



Social security coordination in the posting of workers from Poland: Identifying challenges and proposing solutions*

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Introduction

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Poland is one of the key countries in terms of posting workers abroad, being the main issuing Member State of Portable Documents A1 issued to persons covered by Article 13 of the Regulation (EC) No 883/2004 called ‘Basic Regulation’ and taking second place in issuing A1 certificates related to Article 12 of this regulation. In 2018, 39% (238,525) of PDs A1 was issued by Poland to persons covered by Article 12 and 58% (351,000) to persons covered by Article 13 (De Wispelaere et al., 2020). Most postings from Poland in 2018 were directed at Germany (120,540), France (26,371), and Belgium (21,358), with the largest numbers of postings occurring in the construction sector and in the freight transport sector by road. Poland is also a receiving country of posted workers, however to a lesser extent.

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Article 12 refers to the two groups of workers. The first group includes persons who pursue an activity as employed persons in a Member State on behalf of an employer, which normally carries out its activities there, and who are posted by that employer to another Member State to perform work on that employer’s behalf (Article 12(1) of the Basic Regulation). The second group comprises of persons who normally pursue an activity as self-employed persons in a Member State and who go to pursue a similar activity in another Member State (Article 12(2) of the Basic Regulation). In contrast, Article 13 of the Basic Regulation covers persons who pursue an activity as an employed/self-employed person in two or more Member States (e.g. truck drivers).

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



The research conducted in the frame of the POW-BRIDGE project (2020-2021) to identify the gap between legislation and practice in the posting of workers described how, in the context of posting of workers from Poland, social security coordination issues remain one of the key challenges for various stakeholders involved. Hence, in this policy brief, we focus on social security coordination, firstly, by framing it in the context of free movement of labour and services in the EU; and secondly, by pointing to the empirical results of research carried out in Poland, which describe challenges faced by public authorities, employers and posted workers. The findings presented here are gathered through desk research and fifteen interviews with public authorities, social partners and company representatives. The aim of the policy brief is to provide an overview of the main challenges in this area and propose recommendations to improve the functioning of social security coordination in practice.

The nexus between regimes on the EU free movement of labour and services and social security coordination

Regardless of what perspective on posting of workers we take into account – whether we consider the sending or the receiving country context – the coordination of social security in terms of cooperation in exchange of information and the revision of the EU legislation remains the key issue. Firstly, despite legal acts and rulings of the European Union Court of Justice regarding the posting of workers and social security coordination regulations, there are enough unclarified areas that lead to different interpretations and applications of rules. Namely, the material scope of regulations in the field of labour law[‡] and social security law[§] is not consistent, impacting applicable legislation and entailing a risk of (fraudulent) ‘misuse’ of posting rules. In a nutshell, according to the labour law (the posting directives and Rome I), the host Member State can apply its terms and conditions of employment to posted workers from the start of posting. As a result, posted workers are subject to the legislation of two Member States at the same time. In contrast, in line with the EU social security coordination regulations, posted workers remain subject to the social security legislation of the home Member State as long as the posting duration does not exceed 24 months. After 24 months, the social security legislation of the host

‡ Labour law includes i.e. Directive 96/71/EC, 2014/67/EU, Directive 2018/957/EU and 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) that provides the widest notion of ‘posting’.

§ Social security law comprises Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (the so-called ‘Basic Regulation’) and 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 (the so-called ‘Implementing Regulation’).



Member State applies. Therefore, posted workers and self-employed shall be subject to the social security legislation of a single Member State only.

Moreover, the notion of posting remains vague owing to the fact that some definitions depending on the branch of law under consideration include limitations and specific requirements regarding the relationship between employer and employee. The broadest notion of 'posting' is provided by Regulation 593/2008, which does not contain any limitation or specification. According to Article 12 of the Basic Regulation, a worker must 'pursue an activity as an employed person' in the Member State of origin while employer must 'normally carry out its activities' in the Member State of origin. Moreover, Article 13 of the Basic Regulation deals with persons who normally pursue an activity as employed persons or self-employed in two or more Member States. Those different meanings create problems that concern not only workers' rights and efficiency of national social systems (including public spending and the smooth and fast process of issuing the A1 certificates) but also employers' interests and the freedom to provide services.

Secondly, posting of workers that stems from the freedom to provide services within the internal European market and defined in accordance with the social security law constitutes an exception to 'the *lex loci laboris*' principle, i.e. a person employed in the territory of a Member State is subject to the legislation of that State. This rule underlies one of the four main principles of the EU rules on social security coordination: the application of single legislation regarding liability to contribute and entitlement to benefits. The remaining three principles are the following: 1) the non-discrimination on the grounds of nationality (a worker has the same rights and obligations as the nationals of the country where s/he is covered); 2) the aggregation of periods of insurance, employment or residence; 3) the waiving of residence rules also known as the principle of exportability (if a worker is entitled to a cash benefit from one country, s/he may receive it even if s/he is living in a different country). Those principles of the coordination system were employed to achieve a fundamental objective of the Union, i.e. freedom of movement of persons, ensuring that people moving from one Member State to another would not lose their social security rights. Importantly, coordination of social security does not mean harmonising national social security schemes, i.e. European Union legislation does not intend to set up a unified European social security system. On the contrary, the substantive and procedural differences between the national social security schemes remain unaffected, as they are linked to different traditions and cultures and the varying living standards in the Member States. As a result, on the one hand, we deal with countries with extensive social security systems and, on the other hand, less restrictive and cheaper regulatory environments within the European Union. Given those



disparities in social security legislation, employers can take advantage of these disparities in national social security legislations and seek the lowest cost structure for employing workers, which may result in opting for social dumping strategies and developing business models based on offering low-cost services to EU markets. Therefore, applying the ‘country of origin principle’ on posting directly impacts labour costs (wages and social security costs).

So far, many efforts were made to foster social security coordination and information exchange between public authorities involved in the practical implementation of EU law, thus facilitating compliance with social security regulations in the posting of workers[¶]. Recent developments at the EU level on social security coordination concern, *inter alia*, the introduction of digitised tools, i.e. Electronic Exchange of Social Security Information (EESSI), made available by the Commission in July 2017. This IT system helps social security institutions across the EU exchange information more rapidly and securely, improving information quality (i.e. who is entitled to what kind of benefit and in which country), processing times, and the cooperation between the Member States. It also helps mitigate and reduce risks (i.e. the forgery of A1 certificates and other kinds of fraud). Moreover, the European Commission in 2021 will start a pilot of the European Social Security Pass (ESSPASS), a digital tool created to facilitate the procedures linked to the request, issuance and verification upon request of the PD A1.

Apart from facilitating information exchange, recent developments on social security coordination deal with the harmonisation of posting rules. In December 2016, the European Commission came up with a proposal for a revision of the Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004. The Commission’s proposal intends to clarify the conflicting rules on applicable legislation and the relationship between the Regulations and Posting Directives, making the conditions for posting employers stricter. However, there is no consensus on significant changes proposed by the Commission, and negotiations came to a halt. Hence our next section focuses on challenges reported by public authorities and employers’ representatives in relation to the coordination of social security in the posting context.

Challenges related to social security: Perspectives from public authorities and employers in Poland

In the POW-BRIDGE project, we identified issues and challenges that can be described on multiple levels, including public institutions (macro-level),

¶ More information available on the website of the European Commission <https://ec.europa.eu>



employers and intermediaries (meso-level), as well as the employees (micro-level). These challenges, as we describe below, take on various dimensions.

The complexity of legal regulations opens up space for diverging interpretations and an increase in the number of the ECJ judgments

At a macro-level, the most serious long-term problem remains the complexity of the rules on social security coordination and their correct interpretation. In the first place, this complexity concerns issues such as marginal employment, similar activities or the registered office/place of business. It also opens up space for diverging interpretations. Moreover, the changes introduced in recent years, including on the basis of the Court of Justice of the European Union (ECJ) rulings, instead of simplifying the legal framework increased the number of regulations that must be taken into account when issuing administrative decisions. This can lengthen the PD A1 application process. Stakeholders also raised the issue of insufficient administrative staff resources in public agencies in the area of labour mobility (cf. Kall et al., 2020).

Stakeholders who participated in the POW-BRIDGE project also offered an outlook for the future, even if they were quite critical of the direction of proposed changes to amend Regulation 883/2004. Especially the proposal of definition of registered office which, after amendment, will require complex investigations to be made by the Social Insurance Institution before certificate A1 is issued. These investigations will be time consuming and will require obtaining various documents from contribution payers. Both employers and posted workers are interested in immediate issuance of A1 documents (within 7 days) to provide services for service receiver in a host Member State and extended procedures resulting from the amendment of Regulation 883/2004 will weaken rights for free movement of workers and services. The POW-BRIDGE events' participants described the developments as a shift from the basic principles of coordination undermining the principle of single legislation for mobile workers. There is a risk that the new legal proposals in this area may lead to even greater instability of regulations, making employees' insurance even more problematic.

The COVID-19 pandemic has exacerbated administrative challenges in the issuing of PDs A1

The COVID-19 pandemic brought a series of challenges in the area of social security coordination. The posting of workers was affected by restrictions on border crossings and bureaucratic issues. The pandemic has exacerbated previous administrative challenges (including interpretability of regulations and lengthy procedures) in issuing PDs A1 by the Social Insurance Institution. During the pandemic, Social Insurance Institution experienced staff shortages due to quarantine and more workload due to the introduction of new social benefits aimed to tackle the effects of the pandemic. Due to the delays in administrative processes, some posted workers received their PD A1 already during their stay in the host country.



Even during the pandemic-related lockdowns in the EU Member States, there was no significant decrease in the number of official enquiries from institutions in the receiving countries concerning the establishing of the actual insurance situation of a given posted worker. The Polish National Labour Inspectorate (i.e. the liaison institution) received numerous queries concerning the obligation to quarantine for posted workers after crossing the borders.

The pandemic coincided with ongoing efforts to digitalise some of the processes, including circulation of documents and handling of formalities online. For instance, the Social Insurance Institution has implemented an A1 Certificate Application Creator facilitating applying for an A1 certificate.

At the meso-level, in terms of the employers' perspective, one of the key issues is dealing with how social security coordination works in practice. Employers' representatives described numerous cases where public authorities (mainly in France and Belgium) asked for clarifications about the application of Polish social security legislation.

Many employers apply the rules on business trip and use travel allowances as a cost-saving strategy

A major issue in the application of the posting of workers legislation in Poland remains the adoption of an inappropriate basis for social security contributions (Szywniewski, 2019; Ślebzak, 2018). Notwithstanding growing awareness of what the posting of workers involves, many employers apply the rules on business trips and use travel allowances as a cost-saving strategy. However, the posting of workers and business travel are two different situations regulated by various legal acts. Posting of workers consists of sending the employee to carry out services in the territory of another Member State for a limited period. A business trip, regulated in Article 77 of the Labour Code, concerns a situation where an employee performs, at the employer's request, job duties outside the employer's registered office location or outside his/her permanent place of work. An employee is entitled to travel allowances (tax-free) for the time of performing duties as part of a business trip, while travel allowances should not be paid to the posted workers. In the situation of posting, an employee who was previously employed with this employer, it is necessary to change to the appropriate level the remuneration that the employee usually received for work in Poland. The use of travel allowances as the main component of remuneration means that the social security contribution assessment base is artificially low.

Moreover, some employers use different contracts of mandate (i.e. civil law contract), with artificially low salaries on the basis of which social security contributions are calculated. This practice seems to be relatively widespread in the home care sector (Matuszczyk, in press). The POW-Bridge research showed examples where employers use the minimum rather than the average wage as



a reference point for calculating social security contributions. Such an unfair strategy means lower labour costs on the part of the employer and, as a rule, a higher net salary, which is a competitive advantage when recruiting employees.

It is worth noting, however, that employers and temporary work agencies are not always aware of the specific guidelines they should apply. Sometimes, payers of social security contributions struggle with the interpretation of the rules on applicable legislation.

As a consequence of the application of improper social insurance legislation, employees temporarily drop out of the social security system

At the micro-level, one of the issues is a situation of employees temporarily dropping out of the social security system due to the application of improper social insurance legislation, which leads to a gap in the paid contribution periods. Disclosure of such a situation, e.g. by control institutions in the country to which the employee has been posted with an illegally granted PD A1, leads, *inter alia*, to the retrospective calculation of insurance contributions. It then turns out that it is necessary to re-register the employee retrospectively, which may result in serious problems with obtaining the right to social benefits from a given insurance institution.

Moreover, the current rules on the coordination of social security systems complicate procedures in which it is necessary to add up contribution periods of employees who have paid them to different national institutions. In Regulation 883/2004 there are provisions concerning aggregation of social security periods for establishing right to benefits, but it should be preferred to use provisions on applicable legislation in such a way that a posted worker avoids changes of applicable legislation especially for a short periods of insurance. Complications deriving from changes of applicable legislation when applying for benefits should be resolved in more restrictive way of extension of applicable legislation e.g. by legal instrument of posting..

Low levels of knowledge about legislation on the posting of workers and the coordination of social security systems is a challenge both on employers and employees' side

Low levels of knowledge about legislation on the posting of workers and inadequacies in the coordination of social security systems pose challenges for employers and employees alike. Sometimes employees are not aware of their status when they go to work abroad as posted workers, as reported by research carried out among workers posted from Poland to the home care sector in Germany (Matuszczyk, in press). These employees often do not know what an A1 form is, although they mention that they receive travel allowances for business trips. These findings are in line with the reports on a generally low level of knowledge on social rights amongst workers in Poland, especially regarding pension insurance (Marczak, 2016).



Policy Recommendations

Empirical research within the POW-BRIDGE project identified the challenges related to social security coordination. The project set-up also allowed us to address these challenges with relevant stakeholders in search of possible solutions. These discussions have led us to consider the various ways in which to improve social security coordination in the context of posting of workers.

First and most importantly, there is a need for a greater legal clarity in the application and interpretation of social security legislation in the case of posting and – related to it – need for a simplification of administrative procedures for issuing of the A1 forms. In the POW—BRIDGE Polish report (Brzozowska et al., 2021) we described in much detail the body of legislation on posting of workers in relation to social security but also temporary agency work, health insurance, and company law, among others. The complexity of legal regulations on posting of workers can create situations in which it is difficult to determine applicable legislation, increasing the risk of fraud. Interpretations made by various legal bodies with reference to even some of the basic regulations contain discrepancies. Hence there is a need for establishing objective guidelines for administration staff involved in the decision and issuing of the A1 forms which could address discrepancies in interpretation and also make the whole process more efficient and shorter. The main proposal here is the simplification of regulations which would make them less interpretable by a single official taking the decision. A novelisation of rules could address this issue in the first place.

It is the complexity of the legal framework that leads to problems with timely issuing the PD A1. On an operational level, the digitalisation of processes related to PD A1 issuing could make the process more efficient, decreasing the waiting times for documents on the side of employers. Digitalisation could include the PD A1 applications to be made online, the actual documents to be issued in an electronic form or in a specially designed application. Some of these processes are already under way. One example is a recently introduced Electronic Exchange of Social Security Information (EESSI) which will connect social insurance institutions in the EU. What is more, electronic PD A1 forms can be a way to combat fraud regarding the paper PD A1 and errors. .

Finally, our recommendations point to a need for awareness-raising and access to information on the A1 forms and procedures for posting employers and posted employees, in particular in the social security area. Posted workers should be aware of what posting involves, what the PD A1 is, and what are the implications of using contracts outside of Labour Code (contracts for specific work, contract of mandate, or agency contract). Even if the civil law contracts can be more flexible and cheaper for employers, they entail social security risks on the part of employees.

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