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Social dumping and the abuse of A1-forms in the EU: The need for effective measures



Preface

Through this way, I want to thank my supervisor, Ms. M.J.G.A.M. Weerepas, for the good supervision and support with the writing of this master thesis. Thanks to her clear feedback, I was able to write and finalize this master thesis. I also want to thank Mr. R. Cox, journalist at Dagblad de Limburger and head of the investigation in the abusive practices of posted workers at the construction of the A2-highway in Maastricht. I've had contact with him about the investigation of abusive practices at the A2-highway in Maastricht. He gave me detailed information about the abusive practices that occurred in Maastricht and gave me insights and sources that I could use in writing in this master thesis.

List of abbreviations

ABVV	Algemeen Belgisch Vakverbond
ACV	Confederation of Christian Trade Unions
Art.	Article
CLR	European Institute for Construction Labour Research
EBC	European Builders Confederation
EC	European Commission
EEA	European Economic Area
EFBWW	European Federation of Building and Woodworkers
EPC	European Policy Centre
EU	European Union
ETUI	European Trade Union Institute
FNV	Federatie Nederlandse Vakbeweging
IMI	Internal Market Information System
Ltd.	Limited
No	Number
NV	Naamloze vennootschap
OECD MC	Organisation for Economic Co-operation and Development Model Convention
p.	page
PWD	The Posting of Workers Directive
Reg.	Regulation

SVB	Sociale Verzekeringsbank
SZW	Inspectie Sociale Zekerheid en Werkgelegenheid
TFEU	Treaty Functioning of the European Union
trESS	Training and Reporting on European Social Security
TRM	Théâtre Royal de la Monnaie
Vol.	Volume

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1 Introduction

In the EU, citizens have the right to move and reside freely within the territory of the EU, subject to certain conditions.¹ Employees of a company are often sent from one Contracting State to the other Contracting State, to work there temporarily. This is called posting. This posting has positive effects on the economy of the Contracting States because of the economic integration, employment needs and the efficiency and productivity gains resulting from higher competition.² However, these positive effects are overshadowed by the phenomenon called “social dumping”. According to M. Bernaciak, social dumping is “the practice, undertaken by self-interested market participants, of undermining or evading existing social regulations with the aim of gaining a competitive advantage”.³ The social dumping with respect to posted workers means that these workers are exploited by a company as cheap labour to work in another Member State while not safeguarding their social security rights. An example of social dumping is the recent case involving the Irish company Atlanco Rimec. Atlanco Rimec exploits temporary posted migrant workers in the construction industry.⁴ “It’s model basically is bidding on contracts at northern European prices in simple terms and employing labour at Southern European and Eastern European rates from those countries. They then cream the bit out of the middle and frequently cream tax and national insurance to boot on the back of that too”.⁵ This company and its social dumping practices

¹ EC, *EU citizenship and free movement: Movement and residence*, 2016

² E. Vaccarino & Z. Darvas, Bruegel, *“Social Dumping” and posted workers: a new clash within the EU*, 2016

³ M. Bernaciak, ETUI, *Social dumping and the EU integration process*, Brussels, 2014, p. 5

⁴ S. Hägglund & W. Buelen, EFBWW, *Another Shocking documentary on cross-border social dumping practices of Atlanco Rimec*, 2014

⁵ S. Collyer, *EU Wide Social Dumping Scandal*, 2015

were for instance recently involved in the posting of workers in Maastricht for the construction of the A2-highway.⁶

A big problem with regard to social dumping is the abuse of A1-forms, which is a binding form that decides that the posted employees stay socially secured in the sending Member State.⁷ The A1-forms and their binding status can be used to take abuse of the rules on social security with respect to posting. The question is how to prevent the social dumping and the abuse of these A1-forms in the EU.

⁶ S. Hägglund & W. Buelen, EFBWW, *A new case of social dumping and exploitation of workers by Atlanco Rimec*, Brussels, 2013

⁷ SVB, *International Secondment General conditions for A1/(E)101 certificate applications*, 2016

1.1 Central question

For this master thesis I will formulate one central research question and where it is necessary or possible, I will make some preliminary conclusions. The central question of this master thesis is as follows:

“How can social dumping and the abuse of A1-forms effectively be combatted in the European Union?”

I will analyze and try to answer this question on the basis of the most recent developments in this field of topic.

1.2 Method of treatment

In the second chapter of this thesis, I will elaborate on the applicable regulations, directives and other rules or laws with regard to the posting of employees: Regulation 883/2004⁸, Regulation 987/2009⁹ and Directive 96/71/EC¹⁰. In that chapter I will also make the connection between social security rules and taxation rules and labour law, respectively. In the third chapter I will describe social dumping and the abusive practices of the A1-forms. The relevant case law will also be examined in this chapter. In the fourth chapter, recent developments and efforts in order to prevent social dumping and the abuse of A1-forms will be discussed. Finally, I will come to a conclusion and revisit the central question of this master thesis.

⁸ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, PbEU 2004

⁹ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, PbEU 2009

¹⁰ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, PbEU 1996

2 EU rules on the posting of employees

The freedom to provide services is an integral part of the EU as a single market.¹¹ This is legally laid down in art. 56 of the Treaty Functioning of the EU (TFEU). The posting of employees is an example of this freedom to provide services. The posting of employees is about the sending of employees to another Member State to temporarily work on an employer's behalf in that other Member State. Multiple EU laws and regulations are involved in the posting of employees. The number of posted employees in the EU is estimated to be 1.2 million, which is less than 1% of the EU working age population. The sector that most commonly uses the posting of employees is construction, in particular small and medium sized enterprises.¹² This chapter will discuss the relevant EU laws and regulations regarding the posting of employees.

2.1 Regulation 883/2004

Reg. 883/2004¹³ is about the coordination of national social security schemes in the EU. This Regulation determines the legislation applicable for persons in the EU. For the application of the Reg. 883/2004 the territorial scope of this Regulation has to be met.¹⁴ The territorial scope of Reg. 883/2004 consists not only of the European Union, but also includes the European Economic Area (EEA). The EEA includes the Member States of the EU and those Member States of the European Free Trade Association which have not yet become an EU Member State (which are Norway, Liechtenstein and Iceland).¹⁵ Besides that, Reg. 883/2004 also applies to Switzerland on the basis of an Agreement

¹¹ EC, *Posting of workers: EU safeguards against social dumping*, Brussels, 2014

¹² EC, *Posting of workers: EU safeguards against social dumping*, Brussels, 2014

¹³ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, PbEU 2004

¹⁴ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 3.3

¹⁵ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 3.3

between the EU and Switzerland.¹⁶ Next to the territorial scope, the personal scope has to be met. This personal scope is laid down in art. 2 of Reg. 883/2004 and covers nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.¹⁷ Art. 2(2) Reg. 883/2004 further includes survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.¹⁸ If both the territorial and personal scope are met, the material scope must be met for the application of Reg. 883/2004. The material scope is laid down in art. 3 of Reg. 883/2004 and contains a list of branches of social security, such as sickness benefits, invalidity benefits and more.¹⁹ When the territorial, the personal and the material scope are met, Reg. 883/2004 will be applicable.

Next, it should be determined which legislation is applicable. Art. 11(1) Reg. 883/2004 states that persons to whom the Regulation applies, shall be subject to the legislation of a single Member State only.²⁰ The determination of the applicable legislation is described in articles 11 through 16 of Reg. 883/2004. The main principle of the applicable legislation is *lex loci laboris*. This means that the legislation of the State in which a person pursues his/her activity to

¹⁶ Decision No 1/2012 of the Joint Committee established under the agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 31 March 2012, (2012/195/EU)

¹⁷ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 4.3.1

¹⁸ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 4.3.1

¹⁹ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 5.1

²⁰ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 6.2.2.1

work as an employed or self-employed person, is applicable.²¹ *Lex loci domicilii* means that the applicable legislation is the legislation of the Member State of residence (home country).²² Distinctions are made in determining the applicable legislation, with regard to employees, self-employed persons, civil servants, active or non-active persons, posted employees and simultaneous activities of persons in two or more States. The focus in this chapter will be on the posting of employees.

2.1.1 Posting

The general rule of art. 11(3)(a) Reg. 883/2004 implies that the legislation of the State in which work is exercised, is applicable.²³ However, with the posting of employees, the legislation of the Member State that sends workers is applicable. The goal of posting is to facilitate the freedom to provide services for the benefit of employers which post workers to Member States other than that in which they are established, as well as the freedom of movement of workers.²⁴ The goal of posting is also to avoid administrative complications that would have existed if the general rule was applicable. This general rule would have meant that for the temporary employment of the employee that is sent to another Member State, the legislation of that Member State would be applicable. This would cause an administrative burden and the rules on posting avoid these complications.

²¹ J. Cremers, CLR, Part 1 – Synthesis report, *In search of cheap labour in Europe: Working and living conditions of posted workers*, Introduction

²² M. Coucheir et al., trESS, *Think Tank Report 2008: The relationship and interaction between the coordination Regulations and Directive 2004/38/EC*, p. 4

²³ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 6.2.1

²⁴ Decision No A2 of 12 June 2009, par. (1)

Art. 12 of Reg. 883/2004 states the rules of posting. Art. 12(1) states: “*A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer’s behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.*”²⁵ This article implies a few requirements to be met, in order to continue to be subject to the legislation of the sending State. First of all, there has to be a person who pursues an activity as an employed person. The activity as an employed person is defined in art. 1(a) of Reg. 883/2004 and means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists.²⁶ Reg. 987/2009²⁷ lays down procedures for implementing Reg. 883/2004. In art. 14 Reg. 987/2009, details are described about the posting. In art. 14(1) Reg. 987/2009 it is stated that art. 12(1) Reg. 883/2004 shall include a person who is recruited with a view to being posted to another Member State, provided that, immediately before the start of his/her employment, the person concerned is already subject to the legislation of the Member State in which his/her employer is established.²⁸ Art. 14(2) Reg. 987/2009 clarifies the wording of ‘which normally carries out’ of art. 12(1) Reg. 883/2004. This wording refers to an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it

²⁵ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 7.1.1

²⁶ Reg. 883/2004, art. 1(a)

²⁷ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, PbEU 2009

²⁸ Reg. 987/2009, art. 14(1)

is established, taking account of all criteria characterizing the activities carried out by the undertaking in question.²⁹ The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out. Next to the implementing Reg. 987/2009, the Decision No A2 of 12 June 2009³⁰ concerns the interpretation of art. 12 Reg. 883/2004. This Decision also mentions conditions for the application of art. 12(1) Reg. 883/2004. The first condition is the existence of a direct relationship between the employer and the worker it engages. The determination of a direct relationship is done by assuming that the worker continues to be under the authority of the employer which posted him and by taking a number of elements into account, including responsibility for recruitment, employment contract, remuneration (without prejudice to possible agreements between the employer in the sending State and the undertaking in the State of employment on the payment to the workers), dismissal and the authority to determine the nature of the work.³¹ It is stated that the protection of the worker and the legal security to which he and the institution with which he is insured are entitled, are full guarantees that the direct relationship is maintained throughout the period of posting.³² The second condition is the existence of ties between the employer and the Member State in which it is established. This means that the rules on posting only apply to undertakings which ordinarily perform substantial activities in the territory of the Member State in which they are established. This condition thus coincides with art. 14(2) Reg. 987/2009. Furthermore, the Decision states that

²⁹ Reg. 987/2009, art. 14(2)

³⁰ Decision No A2 of 12 June 2009 concerning the interpretation of Article 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 workers temporarily working outside the competent State, PbEU 2010, C 106/5

³¹ Decision No A2 of 12 June 2009, par. 1

³² Decision No A2 of 12 June 2009, par. (4)

the worker and the employer must be duly informed of the conditions under which the posted worker is allowed to remain subject to the legislation of the sending State.³³ Also, the situation of undertakings and workers should be assessed and monitored by the competent institutions with the appropriate guarantees for the freedom to provide services and the freedom of movement of workers.³⁴ It is also mentioned that the posted employee should have been subject to the legislation of the Member State in which the employer is established, for at least one month. Shorter periods require a case-by-case evaluation taking account of all the other factors involved.³⁵ Besides all these requirements, there is the requirement of a maximum posting period of 24 months.³⁶ This period can, however, be extended by agreement.³⁷ In many Member States, the duration of such agreements is limited by the competent authorities to a maximum of five years.³⁸ Brief interruption of the activities of an employee in the working State shall not constitute interruption for the posting period. Once the posting period has ended, no immediate new posting period can be authorized for the same employee, the same undertaking and the same Member State. At least two months must have been elapsed before a new posting period can be initiated.³⁹

Posting according to art. 12(1) Reg. 883/2004 shall not apply or cease to apply in the following cases. First of all, in case the undertaking to which the worker has been posted places him at the disposal of another undertaking of the

³³ Decision No A2 of 12 June 2009, par. (9)

³⁴ Decision No A2 of 12 June 2009, par. (10)

³⁵ Decision No A2 of 12 June 2009, par. 1

³⁶ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 7.1.1.5

³⁷ See art. 16(1) Reg. 883/2004 which provides exceptions to articles 11 to 15 of Reg. 883/2004

³⁸ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 7.5

³⁹ Decision No A2, of 12 June 2009, par. 3(c)

Member State in which it is situated.⁴⁰ Also, in case the worker who has been posted to a Member State is placed at the disposal of an undertaking situated in another Member State.⁴¹ And finally, in case the worker is recruited in a Member State in order to be sent by an undertaking situated in a second Member State to an undertaking in a third Member State.⁴²

Art. 12(2) Reg. 883/2004 is similar to art. 12(1) Reg. 883/2004 but instead, applies to self-employed persons. If this self-employed person goes to pursue a similar activity in another Member State, he/she will continue to be subject to the legislation of the first Member State provided that the period of this activity in the other Member State does not exceed 24 months.

2.2 Directive 96/71/EC

Directive 96/71/EC⁴³, the Posting of Workers Directive, was adopted in December 1996 and implemented by Member States in December 1999.⁴⁴ This PWD safeguards the social rights of posted workers and prevents social dumping.⁴⁵

Art. 2(1) of the PWD gives the definition of a posted worker. This is a worker who, for a limited period, carries out his/her work in the territory of a Member State other than the State in which he/she normally works. The PWD covers three cross-border situations. The first situation of posting is a contract concluded between the undertaking making the posting and the party for whom

⁴⁰ Decision No A2, of 12 June 2009, par. 4(a)

⁴¹ Decision No A2, of 12 June 2009, par. 4(b)

⁴² Decision No A2, of 12 June 2009, par. 4(c)

⁴³ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, PbEU 1996

⁴⁴ PWD art. 7

⁴⁵ EC, *Posting of workers: EU safeguards against social dumping*, Brussels, 2014

the services are intended.⁴⁶ The second situation of posting is that of the posting of workers to an undertaking in another Member State owned by the group (intra-group).⁴⁷ The last situation of posting is the hiring out of workers by a temporary employment undertaking or placement agency to a user undertaking established in another Member State.⁴⁸ The conditions for posting are that an employment relationship must remain during the posting period between the posted worker(s) and the undertaking making the posting. Also the posting period must be limited.

The main purpose of the PWD is to ensure that posted workers are subject to the laws, regulations and administrative provisions of the working State.⁴⁹ For the construction sector and related activities where collective agreements or arbitration awards are universally applicable, the PWD provides a list of the laws, regulations and administrative provisions concerned.⁵⁰ This list includes⁵¹:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- the minimum rates of pay, including overtime rates (this is determined by the national law of the working State); this point does not apply supplementary occupational retirement pension schemes;
- the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- health, safety and hygiene at work;

⁴⁶ PWD art. 2(a)

⁴⁷ PWD art. 2(b)

⁴⁸ PWD art. 2(c)

⁴⁹ PWD art. 3(1)

⁵⁰ PWD art. 3(1) second indent and Annex

⁵¹ PWD art. 3(1)(a)-(g)

- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- equality of treatment between men and women and other provisions on non-discrimination.

The application of more favorable terms and conditions of employment are not precluded by art. 3(1)-(6) PWD.⁵²

Even though the posting definition in the PWD is different than that of the Reg. 883/2004, the meaning of posting coincides. Besides that, the PWD focuses more on the applicability of the laws, regulations and administrative provisions in the working State for posted workers to guarantee minimum rights and conditions, instead of the sending State.

Besides this PWD, the Enforcement Directive is approved and accompanies the PWD with the practical implication and enforcement of the rules and provisions. This Enforcement Directive will be discussed in detail in chapter 4.

2.3 Labour law

For the determination of the applicable contractual obligations in an EU Member State, the Rome I Regulation⁵³ is used. The relevant article in this Regulation is art. 8, which involves individual employment contracts.⁵⁴ Art. 8(1) of the Rome I Regulation refers to art. 3 of the Regulation for the main

⁵² PWD art. 3(7)

⁵³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), PbEU 2008, L 177/6

⁵⁴ Regulation (EC) No 593/2008 (Rome I), art. 8

rule.⁵⁵ Art. 3(1) of the Rome I Regulation states that the parties involved have a freedom of choice with respect to law applicable to the contract and that this choice shall be made explicitly in the terms of the contract or implicitly demonstrated by the circumstances of the case.⁵⁶ This main rule may not conflict the applicable rules in case the employee does not have a freedom of choice. The rules applicable in case an employee does not have a freedom of choice, are stated in art. 8 paragraphs 2, 3 and 4 of the Rome I Regulation.⁵⁷ So, in the case where the employee does not have a freedom of choice, art. 8(2) Rome I Regulation states that the employment contract shall be governed by the country in which the employee habitually carries out his/her work in performance of the contract.⁵⁸ If the employee temporarily works in another country, the country where the work is habitually exercised shall not be deemed to have changed.⁵⁹ If the applicable law as stated in art. 8(2) Rome I Regulation cannot be determined, we look at art. 8(3) Rome I Regulation, which states that the law of the country where the place of business through which the employee was engaged is situated, shall govern the employment contract.⁶⁰ Art. 8(4) Rome I Regulation furthermore states that in case that circumstances would lead to the conclusion that the employment contract is more closely connected with another country as stated in the previous paragraphs, the law of that other country shall apply.⁶¹

⁵⁵ Regulation (EC) No 593/2008 (Rome I), art. 8(1)

⁵⁶ Regulation (EC) No 593/2008 (Rome I), art. 3(1)

⁵⁷ V. Behr, *Journal of Law and Commerce*, *Rome I Regulation A-Mostly-Unified private international law of contractual relationships within-most-of the European Union*, 2011, p. 254-255

⁵⁸ Regulation (EC) No 593/2008 (Rome I), art. 8(2)

⁵⁹ Regulation (EC) No 593/2008 (Rome I), art. 8(2)

⁶⁰ Regulation (EC) No 593/2008 (Rome I), art. 8(3)

⁶¹ Regulation (EC) No 593/2008 (Rome I), art. 8(4)

Labour law and the applicable Rome I Regulation will thus apply the laws of the country for employment contracts based on the circumstances (where does the employee habitually exercises his/her work, where is the place of business situated, where is the closest connection with the employment). Workers that are posted and temporarily work in another country, will still be subject to the law of the country in which they habitually exercise their work.

2.4 Tax law (OECD Model Convention)

Art. 15 OECD MC outlines the rules relating to income from employment in a tax context. The general rule is laid down in art. 15(1) OECD MC which states that income from employment shall be taxable only in the State of residence of the person carrying out that activity. However, if the employment is exercised in another Contracting State, the income from employment may be taxed in that other Contracting State.⁶² Art. 15(2) OECD MC provides an exception to this general rule, by stating that the income from employment exercised in another Contracting State shall be taxable only in the residence State if the following cumulative criteria are fulfilled⁶³:

- (a) the employee is present in the work state for a period or periods not exceeding in the aggregate 183 days in a given 12-month period; and
- (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the work state; and
- (c) the remuneration is not borne by a permanent establishment that the employer has in the work state.

⁶² Art. 15(1) OECD MC

⁶³ Art. 15(2)(a-c) OECD MC

Most authors, including Pötgens, consider art. 15 OECD MC a closed system for income from employment. This means that if the income from employment does not fall under articles 16, 18 or 19 OECD MC, art. 15 OECD MC applies. According to them, income from employment can thus never fall under the ‘other income article’, art. 21 OECD MC.⁶⁴

The object and purpose of art. 15 OECD MC is to facilitate the international movement of personnel and the operations of enterprises engaged in trade. The reason for art. 15(2) OECD MC is that an excessive administrative burden can be avoided when the residence State is only able to tax income from employment, when this employment is exercised in the other State. This administrative burden is considered excessive (and art. 15(2) OECD MC shall thus be applicable) when there is no sufficient level of presence of both the employee or the employer (art. 15(2)(a-c) OECD MC).⁶⁵

Although the tax law perspective will not be the main focus in this thesis, it is still relevant in the consideration of posting.

2.4.1 Hiring-out of labour vs. Secondment

International hiring-out of labour is an abusive practice that is to be prevented. In the international hiring-out of labour, a user wants to employ personnel for temporary work (periods not exceeding 183 days). The personnel is recruited through an intermediary established abroad who purports to be the employer and usually enters into a formal employment agreement with the workers. The intermediary pays the salaries of the employees and hires them out to the user

⁶⁴ B. Peeters, *Article 15 of the OECD Model Convention on “Income from Employment” and its Undefined Terms*, p. 73

⁶⁵ K. Dziurdz and F. Pötgens, *Cross-Border Short-Term Employment*, p. 405

for consideration.⁶⁶ With this type of hiring-out of labour, people try to exploit the rules of art. 15 OECD MC. Double exemption may occur if the work State does not consider the user to be an employer and the residence State of the employee grants relief of double taxation through exemption and considers the user to be an employer on whose behalf the salary was paid by the intermediary.⁶⁷

The problem here is the definition of employer which could be interpreted differently, and thereby triggering art. 15(2)(b) OECD MC or not. The term employer is not defined in the OECD MC and therefore reference can be made to the meaning the term has under the domestic law of a Contracting State according to art. 3(2) OECD MC.⁶⁸ The OECD Commentary on art. 15 OECD MC provides interpretation of the term employer in the case of abusive situations (hiring-out of labour).⁶⁹ The Commentary gives guidance for the determination on who the ‘real employer’ is. The approach does not necessarily follow the formal (written) employment contract, but is more a substance over form approach.⁷⁰ First, the nature of services rendered by the employee will be important. It has to be determined whether these services constitute an integral part of the business of the enterprise to which these services are provided (integration test). A key consideration will be which enterprise bears the

⁶⁶ L. de Broe et al., *Interpretation of Article 15(2)(b) of the OECD Model Convention: “Remuneration paid by, or on behalf of, an Employer Who is not a Resident of the Other State”*, p. 505

⁶⁷ L. de Broe et al., *Interpretation of Article 15(2)(b) of the OECD Model Convention: “Remuneration paid by, or on behalf of, an Employer Who is not a Resident of the Other State”*, p. 505

⁶⁸ Art. 3(2) OECD MC

⁶⁹ Par. 8 Commentary on art. 15

⁷⁰ L. de Broe et al., *Interpretation of Article 15(2)(b) of the OECD Model Convention: “Remuneration paid by, or on behalf of, an Employer Who is not a Resident of the Other State”*, p. 506

responsibility or risk for the results produced by the employee.⁷¹ Where the employment relationship seems to be different than the formal contractual relationship, additional factors should be determined to determine the ‘real employer’. Examples of these factors are the determination of who has the authority to give instructions to the employee and who controls and has the responsibility for the place at which the work is performed (control test).⁷² This substance over form approach should thus determine who the ‘real employer’ is, in order to prevent abusive situations.

In the case of bona fide cross-border secondment of employees, the employer is mostly the entity to which the employee is seconded and which bears the cost of the remuneration.⁷³ It is ambiguous whether the substance over form approach of par. 8 of the Commentary on art. 15 OECD MC applies also to bona fide cases, or whether it is restricted to abusive situations. It would be better if the Commentary would make it clear that par. 8 of the Commentary on art. 15 OECD MC applies in general, so also in bona fide cases.⁷⁴

⁷¹ Par. 8.13 Commentary on art. 15

⁷² See par. 8.14 Commentary art. 15 for all the additional factors

⁷³ L. de Broe et al., *Interpretation of Article 15(2)b) of the OECD Model Convention: “Remuneration paid by, or on behalf of, an Employer Who is not a Resident of the Other State”*, p. 508

⁷⁴ L. de Broe et al., *Interpretation of Article 15(2)b) of the OECD Model Convention: “Remuneration paid by, or on behalf of, an Employer Who is not a Resident of the Other State”*, p. 511

3 Social dumping and the abuse of A1-forms

Social dumping and the abuse of A1-forms are undesirable practices in the social security sphere. This chapter describes these practices in detail and discusses the relevant cases and case law related with them.

3.1 Social dumping

Social dumping can be described as “the practice, undertaken by self-interested market participants, of undermining or evading existing social regulations with the aim of gaining a competitive advantage”.⁷⁵ Social dumping is not only detrimental to the society in terms of unfair competition, but it is also very harmful for the posted workers in the form of bad or no social protection, deplorable wages and inhuman living and working conditions.⁷⁶ The practices of social dumping can best be explained by practical examples.

3.1.1 Practical Examples

A company that has been involved in several social dumping practices in the past years is the Irish company Atlanco Rimec. The company was involved as a (sub)contractor in the Netherlands with the construction of the A2-highway in Maastricht. Atlanco Rimec posted Portuguese workers in the Netherlands to work on this project of the construction of the A2-highway in Maastricht. Atlanco Rimec arranged their stay in the Netherlands. The Portuguese workers stayed in rented houses which were due to be demolished. These houses were rented out by a Dutch housing corporation to Atlanco Rimec for approximately

⁷⁵ M. Bernaciak, ETUI, *Social dumping and the EU integration process*, Brussels, 2014, p. 5

⁷⁶ EFBWW, Stop Social Dumping, *Social Dumping and Exploitation*, 2016

450 Euro per month.⁷⁷ The Portuguese workers, who stayed with three or four workers in such a house, had to pay a monthly rent of 968 Euro to Atlanco Rimec. So, the Portuguese workers clearly got exploited. To hide this from the outside, Atlanco Rimec deducted a big amount from the salaries of the workers under the guise of ‘logistical costs’.⁷⁸ Where the difference in these amounts went, is not clear. Clear, however, is that the workers were charged a lot more money by Atlanco Rimec than the 450 Euro of rent per month.⁷⁹ The initial reason for posting foreign (Portuguese) workers was the cheap labour costs. The labour costs of the Portuguese workers were significantly lower than that of Dutch workers. This difference in labour costs creates an unfair competition among the EU Member States; “cheap” workers that are posted, have a competitive advantage over local workers in the host State. The fact that companies like Atlanco Rimec were able to abuse the rules and exploit the workers, indicates that the real issue is the enforcement of these rules.⁸⁰ The posted workers also had to work overtime, beyond the overtime limits stated in the law. As of 2014 a Dutch institution, ‘de Inspectie Sociale Zekerheid en Werkgelegenheid (SZW)’ investigated this issue of overtime registration and asked questions to the construction company Avenue2 (which worked together with Atlanco Rimec on the project in Maastricht).⁸¹ They said that the overtime

⁷⁷ Information from contact with Rob Cox, journalist at Dagblad de Limburger and head of the investigation in the abusive practices of posted workers at the construction of the A2-highway in Maastricht

⁷⁸ Information from contact with Rob Cox, journalist at Dagblad de Limburger and head of the investigation in the abusive practices of posted workers at the construction of the A2-highway in Maastricht

⁷⁹ Information from contact with Rob Cox, journalist at Dagblad de Limburger and head of the investigation in the abusive practices of posted workers at the construction of the A2-highway in Maastricht

⁸⁰ E. Vaccarino & Z. Darvas, Bruegel, *“Social Dumping” and posted workers: a new clash within the EU*, 2016

⁸¹ H. Heuts, 1limburg, *Nog geen maatregelen tegen topmannen bouwer A2-tunnel*, 2016

registrations were supposed to be bonuses for the good work of the workers. Two directors of the company were legally prosecuted for forgery and the case is now still pending.⁸²

Besides the case of the A2-highway in Maastricht, Atlanco Rimec has been involved in other social dumping practices as well. As soon as workers spoke publicly about the abusive practices, the company threatened and/or fired them (and put them on a blacklist) to get rid of the problems.⁸³ In case the problems would become too big, the company would close down and a new company would be set up under a new name to continue the abusive practices.⁸⁴ Besides that, most of the posted workers were not protected well enough in terms of social security. Social security has been structured via ‘letterbox companies’ (companies with no significant activity in a country) in Cyprus in the past, since it’s cheap.⁸⁵ An interesting case in this regard is the case of *Chain v. Atlanco*⁸⁶. Mr. Chain was working for Atlanco Rimec and worked in different EU Member States. Atlanco structured their social security via Cyprus since it’s cheap. Mr. Chain, however, did not get disability benefits in the countries where he worked, neither did he get those benefits from Cyprus. The case was also very strange because Mr. Chain himself did not go to court, but a lawsuit was in fact instigated in his name. The case was therefore eventually dismissed by the CJEU.⁸⁷

⁸² H. Heuts, 1limburg, *Nog geen maatregelen tegen topmannen bouwer A2-tunnel*, 2016

⁸³ R. Cox, *Dagblad de Limburger*, *De doofpot van de A2-tunnel*, 2014

⁸⁴ S. Collyer, *EU Wide Social Dumping Scandal*, 2015

⁸⁵ S. Hägglund & W. Buelen, EFBWW, *Another Shocking documentary on cross-border social dumping practices of Atlanco Rimec*, 2014

⁸⁶ *Bogdan Chain v. Atlanco*, C-189/14, 2015

⁸⁷ S. Peers, *EU Law Analysis, The Fake Client: The case that bamboozled the CJEU*, 2015

Recently, another social dumping case was discovered in the Netherlands by the labour union for the construction sector, 'FNV Bouw'. It concerns the construction of a new highway in Friesland, the Netherlands, where foreign workers are working on. These foreign workers are remunerated too little, are not getting their travel costs reimbursed and are working overtime beyond the allowed limits.⁸⁸ Besides that, it appears that there is bogus self-employment. Bogus self-employment happens often and means that self-employed people are able to stay subject to social security legislation in their home State by getting an A1-form (where this should not be allowed). The bogus self-employment in this case constitutes workers which are reliable to a contractor and have no self-influence.⁸⁹ These workers are thus normal employees even though they pretend to be self-employed (in order to avoid social security). In the Netherlands, Lodewijk Asscher⁹⁰ has taken action to combat the bogus self-employment. He introduced the 'Wet Aanpak Schijnconstructies' to combat these abusive practices.⁹¹ Next to that, new agreements are introduced to determine whether someone is liable to withhold income tax and whether someone is liable to social security legislation.⁹²

Taking all of the aforementioned in regard, it can be seen that the relation of social dumping and posting is that posting means that the legislation of the sending State remains applicable for the posted workers with regard to social security. Since there are differences in social security legislation across the countries in the EU, companies seek ways to exploit these differences by

⁸⁸ Financieel Dagblad, 'Misstanden bij aanleg centrale as Friesland', 2016

⁸⁹ Financieel Dagblad, 'Misstanden bij aanleg centrale as Friesland', 2016

⁹⁰ Deputy Prime Minister of the Netherlands and Minister of Social Affairs and Employment

⁹¹ Rijksoverheid, *Maatregelen tegen schijnconstructies*, 2016

⁹² J. de Wrede and C.M. Hermesdorf, De Kempenaer Advocaten, *De aanpak van schijnzelfstandigheid: van VAR naar Modelovereenkomst*, 2016

making sure the cheapest social security legislation applies. There are many forms of social dumping and some of them are described in this paragraph with practical examples. However, the cases or practical examples described here, are not the only cases involving social dumping. It is a serious problem in the EU and measures are needed to safeguard competition and the social rights of posted workers in the EU.

3.2 A1-forms⁹³

The practice of social dumping and its relation to posting has been explained in the previous paragraph. The conditions of posting are often hard to check; it is difficult to see if someone is really posted to work on the employer's behalf or to replace another worker.⁹⁴ Related to social dumping is the issuance of posting certificates. Posting certificates are issued by the competent institution(s) of the sending State that posted the worker, as a formal statement of the applicable social security legislation.⁹⁵ It proves that the posted worker is subject to the social security legislation of the sending State and that all conditions of posting are fulfilled.⁹⁶ These posting certificates were E101-forms in the past, and have been replaced by portable documents A1 (hereafter: A1-forms) since 1 May 2010 (replacement for Switzerland since 1 April 2012 and for Liechtenstein, Norway and Iceland since 1 June 2012).⁹⁷ Issuing a posting certificate or A1-form is not obligated since it is not a condition of the posting

⁹³ See Annex I for an example of an A1-form

⁹⁴ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 7.1.3

⁹⁵ EC, J. Pacolet and F. De Wispelaere, HIVA-KU Leuven, *Posting of workers: Report on A1 portable documents issued in 2014*, p. 9

⁹⁶ art. 5(1) Reg. 987/2009

⁹⁷ EC, J. Pacolet and F. De Wispelaere, HIVA-KU Leuven, *Posting of workers: Report on A1 portable documents issued in 2014*, p. 9

rules.⁹⁸ It does, however, provide certainty with regard to the applicable legislation of posted workers.

The A1-forms are not only issued for posted workers, but can also be issued for workers active in two or more Member States, flight and cabin crew and some other occasions. The focus in this thesis will be on the A1-forms in relation to posting. It can be seen that 76% of the A1-forms relate to posting. In 2014, approximately 1.45 million A1-forms were issued to one specific Member State.⁹⁹

If the A1-forms for posting are not obligated, what is their legal status then? And what happens if the host State expresses doubt about the correctness of the issuance of an A1-form? Besides that, how are A1-forms used for abusive practices? These questions will be clarified in the following paragraphs.

3.2.1 Fitzwilliam Case

The Fitzwilliam case concerned Fitzwilliam Technical Services (Fitzwilliam Executive Search Ltd.), an Irish company established in Dublin and engaged in the provision of temporary personnel in Ireland and the Netherlands.¹⁰⁰ For the workers which were posted to the Netherlands, Fitzwilliam issued posting certificates (E101 and E111 for sickness insurance) and thereby stated that these workers continued to be subject to Irish social security legislation.¹⁰¹ ‘Het

⁹⁸ F.L.J. Pennings, *European Social Security Law*, 6th edition, 2015, par. 7.3

⁹⁹ EC, J. Pacolet and F. De Wispelaere, HIVA-KU Leuven, *Posting of workers: Report on A1 portable documents issued in 2014*, p. 9

¹⁰⁰ *Fitzwilliam*, C-202/97, 2000, par. 2

¹⁰¹ *Fitzwilliam*, C-202/97, 2000, par. 14

Landelijk Instituut Sociale Verzekeringen' considered that the workers were supposed to be subject to Dutch social security legislation.¹⁰²

A question was raised concerning the legal status of the posting certificates. The E101-certificate determines that the social security legislation of the sending State is applicable and because only one social security legislation can apply at the same time, this means the social security legislation of the working State cannot be applicable.¹⁰³ The competent institution issuing the posting certificate should carry out a proper assessment of facts relating to posting to make sure the E101-certificate is issued correctly.¹⁰⁴ It was stated that the E101-certificate is binding on the competent institution of the Member State to which the posted workers are posted.¹⁰⁵ This makes sure that only one social security legislation is applicable and that legal certainty is guaranteed.¹⁰⁶ However, the institution in the Member State where the workers are posted to, can express doubts to the correct application of the posting certificate. If this is the case, the issuing institution must reconsider the posting certificate and, if necessary, withdraw the certificate.¹⁰⁷ If no agreement can be reached between the institutions to resolve the issue, they can refer the matter to the Administrative Commission. If that doesn't work out, they can start an infringement procedure and enable the Court to examine the correctness of the issuance of the posting certificate.¹⁰⁸

¹⁰² *Fitzwilliam*, C-202/97, 2000, par. 16

¹⁰³ *Fitzwilliam*, C-202/97, 2000, par. 49

¹⁰⁴ *Fitzwilliam*, C-202/97, 2000, par. 51

¹⁰⁵ *Fitzwilliam*, C-202/97, 2000, par. 53

¹⁰⁶ *Fitzwilliam*, C-202/97, 2000, par. 54

¹⁰⁷ *Fitzwilliam*, C-202/97, 2000, par. 56

¹⁰⁸ *Fitzwilliam*, C-202/97, 2000, par. 57 and par. 58

3.2.2 Banks Case

The Banks case concerned Mr. Banks, an opera singer, and other performing artists of British nationality. They were normally working in the United Kingdom and subject to British social security legislation as self-employed persons. They were performing in Belgium between 1992 and 1993 and their contracts with the ‘Théâtre Royal de la Monnaie (TRM) de Bruxelles’ lasted three to four months. TRM stated that the artists were subject to Belgium social security legislation and withheld social security contributions from the artists’ fees.¹⁰⁹ Mr. Banks and the other artists challenged the TRM in this regard. The artists issued an E101-certificate during their engagement period with TRM or during the proceedings before the Court.

It is clear that the posting rules can also apply to self-employed persons.¹¹⁰ In the Banks case reference was made to the Fitzwilliam case with respect to the binding status of the posting certificates.¹¹¹ The Banks case added in this respect that the posting certificate is not only binding to the competent institutions of the Member State where the workers are posted to, but it is also binding on the person who calls upon the services of the workers.¹¹² Another important issue addressed in this case, was whether the certificate could have retroactive effects now that Mr. Banks and the other artists issued the certificate during the proceedings or engagement period. It was stated that the issuance of the E101-certificate is preferably made at the beginning of the period

¹⁰⁹ *Banks*, C-178/97, 2000, par. 2, 3 and 4

¹¹⁰ See par. 2.1.1

¹¹¹ *Banks*, C-178/97, 2000, par. 40

¹¹² *Banks*, C-178/97, 2000, par. 47 and par. 48

concerned, but that the issuance can also be made during that period or after its expiry. This means that the posting certificate can have retroactive effects.¹¹³

3.2.3 Herbosch Kiere Case

Herbosch Kiere NV was a Belgian company involved in construction and installation activities in Belgium. It hired workers from the Irish ICDS Constructors Ltd., which issued E101-certificates for the workers to be posted to Belgium. In Belgium, Herbosch Kiere was considered the real employer for the hired workers, and had to pay contributions for them in Belgium with regard to social security.¹¹⁴ Herbosch Kiere demanded a repayment of these contributions since E101-certificates were issued. The ‘Rijksdienst’ appealed to Court in Brussel.¹¹⁵

The main question in this case was whether courts were also bound to the posting certificates. In this case it was decided that a posting certificate is also binding on a court of the Member State to which a worker has been posted.¹¹⁶ The reason behind this, is that the system must guarantee cooperation in good faith between the competent institutions of the Member States and that this could be undermined if the certificate was not binding on a court of the host Member State.¹¹⁷

¹¹³ *Banks*, C-178/97, 2000, par. 53 and 54

¹¹⁴ *Herbosch Kiere*, C-2/05, 2006, par. 10-14

¹¹⁵ *Herbosch Kiere*, C-2/05, 2006, par. 15

¹¹⁶ *Herbosch Kiere*, C-2/05, 2006, par. 31, 32 and 33

¹¹⁷ *Herbosch Kiere*, C-2/05, 2006, par. 30

3.2.4 Commission vs Belgium Case

A more recent and still pending case concerns Belgian legislation with respect to posting certificates. In 2012 the Belgian Parliament approved a new law, ‘de Programmawet’. The European Commission contacted the Belgian authorities in 2013 about art. 23 and art. 24 of the new ‘Programmawet’.¹¹⁸ These articles state that Belgian authorities (national judges, social inspectors or a public institution of social security) can unilaterally subject a person to Belgian social security legislation, even if this person is in the possession of an A1-form that is issued by a competent institution of the State that sent the worker to Belgium (and as a consequence is subject to the social security legislation of that sending State).¹¹⁹ The EC stated that this Belgian legislation is in breach with EU law by unilaterally subjecting the posted workers in Belgium to Belgian social security legislation (and not following the procedures for A1-forms).¹²⁰ A1-forms are binding on the institutions and courts of the Member States to which the workers are posted to.¹²¹ There are clear procedures which are constituted in art. 5 Reg. 987/2009¹²², and Decision No A1 of the Administrative Commission¹²³ to resolve disagreement among the applicable social security legislation. Besides that, the competent institutions of the Member States

¹¹⁸ EC, *Met redenen omkleed advies*, Inbreuk nr. 2013/2129, 2014, p. 2

¹¹⁹ EC, *Met redenen omkleed advies*, Inbreuk nr. 2013/2129, 2014, p. 2

¹²⁰ EC, *Met redenen omkleed advies*, Inbreuk nr. 2013/2129, 2014, p. 2

¹²¹ See par. 3.2.1-par.3.2.3

¹²² This article confirms the case law on the posting certificates and states the binding status of these certificates. Furthermore, the article states that institutions which receive the certificates can express their doubts which would lead to a reassessment of the certificate by the sending institution. If no agreement is reached, reference is made to the Administrative Commission.

¹²³ Decision No A1 of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council, PbEU 2010, C 106/01

should cooperate to ensure the correct applicability of social security legislation.¹²⁴

The Belgian authorities answered to this by stating that art. 23 and art. 24 of the ‘Programmawet’ are not in breach with EU law, with the argument that these articles aim a correct applicability of Reg. 883/2004 and Reg. 987/2009 and by stating that these articles are in line with “*fraus omnia corrumpit*” (which means that in case of fraud, all effects of a legal statement are negated) and the articles are justified by reason of the prohibition of abuse. These new rules should ensure effective, proportionate and deterring sanctions in case of fraud according to the Belgian authorities.¹²⁵

However, these new rules of Belgium are in breach with the fundament of the coordination of social security legislation: art. 11 Reg. 883/2004.¹²⁶ That is because these rules have the consequence of subjecting a person to the social security legislation of more than one Member State (both the sending State, because of the A1-form, and the working State: Belgium). Next to that, Belgium refers in its argumentation to case law of Van de Bijl¹²⁷ even though it was not stated there that Member States are allowed to unilaterally disregard certificates.¹²⁸ In the Van de Bijl case it was even stated that the receiving Member State is bound to the statement of the sending Member State.¹²⁹ In its argumentation, Belgium does not refer to any of the relevant case law which determines the binding status of posting certificates.¹³⁰

¹²⁴ Art. 76 Reg. 883/2004

¹²⁵ EC, *Met redenen omkleed advies*, Inbreuk nr. 2013/2129, 2014, p. 3

¹²⁶ EC, *Met redenen omkleed advies*, Inbreuk nr. 2013/2129, 2014, p. 3

¹²⁷ Van de Bijl, C-130/88, 1989

¹²⁸ EC, *Met redenen omkleed advies*, Inbreuk nr. 2013/2129, 2014, p. 5

¹²⁹ Van de Bijl, C-130/88, 1989, par. 22-24

¹³⁰ EC, *Met redenen omkleed advies*, Inbreuk nr. 2013/2129, 2014, p. 4

All in all, the EC states that art. 23 and art. 24 of the ‘Programmawet’ of Belgium are in breach with art. 11, 12 and 76(6) of Reg. 883/2004, art. 5 of Reg. 987/2009 and Decision No A1 of the Administrative Commission. The EC follows in its reasoning the relevant case law on posting certificates.¹³¹ Since Belgium did not agree with the EC in this regard, the EC referred Belgium further to the Court.¹³²

3.2.5 Abuse of A1-forms

A1-forms are often used in abusive situations. The issuance of A1-forms is easily granted, often without fulfilling all the necessary criteria of posting which underlie the issuance of A1-forms.¹³³ This means that the A1-forms are wrongfully granted and that the posting conditions are not fulfilled. Hence, posted workers should then not be subject to the social security legislation of the sending State, but should be subject to the legislation of the working State instead. The A1-forms are most of the time issued by institutions in countries where the social security contributions are low/cheap, to ensure that the posted workers are subject to this “cheap” social security legislation. The binding status of these A1-forms, obliges the receiving country and institutions (the State to which the workers are posted) to respect these A1-forms and to respect that the workers are subject to the legislation of the sending State.¹³⁴ This binding status and the lack of effective control mechanisms or rules make it quite easy to issue A1-forms without fulfilling the necessary posting conditions,

¹³¹ See par. 3.2.1-3.2.3

¹³² EC, Press release, *Employment: Commission refers Belgium to Court for refusing certificates of workers affiliated in another Member State*, 2015

¹³³ H. Verschueren, *Belgisch Tijdschrift voor Sociale Zekerheid, Sociale zekerheid en detachering binnen de Europese Unie. De zaak Herbosch Kiere: een gemiste kans in de strijd tegen grensoverschrijdende sociale dumping en sociale fraude*, p. 426, 427

¹³⁴ See case law of previous paragraphs and art. 5 Reg. 987/2009

and thereby contributing to social dumping.¹³⁵ As already stated in the case of the previous paragraphs, the receiving States of A1-forms can express their doubts about the correct issuance of the A1-forms and oblige the sending States to reassess the issuance of the A1-forms. This reassessment is, however, more of a moral obligation and no legal consequences are attached to this reassessment. The issuance of A1-forms can thus continue, even though the receiving State obliges a reassessment of the correctness of the issuance.¹³⁶ The case law also gives further procedures if the countries and/or institutions cannot reach agreement on the issuance of A1-forms; the competent authorities can then go to the Administrative Commission to resolve the issue or if that doesn't solve the problem, they can go to the European Parliament via art. 227 TFEU.¹³⁷ The Administrative Commission is, however, more of a mediator in resolving disagreement concerning administrative cases and is not effective at all. This is among other things, because the institutions themselves cannot submit the problems with respect to A1-forms to the Administrative Commission, only the members of this commission (government leaders) can submit these problems.¹³⁸ Next to that, the case *Herbosch Kiere*, made sure that the A1-forms are also binding on the courts of the receiving State of these forms. As a consequence, the receiving State of the A1-forms is not able to do much about the issuance of these forms, not even in the case where these forms

¹³⁵ H. Verschueren, *Belgisch Tijdschrift voor Sociale Zekerheid, Sociale zekerheid en detachering binnen de Europese Unie. De zaak Herbosch Kiere: een gemiste kans in de strijd tegen grensoverschrijdende sociale dumping en sociale fraude*, p. 426, 427

¹³⁶ H. Verschueren, *Belgisch Tijdschrift voor Sociale Zekerheid, Sociale zekerheid en detachering binnen de Europese Unie. De zaak Herbosch Kiere: een gemiste kans in de strijd tegen grensoverschrijdende sociale dumping en sociale fraude*, p. 435

¹³⁷ See also Decision No A1 of 12 June 2009 and art. 5 Reg. 987/2009

¹³⁸ H. Verschueren, *Belgisch Tijdschrift voor Sociale Zekerheid, Sociale zekerheid en detachering binnen de Europese Unie. De zaak Herbosch Kiere: een gemiste kans in de strijd tegen grensoverschrijdende sociale dumping en sociale fraude*, p. 435-437

are used for abusive purposes.¹³⁹ Better control mechanisms or rules are therefore necessary in order to ensure that the issuance of A1-forms are made correctly and are not used for abusive purposes like social dumping.

Interesting to see is that the three main sending States of A1-forms in relation to posting are Poland, Germany and France. The three main receiving States of these A1-forms are Germany, France and Belgium.¹⁴⁰ It would be expected, from the perspective of (abusive) social dumping with respect to the A1-forms, that the main sending States were “cheap social security countries”, but only Poland is in the top 3 as such a country. This might indicate that the majority of A1-forms are issued correctly without the purpose of social dumping. However, Poland is still the main sending State of A1-forms (might indicate social dumping, since it is a “cheap” social security country) and the main receiving States are all “expensive” social security countries. Besides that, the number of A1-forms issued relating to posting increased steadily in the years 2010-2014.¹⁴¹ This all leads to the conclusion that the abusive use of A1-forms cannot be ignored by analyzing these numbers.

¹³⁹ H. Verschueren, *Belgisch Tijdschrift voor Sociale Zekerheid, Sociale zekerheid en detachering binnen de Europese Unie. De zaak Herbosch Kiere: een gemiste kans in de strijd tegen grensoverschrijdende sociale dumping en sociale fraude*, p. 438, 439

¹⁴⁰ EC, J. Pacolet and F. De Wispelaere, HIVA-KU Leuven, *Posting of workers: Report on A1 portable documents issued in 2014*, p. 14

See also Annex II for an overview of sending and receiving Member States of A1-forms

¹⁴¹ EC, J. Pacolet and F. De Wispelaere, HIVA-KU Leuven, *Posting of workers: Report on A1 portable documents issued in 2014*, p. 34

See also Annex III

4 Countering abusive practices

As discussed in the previous chapters, social dumping and the abuse of A1-forms in relation to posting are serious problems in the EU. This chapter will give an overview of the recent proposals and actions taken to counter these abusive practices.

4.1 The Enforcement Directive

As already discussed, the PWD safeguards the social rights of workers and prevents social dumping.¹⁴² The PWD defines a mandatory set of rules that make the posted workers entitled to a set of minimum conditions in the host State (even though they are still subject to the social security legislation of the sending State if the posting conditions are fulfilled).¹⁴³

The Enforcement Directive¹⁴⁴ accompanies the PWD and was approved in 2014.¹⁴⁵ This Enforcement Directive has to be implemented by Member States in their national law by 18 June 2016.¹⁴⁶ One of the problems discussed in the previous chapter, was that the conditions of posting are not always rightfully fulfilled or applied (and thereby causing social dumping or abusive practices with A1-forms) and that there are no effective enforcement rules or regulations in place to combat these abusive practices. The Enforcement Directive will

¹⁴² See par. 2.2

¹⁴³ EC, Fact Sheet, *Revision of the Posting of Workers Directive – frequently asked questions*, 2016

¹⁴⁴ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('IMI Regulation'), PbEU 2014

¹⁴⁵ EC, Fact Sheet, *Revision of the Posting of Workers Directive – frequently asked questions*, 2016

¹⁴⁶ EC, Fact Sheet, *Revision of the Posting of Workers Directive – frequently asked questions*, 2016

ensure that the rules and safeguards laid down in the PWD are better applied in practice so that there are no or less possibilities for social dumping.¹⁴⁷ It thus provides a common framework for a more uniform implementation, application and enforcement of the PWD. The Enforcement Directive also aims to guarantee an appropriate level of protection of the rights of posted workers for the cross-border provision of services.¹⁴⁸

An important part of the Enforcement Directive is the identification of a genuine or abusive situation of posting, since social dumping practices often involve ‘letterbox companies’¹⁴⁹ and wrongful applicability of the posting criteria. To determine whether an undertaking genuinely performs substantial activities, the competent institutions shall make an overall assessment of all factual elements characterizing those activities. These elements may constitute of¹⁵⁰:

- the place where the undertaking has its registered office and administration;
- the place where posted workers are recruited and from which they are posted;
- the law applicable to the concluded contracts between the undertaking and its workers and clients;
- the place where the undertaking performs substantial activities and where it hires administrative staff;

¹⁴⁷ EC, Press release, *Employment: Commission welcomes Council adoption of Posting of Workers Enforcement Directive*, 2014

¹⁴⁸ Art. 1(1) Enforcement Directive

¹⁴⁹ See par. 3.1.1

¹⁵⁰ Art. 4(2) Enforcement Directive (not an exhaustive list!)

- the number of contracts performed or the size of the turnover in the Member State of establishment.

To determine whether a posted worker temporarily carries out work in a Member State other than that in which he/she normally performs his/her work, again all factual elements characterizing the work and the situation of the worker shall be examined.¹⁵¹ The Enforcement Directive thus applies a case-by-case analysis of all relevant and factual elements (with some examples of elements to consider) to determine whether there is a genuine posting or a form of abusive posting.

Chapter II of the Enforcement Directive contains measures to ensure improved access of information and transparency. Among the measures is a single official national website with all the information about the terms and conditions of employment and the applicable national or regional laws/regulations with respect to workers that are posted to the territory of that country.¹⁵² This should make things more clear for both the posted workers and the institutions related with the posting, and may lead to a reduction of incorrect application of the posting rules.

Chapter III contains rules about the administrative cooperation between the Member States concerned with regard to the posting of workers. Limits are set for Member States to reply to requests of other Member States or the Commission up to a maximum of 2 working days from the receipt of the request in urgent cases, or up to a maximum of 25 working days from the receipt of the request in all other cases.¹⁵³ The improved cooperation and

¹⁵¹ Art. 4(3) Enforcement Directive (not an exhaustive list!)

¹⁵² Art. 5(2)(a/b) Enforcement Directive

¹⁵³ Art. 6(6)(a/b) Enforcement Directive

mutual assistance provided for in this chapter of the Directive, should give Member States and institutions better means to see if the posting conditions are rightfully fulfilled and to better detect and prevent abusive practices.

Chapter IV of the Directive ensures effective monitoring of compliance. This is a crucial part, since it has been stated that the monitoring or control mechanisms are not effective in countering the abusive practices.¹⁵⁴ The service providers involved in posting, are obliged to make information available to the Member State in which the posted workers are providing services on their behalf.¹⁵⁵ The service providers are also obligated to designate a person as liaison with the competent authorities of the working State (and if necessary a designation of a contact person for engagement with social partners).¹⁵⁶ Combined with inspections of competent authorities, this increases the controls and checks that are necessary to effectively combat abusive practices.¹⁵⁷

Chapter V of the Enforcement Directive ensures effective complaint mechanisms for posted workers against their employers in case of losses or damage for these posted workers or the wrongful application of rules by their employers.¹⁵⁸ Posted workers who are starting judicial or administrative proceedings, are protected by unfavourable treatment of their employers.¹⁵⁹ This means that a company that is involved in social dumping by for instance, depriving a posted worker living conditions and subjecting him/her to bad social security conditions, can be faced with proceedings of these posted employees. In such a situation, a company can no longer, as Atlanco Rimec did,

¹⁵⁴ See par. 3.2.5

¹⁵⁵ See Art. 9(1)(a) Enforcement Directive for a list of the information provision.

¹⁵⁶ Art. 9(1)(e/f) Enforcement Directive

¹⁵⁷ Art. 10(1) Enforcement Directive

¹⁵⁸ Art. 11(1) Enforcement Directive

¹⁵⁹ Art. 11(5) Enforcement Directive

fire these workers (or treat them less favourably) who have started proceedings against the company.¹⁶⁰ This will make posted workers more willingly to start proceedings, since they do not have to fear an unfavourable treatment anymore by their employer. Whether the posted workers are really going to start proceedings in case of abusive practices and whether they will not be treated unfavourably afterwards will, however, remain questionable. Furthermore, the posted workers can now also hold the contractor, to which their employer is a direct subcontractor, liable for the deprivation of their living conditions or unfavourable treatment.¹⁶¹ Since many companies involved in abusive practices are structured in complex ways via subcontracting chains, this rule ensures that even these contractors in the subcontracting chains can be held liable. This may deter their involvement in abusive practices.

Chapter VI of the Directive is about the enforcement of fines and/or penalties. This chapter is, however, more about the procedure for the recovery of fines and/or penalties and stresses the importance of mutual assistance in this regard between competent authorities of the Member States involved.¹⁶² It is of course a good thing that procedures are in place for the recovery of fines and/or penalties, in case these are wrongfully levied. This, however, does not say anything about the levying of penalties/fines and about how high the penalties/fines should be. Chapter VII further states that penalties shall be applicable in case there is an infringement of the rules and/or provisions of this Directive and that these penalties shall be effective, proportionate and dissuasive.¹⁶³ Again nothing is said in detail about how and when to levy those penalties and how high these should be. Further details are necessary to give

¹⁶⁰ See par. 3.1.1

¹⁶¹ Art. 12(1/2) Enforcement Directive

¹⁶² See art. 15 Enforcement Directive

¹⁶³ Art. 20 Enforcement Directive

clarity and to make sure that the penalties are high enough to combat/deter social dumping and abusive practices in this context. Chapter VII further states that certain parts of this Directive with regard to cooperation and mutual assistance should be implemented through an Internal Market Information System (IMI).¹⁶⁴ It is also stated that the Commission shall review the application and implementation of this Directive no later than 18 June 2019 and propose, where necessary, modifications and amendments.¹⁶⁵

4.2 Proposal Thyssen

On 8 March 2016, Marianne Thyssen¹⁶⁶ proposed a revision of Directive 96/71/EC, the PWD. The proposal¹⁶⁷ should ensure better protection for workers, more transparency and legal certainty, and a level playing field between domestic and posting firms while respecting Member States' bargaining systems.¹⁶⁸ It should thus facilitate labour mobility but in a fair way.

The proposal contains a revision in three ways. The first is the introduction of the principle 'equal pay for equal work in the same place'.¹⁶⁹ This means that the remuneration of posted workers shall be the same as the remuneration of local workers in the host State. Remuneration shall include minimum rates of

¹⁶⁴ Art. 21 Enforcement Directive

¹⁶⁵ Art. 24(1) Enforcement Directive

¹⁶⁶ European Commissioner responsible for Employment, Social Affairs, Skills and Labour Mobility

¹⁶⁷ EC, *Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*, 2016/0070, Strasbourg, 8 March 2016

¹⁶⁸ EC, Employment, Social Affairs & Inclusion, *The Commission presents reform of posting of workers – towards a fair and truly European Labour Market*, 2016

¹⁶⁹ EC, *Proposal for a Directive amending Directive 96/71/EC*, p. 4

pay, allowances and/or bonuses where applicable.¹⁷⁰ For this change, art. 3(1) of the PWD is revised in such a way that “minimum rates of pay” is replaced by “remuneration”. Furthermore art. 3(1) PWD is revised by making the collective agreements applicable as in art. 3(8) PWD, to posted workers in all sectors of the economy (so the phrase “insofar as they concern activities referred to in the Annex” is deleted). Next to that, Member States are obliged to publish the elements of remuneration for posted workers on a public website.¹⁷¹ Also, a new paragraph will be added that gives Member States the possibility to oblige undertakings to subcontract only to undertakings that grant workers certain conditions on remuneration applicable to the contractor. This must be done in a proportionate and non-discriminatory way.¹⁷²

The second revision concerns the rules on temporary work agencies. For this, a new paragraph will be added, specifying the conditions to be applied to cross-border agencies hiring out work, which should coincide with the conditions applied by to national agencies hiring out workers. This corresponds to art. 3(9) PWD but is different in that it is now a legal obligation for Member States.¹⁷³

The third revision adds an article concerning the labour law. This articles states that in case the duration of posting exceeds 24 months (without the possibility of extending the period), the labour law of the host Member State will be applicable to the employment contract of the posted worker according to Rome

¹⁷⁰ EC, Employment, Social Affairs & Inclusion, *The Commission presents reform of posting of workers – towards a fair and truly European Labour Market*, 2016

¹⁷¹ EC, *Proposal for a Directive amending Directive 96/71/EC*, p. 7

¹⁷² EC, *Proposal for a Directive amending Directive 96/71/EC*, p. 7-8

¹⁷³ EC, *Proposal for a Directive amending Directive 96/71/EC*, p. 8

I Regulation, if no other choice of law was made by the parties. This labour law of the host Member State will only be applicable where it is favourable.¹⁷⁴

4.2.1 EU Member States' view

The proposal of Thyssen was received with mixed views among the Member States of the EU. Austria, Belgium, France, Germany, the Netherlands, Luxembourg and Sweden (so most of the Western European countries) have claimed their support for the proposal of Thyssen in the revision of the PWD to combat social dumping.¹⁷⁵ On the contrary, most of the Eastern European countries like Bulgaria, Slovakia, Hungary, Czech Republic, Latvia, Estonia, Lithuania, Poland and Romania have started a 'Yellow Card' procedure via the Treaty of Lisbon. This procedure can be initiated when at least nine national parliaments agree on this initiation and it means that they believe an EU programme (in this case the proposal of Thyssen) is unnecessary or that the problem can be resolved satisfactorily at national or regional level (principle of subsidiarity).¹⁷⁶ This 'Yellow Card' procedure has the effect that the EC must reconsider its proposal to revise the PWD. The proposal can then be amended or withdrawn, or the 'Yellow Card' procedure can be ignored by the EC.¹⁷⁷ The countries that initiated the 'Yellow Card' procedure are concerned that the principle of 'equal pay for equal work in the same place' may be incompatible with the Single Market, since the pay rate differences constitute a legitimate element of competition for service providers. They further state that posted

¹⁷⁴ EC, *Proposal for a Directive amending Directive 96/71/EC*, p. 6-7

¹⁷⁵ EC, *Proposal for a Directive amending Directive 96/71/EC*, p. 4-5

¹⁷⁶ T. Miessen, ACV, *europeinfos, Red card against social dumping – Can the EU establish a European labour market with a fairer deal for the mobility of workers?*, 2016

¹⁷⁷ M. Peepkorn, *de Volkskrant, Asscher: zwicht niet voor 'gele kaart' Oost-Europa*, 2016

workers should remain subject to the social security legislation of the sending Member States.¹⁷⁸

These differences in views towards the proposal of Thyssen between the Western and Eastern European countries, are not that surprising. The countries that initiated the ‘Yellow Card’ procedure, fear of losing their competitive advantage in terms of lower wage costs.¹⁷⁹ That is because the proposal of Thyssen wants the posted workers to get an equal remuneration for equal work in the same place compared with local workers in the host State. This proposal would probably lead to less demand for Eastern European workers, since they do not imply lower wage costs anymore. On the other hand, the Western European countries support the proposal of Thyssen, because they see the “cheaper” workers (implying lower wage costs) from Eastern European countries as a threat for jobs for local workers in their State.¹⁸⁰ The proposal would equalize the situation between foreign and local workers in terms of remuneration, thereby not creating a competitive advantage for Eastern European workers/companies anymore. The fact that these Eastern European countries started the ‘Yellow Card’ procedure, might demonstrate their part in this practice of social dumping and/or unfair competition.¹⁸¹

4.3 Public consultation on European Pillar of Social Rights

In September 2015 President Juncker¹⁸² announced the European Pillar of Social Rights and in March 2016 the first preliminary outline was presented by

¹⁷⁸ EC, *Proposal for a Directive amending Directive 96/71/EC*, p. 5

¹⁷⁹ M. Peepkorn, *de Volkskrant, Asscher: zwicht niet voor ‘gele kaart’ Oost-Europa*, 2016

¹⁸⁰ Eutom, *Sociale dumping: vechten voor plan-Thyssen*, 2016

¹⁸¹ Eutom, *Sociale dumping: vechten voor plan-Thyssen*, 2016

¹⁸² President of the European Commission

the EC. Next to that, a consultation was opened on this Pillar of Social Rights that will run till the end of 2016 and which is aimed at making an assessment of the present situation in the EU with regard to social rights, to reflect on new trends and to gather feedback on the preliminary outline of the Pillar of Social Rights.¹⁸³ The European Pillar of Social Rights should reflect the challenges of the changing world like the ageing population, the aftermath of the economic crisis, the digitalization and more. It reflects on the present social model and wants to make the social model future-proof.¹⁸⁴ This Pillar of Social Rights is targeted for the Euro Area, but non-Euro Member States can join if they want to and the consultation is open to everybody.¹⁸⁵ The European Pillar of Social Rights will be presented in 2017 after the consultation has ended.¹⁸⁶

4.4 Effective measures?

As described in the previous paragraphs, different recent actions and developments have taken place in order to counter the abusive practices of social dumping and the abuse of A1-forms. The recent attention and accompanying actions to counter these abusive practices are a good step in the right direction. However, important in this regard is to see how effective these measures really are in countering the abusive practices.

Social dumping and the abuse of A1-forms often occur because of a wrong application of the posting criteria. The Enforcement Directive gives good

¹⁸³ EC, Press release, *Commission launches a public consultation on the European Pillar of Social Rights*, 2016

¹⁸⁴ EC, Press release, *Commission launches a public consultation on the European Pillar of Social Rights*, 2016

¹⁸⁵ EC, Press release, *Commission launches a public consultation on the European Pillar of Social Rights*, 2016

¹⁸⁶ EC, Press release, *Commission launches a public consultation on the European Pillar of Social Rights*, 2016

guidance for the assessment whether there is a genuine posting or an abusive form of posting. Furthermore, the Enforcement Directive ensures an improved coordination and mutual assistance of Member States to tackle the abusive practices.¹⁸⁷ We have seen that the monitoring and enforcement of the rules are very important in countering abusive practices. The Enforcement Directive addresses this problem by obligating institutions that post workers, to make available information with regard to these workers and by increasing the mutual assistance and coordination in this regard between Member States.¹⁸⁸ The enforcement in the form of penalties and/or fines are also stated in the Enforcement Directive, but lack a detailed guidance on the applicability in practice (what amount and in which situations should they apply?).

The proposal of Thyssen for a revision of the PWD, has caused a lot of fuzz resulting in different views of Member States. While the Western European countries support the proposal of Thyssen, the Eastern European countries initiated a ‘Yellow Card’ procedure in the hope that the proposal will be withdrawn or amended.¹⁸⁹ These Eastern European countries do not want to lose their competitive advantage in terms of favourable wage costs. The proposal Thyssen is a good initiative in equalizing the level playing field in terms of remuneration for both posted workers and local workers in the host State. The proposal also deals with temporary agencies and the applicable labour law in case that the posting period of 24 months is exceeded. These are all good steps in combatting social dumping by ensuring and protecting the rights of the posted workers.

¹⁸⁷ See par. 4.1

¹⁸⁸ See par. 4.1

¹⁸⁹ See par. 4.2.1

However, the proposal of Thyssen does not say anything about the social security legislation. In case the posting criteria are fulfilled (and where an A1-form may be issued), the posted worker will stay subject to the social security legislation of the sending State. Many companies take abuse of these rules, by making sure that posted workers stay subject to social security legislation of a country where the social security contributions are cheap. Structuring the posting in such a way that exploits the differences in social security legislation among different Member States, is a problem which is not addressed at all in the proposal of Thyssen.¹⁹⁰ The posted workers that stay subject to “cheap” social security legislation will then still have a competitive advantage compared to local workers in the host State, which is undesirable. That is why many people, including Bart Tommelein¹⁹¹, would rather see that the rules of social security legislation as in art. 12 Reg. 883/2004 are amended in such a way that the social security legislation of the host country would be applicable.¹⁹² Indeed, this would completely equalize the level playing field between posted workers and local workers in the host State. However, this would also create more administrative burdens for short-time posting of workers now that they have to pay social security contributions in the host country. The reduction of the administrative burden was one of the main reasons for introducing the posting rules as in art. 12 Reg. 883/2004.¹⁹³ Bart Tommelein also pledges for a reduction of the maximum posting period to 6 months, since the average posting period appears to be 4 months.¹⁹⁴ This period of 6 months coincides

¹⁹⁰ ABVV Algemene Centrale, *Het plan van eurocommissaris Thyssen is ‘too little, too late’*, 2016

¹⁹¹ Belgian politician of Open Vld and minister in the Flemish Government

¹⁹² Deredactie.be, *“Verder gaan om sociale dumping tegen te gaan”*, 2016

¹⁹³ See par. 2.1.1

¹⁹⁴ Deredactie.be, *“Verder gaan om sociale dumping tegen te gaan”*, 2016

with the period mentioned in art. 15 OECD MC with regard to tax law.¹⁹⁵ If the posting period is within these 6 months, the posted worker can stay subject to the social security legislation of the sending State and thereby have minimum administrative burdens. This concession of maintaining minimum administrative burdens and still letting the social security legislation of the sending State be applicable, would however still mean that the posted workers from “cheap” social security countries have a competitive advantage.

Besides the unaddressed rules on applicable social security legislation, the bogus self-employment¹⁹⁶ is also not addressed in the proposal.¹⁹⁷ Furthermore, the proposal of Thyssen intends to make the collective agreements applicable to posted workers in all sectors of the economy. This excludes other types of agreements and neglects collective bargaining in the EU, which is characterized by great diversity.¹⁹⁸ Furthermore, some sectors might be better regulated than other sectors and with the intention of applying universally applicable collective agreements in sectors, this could create inequality with regard to social protection for posted workers.¹⁹⁹

Hence, the proposal of Thyssen is a step in the right direction but is too little to effectively address all the problems of social dumping and the abuse of A1-forms.²⁰⁰ The proposal of Thyssen can, however, be seen as a good attempt for a concession between the Western and Eastern European countries. However, it

¹⁹⁵ See par. 2.4

¹⁹⁶ See par. 3.1.1

¹⁹⁷ Deredactie.be, “Verder gaan om sociale dumping tegen te gaan”, 2016

¹⁹⁸ C. Dhéret and A. Ghimis, EPC, *Discussion paper - The revision of the Posted Workers Directive: towards a sufficient policy adjustment?*, 2016, p. 10

¹⁹⁹ C. Dhéret and A. Ghimis, EPC, *Discussion paper - The revision of the Posted Workers Directive: towards a sufficient policy adjustment?*, 2016, p. 10

²⁰⁰ ABVV Algemene Centrale, *Het plan van eurocommissaris Thyssen is ‘too little, too late’*, 2016

is difficult to satisfy everybody and the initiation of the ‘Yellow Card’ procedure exemplifies this.

Quite remarkably, no special attention is given to the control of A1-forms in either the Enforcement Directive or the proposal of Thyssen, although we have seen that the abuse with these A1-forms is a problem in the EU.²⁰¹ The Enforcement Directive may help in the enforcement of the correct issuance of A1-forms by obligating information provision by service providers and improving mutual assistance and coordination between Member States, but the question is whether this is enough to ensure the correct issuance of A1-forms. Furthermore, the initiation of the public consultation on the European Pillar of Social Rights is also a good initiative that could improve the social situation in the EU and by letting everybody have a say in the implementation of this Pillar of Social Rights. So far, this European Pillar of Social Rights is, in my opinion however, still too vague and does not give specific solutions for problems. Maybe the real implementation in 2017 will give more detail for tackling specific problems.

Although all recent developments to counter abusive practices in the form of social dumping and the abuse of A1-forms are improving the situation, they do not counter all abusive practices. Amending the posting rules by making sure posted workers are subject to the social security legislation of the host State would completely equalize the level playing field between posted workers and local workers in the host State. This would, however, come at the cost of more administrative burdens. Research would have to be done on whether the benefits would outweigh the costs. If this is implemented (and if the benefits outweigh the costs), A1-forms will not be necessary anymore and would make

²⁰¹ See par. 3.2.5

the abuse in these forms go away. However, making posted workers always subject to social security legislation of the host State might be an infringement on the freedom to provide services. Considering this and the increased administrative burdens, this might thus not be the ideal solution. An alternative to this might be the reduction of the maximum posting period to 6 months (and within this posting period the posted worker would still be subject to social security legislation of the sending State). This would not equalize the level playing field completely and workers from “cheap” social security countries would still have a competitive advantage over the local workers in the host State. However, the reduction of the posting period might deter companies from getting involved in abusive practices since it only concerns a short period. Next to that, the period would coincide with the period according to the tax rules.²⁰² This reduction of the posting period has to be investigated to get a good overview of the possible consequences with respect to countering social dumping and the abuse of A1-forms.

It can be seen that there is a strong tension between the social security rules in maintaining the social security legislation of the working State as the basis for equal treatment (where the posting rules are an exception to this), while safeguarding the freedom to provide services.²⁰³ The PWD, the Enforcement Directive as well as the proposal of Thyssen try to balance these rights. If the rules of posting remain the same (possibly with a reduction to the posting period), stronger enforcement rules and penalties/fines are necessary to make sure there is no case of social dumping or abuse of A1-forms. Patrick Liébus²⁰⁴

²⁰² See par. 2.4

²⁰³ H. Verschueren, *Belgisch Tijdschrift voor Sociale Zekerheid, Sociale zekerheid en detachering binnen de Europese Unie. De zaak Herbosch Kiere: een gemiste kans in de strijd tegen grensoverschrijdende sociale dumping en sociale fraude*, p. 416

²⁰⁴ President of the European Builders Confederation (EBC)

also states that more has to be done. He states that fair competition and the protection of workers' rights can only be achieved through additional resources for labour inspections, the creation of an electronic database in the EU of A1-forms (for better monitoring and enforcement) and improved collaboration between Member States to combat social fraud and the abuse of A1-forms.²⁰⁵ An electronic database in the EU with all relevant information concerning posting (company, posted workers, A1-forms, history of workers and companies, (sub)contractors etc.) would be desirable and could lead to stronger enforcement which is so urgently needed in countering of these abusive practices.²⁰⁶ Besides that, an electronic database can give a clear and comprehensive overview, which in turn leads to better evaluation of checking whether there are abusive practices. The idea of an electronic database is not new. It was already mentioned in Reg. 884/2004 as a task of the Administrative Commission to modernize the exchange of information between institutions.²⁰⁷ A Technical Commission for Data Processing that should propose the Administrative Commission with the operation, security and use of standards of this electronic database, was also mentioned.²⁰⁸ These plans to introduce an electronic database have, however, still not been implemented to date.

In my opinion, more action is necessary and especially in the form of initiating and implementing an electronic database or IMI (including all relevant information with regard to posting, including A1-forms), stronger enforcement and more details with regard to practical application of fines and/or penalties. Bogus self-employment should also be addressed and the

²⁰⁵ EBC, Press release, *Posting of workers: European small construction entrepreneurs welcome revision*, 2016

²⁰⁶ See also par. 4.1 concerning a public website and the IMI

²⁰⁷ Art. 72(d) Reg. 883/2004 (see also preamble par. (39) and art. 78 Reg. 883/2004)

²⁰⁸ Art. 73 Reg. 883/2004 (see also preamble par. (39) and art. 78 Reg. 883/2004)

actions taken by Lodewijk Asscher are a good example on how to address this.²⁰⁹ Next to that, the Enforcement Directive and the proposal of Thyssen should be implemented and certainly no message should be given to the ‘Yellow Card’ procedure. The proposal of Thyssen can be seen as a concession and unfortunately not everybody will agree on the proposed measures, but these measures are certainly necessary to counter social dumping and the abuse of A1-forms. It will, however, still be very hard to introduce and implement measures that effectively counter social dumping and the abuse of A1-forms, since the EU rules and regulations are in tension with the freedom to provide services. Completely equalizing the level playing field between posted workers and local workers in the host State is nearly impossible because of the differences in social security legislation, but the gap can and should be narrowed down as much as possible with the proposed measures.

²⁰⁹ See par. 3.1.1

5 Conclusion

The posting of employees is about the sending of employees to another Member State to temporarily work on an employer's behalf in that other Member State. There are multiple regulations and rules which relate to this posting. The most important with respect to social security legislation is art. 12 Reg. 883/2004. If all criteria of this article are fulfilled, a posted worker will remain subject to the social security legislation of the sending State. This is an exception to the main rule, *lex loci laboris*, but was introduced in order to facilitate the freedom to provide services and to avoid administrative burdens that would occur in case the main rule would be applicable.

Unfortunately, the posting rules are used for abusive practices like social dumping and the abuse of A1-forms. Social dumping occurs in many forms, but the main principle involves around the posting of workers from countries where labour and social security are cheap and thereby creating a competitive advantage which leads to unfair competition. The workers involved are often exploited as they are exposed to bad or no social security protection, deplorable wages and inhuman working conditions. Besides social dumping, A1-forms are issued by institutions that post workers to make sure these posted workers remain subject to the social security legislation of the sending State. The abuse with these forms is done by issuing the forms without fulfilling all the necessary criteria of posting, which underlie these A1-forms. The binding status of these posting certificates restrict receiving institutions and/or Member States to do something about these A1-forms. Hence, enforcement of the posting rules are very important in countering these abusive practices.

The central question in this thesis is: *“How can social dumping and the abuse of A1-forms effectively be combatted in the European Union?”*

Several actions and measures are taken to counter the abusive practices of social dumping and the abuse of A1-forms. The Enforcement Directive, the proposal of Thyssen and the introduction of the European Pillar of Social Rights are important measures in this regard. These measures must make sure that posted workers are better protected with regard to social rights and that unfair competition is reduced. The measures do certainly improve the situation by way of better enforcement and cooperation between Member States, as well as by introducing the principle of 'equal pay for equal work in the same place'. These measures are, however, not enough to effectively combat the abusive practices. In addition with these measures, an electronic database with all relevant information with respect to posting would make it easier for countries to check whether there are genuine or abusive practices. It is about time that this electronic database is really implemented and finalized. Next to that, detailed guidance should be given with respect to penalties and/or fines to deter companies and people from engaging in these abusive practices. Bogus self-employment is also an important issue that should be addressed. In the end, not everybody will agree on the proposed measures and no perfect solution exists. However, the proposed measures with some aforementioned additions, could vastly improve the situation and can be effective in reducing social dumping and the abuse of A1-forms to a minimum.

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7 Appendix

Annex I

Coordination of Social
Security Systems

A1



Certificate concerning the social security legislation which applies to the holder

EU Regulations 883/2004 and 987/2009 (*)

INFORMATION FOR THE HOLDER

This certificate concerns the social security legislation which applies to you and confirms that you have no obligations to pay contributions in another State.

Before you leave the State where you are insured to go to another State to work, make sure you have the documents which entitle you to receive the necessary benefits in kind (e.g. medical care, treatment in hospital, and other) in the State where you are working.

- If you are staying temporarily in the State where you are working, ask your health care institution for the European Health Insurance Card (EHIC). You must show this card to your health care provider if you need benefits in kind during your stay.
- If you are going to be living in the State where you are working, ask your health care institution for the S1 document and submit it as soon as possible to the competent health care institution of the place you are going to work (**).

Provisionally the insurance institution in the State of stay will also provide special benefits in the event of an accident at work or an occupational disease.

1. PERSONAL DETAILS OF THE HOLDER

1.1 Personal Identification Number	<input type="checkbox"/> Female	<input type="checkbox"/> Male
1.2 Surname		
1.3 Forenames		
1.4 Surname at birth (***)		
1.5 Date of birth	1.6 Nationality	
1.7 Place of birth		
1.8 Address in the State of residence		
1.8.1 Street, N°	1.8.3 Post code	
1.8.2 Town	1.8.4 Country code	
1.9 Address in the State of stay		
1.9.1 Street, N°	1.9.3 Post code	
1.9.2 Town	1.9.4 Country code	

2. MEMBER STATE LEGISLATION WHICH APPLIES

2.1 Member State		
2.2 Starting date	2.3 Ending date	
<input type="checkbox"/> 2.4 The certificate applies for the duration of the activity		
<input type="checkbox"/> 2.5 The determination is provisional		
<input type="checkbox"/> 2.6 Transitional rules apply as provided for by Regulation (EC) No 883/2004		

(*) Regulations (EC) No 883/2004, Articles 11 through 16, and Regulation (EC) No 987/2009, Article 19.

(**) For Spain, Sweden and Portugal, the certificate must be handed over to, respectively, the head provincial offices of social security National Institute (INSS), the social insurance institution and the social security institution of the place of residence.

(***) Information given to the institution by the holder when this is not known by the institution.

A1



Certificate concerning the social security legislation which applies to the holder

3. STATUS CONFIRMATION OF YOUR POSITION

- 3.1 Posted employed person
- 3.2 Employed, working in two or more States
- 3.3 Posted self-employed person
- 3.4 Self-employed, working in two or more States
- 3.5 Civil servant
- 3.6 Contract staff
- 3.7 Mariner
- 3.8 Working as an employed person and as a self-employed person in different States
- 3.9 Working as a civil servant in one State and as an employed/self-employed person in one or more other States
- 3.10 Flight or cabin crew member
- 3.11 Exception

4. DETAILS OF EMPLOYER/SELF-EMPLOYMENT

- 4.1.1 Employee
 - 4.1.2 Self-employed activity
- 4.2 Employer/self-employed activity code
- 4.3 Name or business name
- 4.4 Registered address
- | | |
|------------------|--------------------|
| 4.4.1 Street, N° | 4.4.2 Country code |
| 4.4.3 Town | 4.4.4 Post code |

5. DETAILS OF EMPLOYER/SELF-EMPLOYMENT WHERE AN ACTIVITY IS PURSUED

- 5.1 Name(s) or business name(s) and code(s) of the firm(s) or ship(s) or the home base(s) where you will be employed
- 5.2 Address(es) or name(s) of ship(s) or the home base(s) where you will be (self) employed in the 'host' State(s)
- 5.3 Or no fixed address in State(s) of (self)employment

A1



**Certificate concerning the social security
legislation which applies to the holder**

6. INSTITUTION COMPLETING THE FORM

6.1 Name	
6.2 Street, N°	
6.3 Town	
6.4 Post code	6.5 Country code
6.6 Institution ID	
6.7 Office fax N°	
6.8 Office phone N°	
6.9 E-mail	
6.10 Date	
6.11 Signature	

STAMP

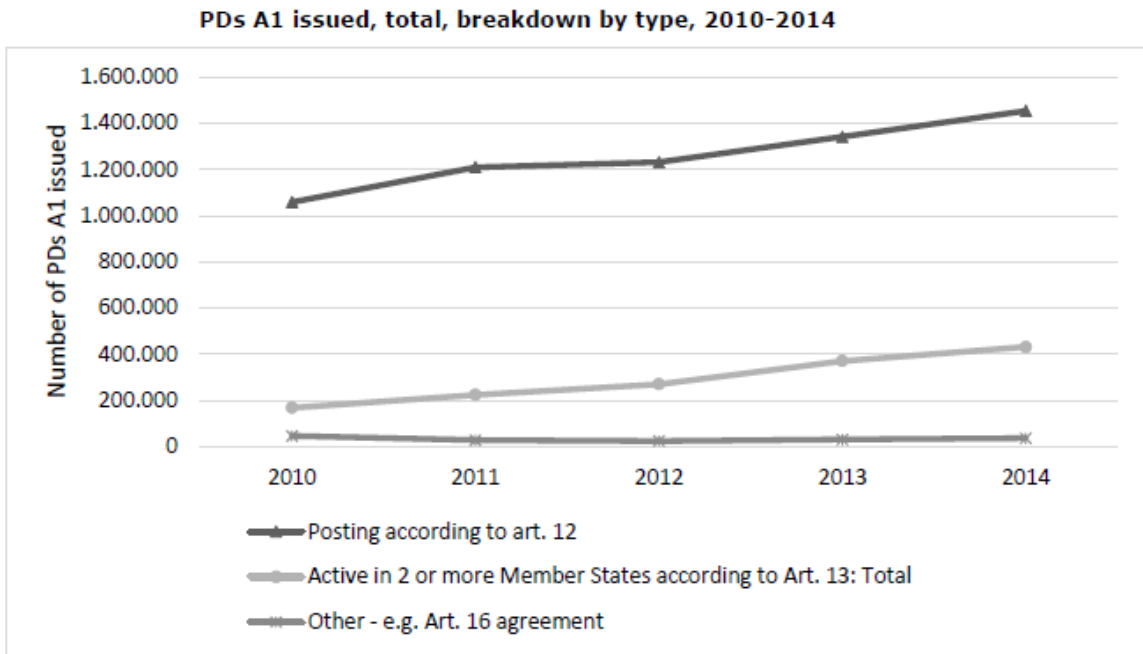
Annex II

PDs A1 issued by sending Member States, breakdown by receiving Member State, 2014

Sending Member States																																	
BE	BG	CZ	DK	DE	EE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	IS	LI	NO	CH	Total
0	1896	406	0	20606	27	395	96	3211	32148	648	2093	4	89	451	20119	3681	12	19219	745	23237	13818	5274	4745	4398	57	76	0	0	1	0	0	159753	
49	74	0	0	276	396	29	403	0	1	6	76	10	0	47	105	259	36	332	62	44	14	23	0	0	0	0	0	0	0	0	0	3267	
233	50	0	0	3469	2	9	2	606	1597	328	276	0	5	3	112	294	0	117	513	2059	78	178	192	7023	21	8	0	0	0	0	0	17165	
238	48	54	0	4659	5	16	18	472	1057	30	777	0	6	105	73	142	0	259	238	1706	190	98	190	364	35	89	0	0	0	0	10869		
6087	6554	4125	0	362	468	1320	10480	17554	14701	6543	0	365	9087	9050	36983	5	8684	19900	151387	6622	24954	50169	31871	368	168	0	0	9	44	0	414220		
21	0	11	0	1069	7	77	184	0	65	10	33	130	3	0	35	19	807	285	72	41	6	67	9	0	0	0	0	0	0	0	2861		
118	5	12	0	1107	0	1	782	854	5	56	0	13	5	74	121	12	66	54	477	106	39	17	18	10	21	0	0	0	0	0	3973		
124	681	102	0	1277	14	4	313	994	14	246	52	1	1	71	5	0	165	56	107	10	148	9	50	112	188	0	0	0	0	0	4744		
1718	78	163	0	11180	29	50	39	0	11454	105	2682	1	25	12	403	312	4	856	1037	1237	8413	2453	496	264	297	516	0	2	0	0	0	44826	
21025	610	798	0	23578	32	178	231	26252	0	273	10767	0	104	1789	17124	2188	6	2695	1336	32282	33867	8759	1408	4923	124	457	0	19	23	0	0	190848	
47	0	45	0	1069	0	22	125	21	0	408	1	8	989	0	14	419	270	5	23	1505	127	29	24	0	0	0	0	0	0	0	4661		
1494	238	449	0	9766	47	55	82	5764	11234	1059	0	4	108	93	347	352	42	1160	1958	2856	908	7976	5189	1021	123	148	0	0	0	0	0	52485	
32	30	3	0	381	0	1	64	65	125	32	54	0	1	7	2	0	0	30	3	29	1	0	2	5	5	72	0	0	0	0	0	844	
29	4	7	0	464	24	0	27	124	0	28	0	0	342	14	10	0	38	149	84	10	6	50	68	4	22	0	0	0	0	0	0	1504	
44	42	16	0	503	6	0	32	105	36	17	0	55	0	11	7	0	72	3	913	0	14	3	39	8	4	0	0	0	0	0	0	1990	
6046	6	13	0	10287	0	9	1	147	2832	39	223	0	1	11	0	243	0	180	205	584	252	120	481	82	1	10	0	0	0	0	0	21763	
167	18	108	0	1839	1	5	7	415	1081	54	277	11	3	0	84	0	49	734	1252	14	359	291	2160	17	18	0	0	0	0	0	0	8966	
9	1	45	0	405	3	0	72	300	0	130	1	0	13	0	0	0	5	17	47	0	1	2	9	2	1	0	0	0	0	0	0	1063	
14993	682	273	0	30162	82	317	78	2250	4871	814	976	4	23	1467	634	1922	12	0	1206	12862	5061	2513	2255	4173	69	67	0	0	0	0	0	87821	
448	524	1332	0	27039	4	6	71	701	1696	1071	3974	19	64	17	203	14837	0	649	2	5989	964	1102	29874	10339	52	24	0	0	0	0	0	101034	
244	59	171	0	5411	3	50	11	1822	2726	571	926	0	6	0	237	273	0	152	278	336	292	191	693	42	22	0	0	0	0	0	0	14521	
199	30	46	0	1917	1	6	1	7008	2504	3	210	0	18	82	10	0	81	444	79	0	39	3	83	46	23	0	0	0	0	0	0	12833	
98	249	172	0	2925	0	3	22	1230	1859	55	819	0	3	65	691	0	89	457	458	52	0	227	232	6	5	0	0	0	0	0	0	9717	
18	22	57	0	927	2	0	88	469	2759	273	0	0	21	142	0	23	528	593	13	10	0	600	3	2	0	0	0	0	0	0	0	6550	
75	105	901	0	2025	0	4	2	289	504	179	315	0	0	60	316	0	48	446	1531	295	125	381	19	21	6	0	0	0	0	0	0	7648	
67	138	28	0	2425	5081	279	43	704	743	183	144	0	100	1471	82	84	0	56	238	3017	256	157	417	701	0	175	0	0	0	0	0	16589	
344	74	237	0	10488	447	369	11	685	1676	371	377	0	238	1366	75	816	0	158	314	10417	290	862	507	2185	710	0	0	0	0	0	0	33019	
1807	843	319	0	11211	6	744	57	9757	11757	480	1942	7	21	113	567	586	42	1717	684	3985	629	854	1657	778	191	112	0	0	0	0	0	50900	
18	0	2	0	58	0	1	2	107	81	0	1	0	0	6	0	0	1	29	29	0	0	0	0	0	2	1	0	0	0	0	0	338	
3	0	0	0	132	0	2	12	0	9	0	1	0	1	202	30	0	0	1	202	30	0	0	0	0	21	0	0	0	0	0	0	417	
213	155	132	0	4098	898	236	0	773	960	221	424	0	317	4132	72	277	0	218	837	3725	403	372	277	403	267	1806	0	0	0	0	0	0	21250
1258	123	279	0	29249	68	56	49	1754	7809	0	33844	0	76	54	653	653	10	681	4224	2427	571	82	2278	1111	83	85	0	0	0	0	0	87492	
1375	0	0	0	3869	12146	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3252	
58611	13275	10380	3869	232776	7147	3261	2325	76286	119727	24060	69279	114	1655	16683	50345	65655	145	37775	41114	266745	74735	57194	102920	73810	2786	4182	23501	140	89	3252	10851	1454687	

* BE: Breakdown only for posted employed persons
 * DE: DVKA: only employed persons
 * FR: Only posted employed persons
 * AT: Breakdown only for posted employed persons
 * RO (breakdown provided for all PDs A1 issued), SK and SE: Figure not equal to this reported in Table 1. This explains also the difference in the total reported figure.
 * LI: Only posted employed persons
 Source Administrative data PD A1 Questionnaire 2015

Annex III



Source Administrative data PD A1 Questionnaire 2015 and previous years