accessible point in Spain with electronically available information in a clear, transparent, comprehensive, and easily accessible way. It should be noted that the information obligations are not limited to the website, as the law states that the

319 See, inter alia, CJEU of 7 October 2010 (Dos Santos Palhota and others, Case C-515/08), paras 34 and 35, CJEU of 19 January 2006 (Commission v Germany, Case C-244/04), para 34.

320 See LISOS Art. 10.2. a) in fine.

321 Thus, for example, a one-month marriage leave under the labour law of another Member State applicable to the posted person would be taken into account because it is more protective.

322 See Decision No 2 of the Administrative Commission, point 3.c) where it is admitted, without applying the *lex loci laboris*, that a worker who has already been posted for 24 months can be posted again to the same companies in the same Member State, when two months have elapsed since the last posting. In fact, the mere change of Member State also resets the counter to zero (Decision No 2 of the Administrative Commission, point 3.c).

323 Directive 2014/67, Art. 5.2 called for the creation of a single official website at national level which clearly indicates, in a detailed, user-friendly and accessible format, which working conditions or which provisions of national law are to apply to workers posted to its territory.

324 See the Commission's information on posting of workers to Spain at https://ec.europa.eu/social/main.jsp?catId=471.

labour authority of the territory where the services are to be provided (in the case of Spain, the labour departments of the Autonomous Communities) must provide information on working conditions (Law 45/1999, Art. 7). None of the channels establishes any type of **mitigation of the administrative penalties** imposed to the employers if the information provided on the single national website or by the Department of Labour itself is not up to date or is not correct.

An analysis of the Spanish official website between February 2021 and January 2022 shows that the website has gradually improved and currently provides information in Spanish, English, French, and German on the law, terms, and conditions of employment applicable to comply with the provisions of Spanish labour and social security law and with other legislation related to posting of workers[325]. In particular, it provides information regarding:

- The Regulations applicable in Spain when workers are posted in the framework of a transnational provision of services, as well as information on the working conditions of posted workers, long-term postings, competent institutions, notification of the posting, infringements and sanctions, and jurisdictional competence, among others[326].
- The contact details of the labour authorities of the Autonomous Communities for the purposes of getting information on working conditions, and notification of the original posting and its possible extension[327].
- The rules applicable to the posting of workers by companies established in Spain (working conditions, infringements and sanctions, jurisdictional competence, and provisions applicable to the activity of Spanish TEAs).
- The link to the Social Security website which sets out the obligations in this area and provides information on the competent authority in relation to the PD A1.
- The link to the European Commission's website with information on posting of workers and access to the European Commission's guidance document published on 25 September 2019 to help workers, employers, and national authorities to understand the rules contained in Directive 96/71/EC, Directive 2014/67/EU and Directive (EU) 2018/957[328].

The official national website in Spain also includes links to existing websites and other contact points, in particular, the relevant social partners. It also provides access to sources for consulting collective agreements (REGCON)[329], and arbitration awards applicable to posted workers. It should be noted that, although instructions and even a search example are provided, the consultation of collective agreements in the database provided for this purpose is not easily accessible for foreign employers, among other reasons because it is only available in Spanish, Catalan, Basque, Galician, and Valencian. In any case, it is a useful tool that complies with the requirements of Directive 2014/67/EU.

In relation to the duration of the posting, no clear information can be found in the Spanish website on how the **motivated notification** must be submitted to comply with the law an apply, in addition to the working, remuneration and employment conditions already applicable during the first 12 months of posting, a set of additional Spanish working conditions. At present, it can be said that there is no systematic monitoring of the compliance with this provision in Spain. Due to the obligation to notify the posting to the Autonomous Communities where services are to be provided and workers are posted, it is the labour authorities of each of the 17 Communities that must receive this notification. However, at the time of finishing this report,

325 https://www.mites.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/index.htm
326 https://www.mites.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/desplazamiento/index.htm
327 https://www.mites.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/datoscontacto-autlaborales/index.htm
328 https://op.europa.eu/en/publication-detail/-/publication/8ac7320a-170f-11ea-8c1f-01aa75ed71a1
329 This is a database for the Register and deposit of collective agreements, collective bargaining agreements, and equality plans in Spain (REGCON): https://expinterweb.mitramiss.gob.es/regcon/

almost none of them had established an ad hoc procedure for registering the motivated notification. Unfortunately, as in other aspects related to the posting of workers to or from Spain, there are no public data or official statistics available on the number of motivated notifications presented or on the number of companies that have notified the extension of postings beyond 12 months.

Annex I

JUDICIAL BODY	SUBJECT	COURT DECISION	COUNTRY OF ORIGIN	COUNTRY OF DESTINATION	SECTOR ACTIVITY	INTERVENTION BY THE LABOUR INSPECTORATE	OTHER
TSJ Aragón (Administrative Chamber) of 12-3-2009 [1].	Labour. Prevention of occupational hazards	The court confirms an **administrative labour sanction** for non-compliance with **OSHA prevention** regulations **(**LISOS art.13.10). Working at height without a safety harness. In addition, there was no person responsible on the employer's site to monitor and control the application of the required protective measures.	Portugal	Spain (Zaragoza)	Construction	Yes Administrative sanction	Irregular Posting
TSJ País Vasco (Social Chamber) of 12-5-2009 [2]	Labour. remuneration	Labour claim by a Portuguese worker supported by a **Spanish trade union** (CCOO) of which he is a member. The Portuguese company must pay 8,150.18 euros in **salary differences for** non-application of the conditions established in the Álava Collective Agreement for the Construction Industry, and compensation for dismissal (with payment of the proportional part of the holidays and the extra summer pay).	Portugal	Spain (Vitoria)	Construction	No.	Irregular Posting
TSJ Galicia (Social Chamber) from 1-7-2020 [3]	Labour. Administrative sanction for non-compliance with working conditions in the sector.	A very serious administrative sanction for non-payment of the minimum wage is confirmed (LISOS Article 8.1). The fine is increased taking into account the number of workers affected (17) and the damage caused to the employees. The Portuguese company did not take into account the higher salary established in the sectoral collective agreement applicable in Spain.	Portugal	Spain (Vigo)	Construction	Yes. Administrative sanction.	Irregular Posting

TSJ Asturias (Social Chamber) from 1-2-2013 [4]	Labour. Claim for a company improvement of the TI allowance provided for in the sectoral collective agreement.	A Spanish worker claims that he is a false posted worker and although he signed his contract in Portugal and is insured with Portuguese social security, this is only an attempt by the company to save on contributions. His claim is rejected for lack of evidence. The full application of the Spanish sectoral collective agreement is rejected, in particular is denied the company's supplement of sickness benefits in cash envisaged in the agreement. The Court considers that this supplement is not t one of the minimum conditions to be respected according to the Posting Directive.	Portugal	Spain (Gijón /Avilés)	Wood	Yes, there was a previous administrative sanction for non-payment of conventional salaries.	Irregular Posting because the company did not pay the conventional salary. However, there was no evidence of the bogus posting alleged by the employee in his complaint.
TSJ Galicia (Social Chamber) of 29-3-2011 [5]	Employment. Claim for a lump sum, recognised as a voluntary improvement for death in an accident at work in the Spanish collective bargaining agreement for the construction industry.	The Spanish sectoral collective agreement in the construction sector provides for the payment of a lump sum of EUR 39,000 (*mejora voluntaria*) to the survivors of workers who die in an accident at work. That right is denied to the parents of a Portuguese posted worker (who died in an accident at work on a construction site in Spain) where he was providing services on behalf of a Portuguese company. Following the accident, the Spanish Labour Inspectorate intervened and the companies involved were penalised for failure to comply with the prevention rules (OSHA). It is considered that the payment of this amount is not one of the minimum conditions to be respected, in accordance with the Posting Directive.	Portugal	Spain (Orense)	Construction	Yes, administrative sanction for non-compliance with OSHA prevention standards. The lawsuit is for a different matter, claiming compensation for the accident.	Irregular Posting.

TSJ Navarra (Social Chamber) of 23-9-2010 [6]	Labour. Salary according to the collective agreement of the Spanish sector.	Lack of Spanish jurisdiction. The Spanish Court considered that the case fell outside the scope of the Posting of Workers Directive and there were no clear links with Spain. Therefore, the matter had to be decided before the Bulgarian courts. The claimant is a lorry driver employed in Bulgaria by a Bulgarian company to provide transport services throughout Europe with a Bulgarian registered lorry. The only connection with Spain is the worker's family residence in a village in Navarra. The worker sought the application of the Collective Agreement for the Transport of Goods in Navarra and the payment by his Bulgarian employer and a Spanish company involved of the wage differences (amounting to 4,190 euros).	Bulgaria	Spain (Navarra)	Road transport	No	Not considered a posted worker
TSJ Andalusia (Seville) (Social Chamber) of 10-07-2012 [7].	Labour. Unlawful posting. Ex officio proceedings.	Fraudulent use of Portuguese companies in order to generate a false posting to Spain at a lower labour cost. The Spanish inspectorate unsuccessfully requested the presentation of the Portuguese A1 forms. The Spanish company was the real employer as it exercised management and organisational powers and disciplinary powers. .	Portugal	Spain (Cadiz)	Construction	Yes, administrative sanctions. Ex officio procedure	Irregular Posting. Non-payment of conventional salary. Fraud of law
TSJ Castilla-León (Burgos) (Administrative Cont. Chamber) of 31-10-2013 [8].	Social Security. Workers without PD A1. Letterbox company in collusion with Spanish company.	The administrative sanctions against a Spanish company for creating a letterbox company in Portugal with no activity in that State are confirmed. The Portuguese workers had no A1 forms and were not insured either with the social security of the country of origin (Portugal), which did not issue any PD A1, or with the State of destination (Spain). Workers must be insured in Spain as there was no posting.	Portugal	Spain (Ávila)	Construction	Yes, administrative sanction	Irregular posting. Fraud of Law CC art. 6.4

TSJ Andalusia (Seville) (Contentious-Administrative Chamber) of 3-10-2013 [9]	Social Security. Validity of Portuguese PD A1s	An appeal by a Portuguese company which refused to be listed in Spain is upheld. The Portuguese PDs A1 are valid. It is shown that the Portuguese company had been paying contributions for its workers in Portugal. The Spanish Court considers in its reasoning the case law of the Court of Justice (CJEU 26-1-2006, Herbosh Kiere case C-2/2005).	Portugal	Spain (Cadiz)	Construction	Yes, although the court annuls the administrative sanctions.	Regular. Validity of Portuguese PDs A1. No fraud of law.
TSJ Cataluña (Social Chamber) of 11-6-2019 [10]	Labour. Claim for dismissal of posted workers who did not want to be subrogated to a French company.	The workers, with mobile or itinerant jobs, were power line installers working for a Spanish company who were posted to France to provide services on behalf of a French company that had a contract for the construction and maintenance of power lines with a French public electricity company (RTE). The intervention of the French inspectorate obliges the French company to hire the posted workers directly. The non-EU nationals first needed to obtain work and residence permits in France. The workers who did not want the subrogation sued the Spanish company for unfair dismissal before the Spanish courts.	Spain	France	Construction (electrical installation)	Yes, the French inspectorate intervened and fined the French company for not respecting the maximum working week time according to French regulations. In addition, it considered that the French company was the actual employer and forced the company to regularise its situation.	Irregular Posting. Lower wages and illegal transfer of labour.

TSJCastilla y León (Administrative Chamber) of 1-4-2019 [11].	Social Security. Refusal by the ITSS to issue the PD A1. The ruling upholds the company.	A Spanish company hires 35 workers and insures them in Spain with a view to posting them to Portugal. It is not correct that the Spanish social security Administration (TGSS) refuses to issue PDs A1 for these workers. The Spanish Labour Inspectorate finds that the Spanish company is not a letterbox company and is active in Spain. The ruling considers that according to Art. 14.1 of Regulation 987/2009 the requirement of already being subject to Spanish social security is fulfilled if the worker was insured at some point in the past, i.e. had a Spanish social security number before being hired. It obliges to issue PDs A1 retroactively. (*)Art. 14.1 of Regulation 987/2009 requires that the worker was insured *immediately* prior to being recruited for being posted.	Spain	Portugal	Construction	Yes, the Spanish inspectorate investigates the company and finds that it is not a letterbox company.	Regular posting. The Spanish company meets the requirements for a PD A1 to be issued according to Article 12 of the BR.
TSJ Balearic Islands (Administrative Chamber) of 5-4-2016 [12].	Social Security. Non-renewal of the work and residence permit of a foreign worker hired by a Spanish letterbox company that posted him to France. Invalidity of the PDs A1.	The renewal of the residence and work permit of a Moroccan posted worker is not applicable as his employer is a Spanish letterbox company which only has substantial activity in France. The cancellation of the worker's insurance in Spain and the PDs A1 issued in his favour is confirmed, so that his work permit cannot be renewed. The court rejects the employee's argument that he was unaware of the employer's fraud. The Spanish court considers that the worker must be insured in France. (*) A Spanish court cannot oblige the French Social Security Administration to insure a worker, especially one who is not authorised to work there.	Spain	France	Forestry	Yes, the Spanish inspectorate detects the letterbox company.	Irregular Posting. Letterbox company set up by a French company. Detrimental to the non-EU worker.

TSJ Basque Country Chamber (Administrative Chamber) of 20-3-2018 [13].	Social Security. Non-renewal of the work and residence permit of a foreign worker hired by a Spanish letterbox company that posted him to France. Invalidity of the PDs A1.	The renewal of the residence and work permit of a worker who is a third-country national is inappropriate because his employer is a Spanish Letterbox company which has substantial activity only in France. The cancellation of the worker's insurance in Spain and the PD A1s issued in his favour is confirmed, so that his work permit cannot be renewed. According to the Spanish Inspectorate, a fictitious company was created in Spain (without infrastructure or organisational structure, nor substantial activity) which also owed Spanish social security contributions. All the postings were to the same French company. The court rejects the worker's allegation that he was unaware of his employer's fraud and that his contract was real, providing the pay slips.	Spain	France	Construction and paints	Yes. The Spanish Labour Inspectorate. detects the letterbox company.	Irregular Posting. Non-payment of contributions and Spanish Letterbox company. Detrimental for the non-EU worker.
TSJ Com. Valenciana (Administrative Chamber) of 9-12-2019 [14].	Social Security. Invalidity of insurance and contributions. Spanish letterbox company.	Invalidity of the insurance and contribution in favour of a posted worker. Such nullity derives from the nullity of the social security registration of a Spanish letterbox company which posted workers to France to work in the construction sector. The Spanish inspectorate, alerted by the French authorities, found that the registered office of the Spanish company was a private address and that the company was not active in Spain, but only in France by means of postings.	Spain	France	Construction	Yes, the Spanish inspectorate detects a Spanish letterbox company with the help of the French authorities.	Irregular Posting. Non-payment of dues and letterbox company.

TSJ Com. Valenciana (Social Chamber) of 13-4-2021) [15].	Employment. Invalid disciplinary dismissal of a posted worker for claiming his salary rights under the sectoral collective agreement of the State of posting. Guarantee of indemnity against employer retaliation.	Worker posted to Belgium who claimed the salary established in the Collective Agreement for the Metal Construction sector because it was higher than that established in the Spanish Agreement. Faced with the company's refusal, he threatened to take legal action and was dismissed. Lawsuit for dismissal that was declared null and void for breach of effective judicial protection in relation to the guarantee of indemnity, obliging the company to pay compensation for non-pecuniary damage. He is unsuccessful in obtaining payment of the Belgian salary because he does not adequately prove that the Belgian collective agreement. The worker merely provided the foreign agreement without translating it and did not prove that it was applicable to him. The payment of the travel allowances provided for in the Spanish collective agreement was also denied because he was directly recruited to provide services abroad, where he had been posted from the outset.	Spain	Belgium	Construction	No	Irregular Posting. Dismissal null and void for employer retaliation for claiming employment rights
TSJ Castilla y León (Burgos) (Social Chamber) of 25-2-2015) [16].	Employment. Unjustified disciplinary dismissal of worker posted to Sweden. Claims the application of the Swedish conventional salary for the calculation of compensation.	A Spanish worker posted to Sweden sued for dismissal and, for the calculation of his compensation, he provided a translation of the State Collective Agreement for the Swedish electricity sector in order to take into account the higher salary it establishes. Although the foreign agreement is considered to be proven, the Spanish court considers that the employee does not meet the conventional requirements to be entitled to the Swedish salary claimed.	Spain	Sweden	Electricity sector	No	Regular posting. No proof of entitlement to the Swedish statutory wage.

TSJ Cataluña (Social Chamber) of 20-9-2017 [17].	Labour Claim for voluntary improvement of the Spanish collective agreement for permanent incapacity resulting from an accident at work in France. Direct liability of the Spanish company for lack of insurance.	Worker fraudulently hired in Spain as a domestic employee to carry out construction work on a house in France suffers an accident at work. The Spanish social security recognises the right to a pension of total permanent disability (IPT). The Spanish company is directly responsible for all social benefits arising from the accident, as he was not insured to the Spanish Social Security at the time of the accident. He was not entitled to employer's benefit (additional percentage or *recargo de prestaciones*) because it was not possible to prove non-compliance with the French prevention rules (OSHA). The Spanish company's obligation to pay compensation of 28,000 euros established, as a voluntary improvement, in the Spanish Collective Agreement for the Construction Industry, which also applies to posted workers, is recognised.	Spain	France	Construction	Yes, the Spanish inspectorate is not considered to have the capacity to assess compliance with risk prevention rules in France.	Irregular Posting. Accident at work and recruitment not in accordance with the law.
TSJ Galicia (Social Chamber) of 18-3-2008 [18].	Social Security. Entitlement to the employer's benefit surcharge (additional percentage or *recargo de prestaciones*) on Spanish benefits in the event of an accident at work resulting in the death at work of a person posted to Portugal.	The employee is entitled to the employer's benefit surcharge (additional percentage or *recargo* de *prestaciones*) on the Spanish widow's pension imposed on a Spanish company is confirmed. The undertaking had posted a Colombian worker to a construction site in Portugal where he suffered an accident due to a lack of preventive measures (OSHA). .	Spain	Portugal	Construction	No. The Spanish inspectorate could not be present at the accident as it occurred in Portugal. No reference is made to the Portuguese inspectorate.	Irregular Posting. Non-compliance with prevention rules.

TSJ Madrid (Social Chamber) of 15-3-2019 [19].	Social Security. Entitlement to the surcharge of IPT benefits (*recargo de prestaciones*) in favour of a posted worker who suffered an accident on a construction site in France due to a lack of preventive measures (OSHA).	The Spanish company has to pay a surcharge on a benefit (the Total Permanent Disability pension) because failed to comply with prevention rules in an occupational accident (OSHA) suffered by an employee posted to France. Non-compliance with occupational risk prevention regulations is evidenced by the report of the French labour inspectorate.	Spain	France	Construction	Yes, the French Labour Inspectorate issued a report on non-compliance with risk prevention rules which was admitted by the Spanish court. There were criminal proceedings. The Spanish inspectorate could not act as the accident took place in France (territoriality).	Irregular Posting. Non-compliance with prevention standards (OSHA).
TSJ Com. Valenciana (Social Chamber) of 9-6-2015 [20].	Employment. Compensation for damages due to an accident at work of a worker posted to Italy. Non-compliance with prevention rules is not proven.	A worker posted to Italy suffers an accident at work. In another previous judgement, it was denied his entitlement to a employer's benefit surcharge (additional percentage or *recargo* de *prestaciones*) , as it was not proven that the company had failed to comply with the prevention rules, nor other causes for which the company was at fault. Nor was it proved that he performed duties that did not correspond to his professional category. The company demonstrated that it had adopted the required safety and prevention measures (OSHA), and that the worker had the necessary training and information to perform the duties. This judgment has the effect of positive res judicata, so that the claim for damages is also rejected.	Spain	Italy	Cook in an event catering company	Yes, but the Spanish inspectorate could not establish the company's responsibility for the accident because it took place in Italy.	Regular Posting. There is no evidence of non-compliance.

TSJ Extremadura (Administrive Chamber) of 16-6-2021 [21].	Social Security. Non-payment of Spanish Social Security contributions by a Spanish company posting workers to Portugal.	The Spanish company must pay contributions for the workers it sends to Portugal, including certain amounts for travel that are not considered *per diems* and travel expenses.	Spain	Portugal	Construction (land levelling)	Not specified	Irregular Posting. Non-payment of Social Security contributions by not including the amounts and salary concepts that should be included in the contribution base (*per diems*).
TSJ Com. Valenciana (Administrative Chamber) of 26-10-2021 [22].	Social Security. Invalidity of Spanish Social Security insurance. Letterbox company	Spanish letterbox company. All construction activity is carried out in Belgium and the Netherlands through posting of workers. No construction activity in Spain, no infrastructure, only administrative staff.	Spain	Belgium	Construction	Yes, the Spanish Inspectorate detects the Letterbox company in Spain.	Irregular posting. Company with a debt of 60,000 euros with the Spanish Social Security.

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[3] TSJ Galicia Sala Social. Rec. 5878/2019, EDJ 2020/654468. https://www.poderjudicial.es/search/AN/openDocument/a7b9d54b43c678d8/20200917

[4] TSJ Asturias Sala Social. Rec. 2813/2012, EDJ 2013/25599; https://www.poderjudicial.es/search/AN/openDocument/407b11833658a608/20130320

[5] TSJ Galicia Sala Social. Rec. 2551/2007 EDJ 2011/78230; https://www.poderjudicial.es/search/AN/openDocument/4adf50022f31581a/20110602

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[12] TSJ Baleares Sala Cont. Administrativo 5-4-16, ROJ: STSJ BAL 246/2016; http://www.poderjudicial.es/search/openDocument/571103f1cb3218af/20160428

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