



Cooperation as a key to overcoming challenges
in the field posting of workers from care, construction,
transport and agriculture sectors



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ACCT TRAINING MATERIALS

What is posting of workers?

sending of workers temporarily to other EU Member States to provide a pre-arranged service

Definition coined by M. Szypniewski Ph.D.

- EU fundamental freedoms invoked
- in the EU extension 2004

- free movement of **goods**

- free movement of
- **persons (workers)**

- freedom of **establishment**
- free movement of **services**

- free movement of **capital**



*Günter Verheugen
1999-2004 Commissioner for Enlargement*



Today's basic idea of legal interpretation in a united Europe assumes that the key point is the function and purpose of the provision, not its literal wording. This is a truly Copernican revolution.

The law is no longer read literally, but always on the assumption that it is rational and pursues a specific goal. It is not the letter that is the most important, but what the standard is supposed to serve in the situation in which it will be

Today, not only Community law, but also national constitutions must be subordinated to a functional interpretation, otherwise we would be bogged down in a web of absurdities and contradictions. On the other hand, contemporary legal texts are written in a specific language, often full of vague phrases, almost Aesopian. In the case of European law, there is a reason why it is important to make it possible to adapt the construction of Community law to the sometimes fundamentally different legParlof.syMsatreemksSaoffjan the 27 Member StCaoturets oof fJutsthiece European Unioofnt.he European Union

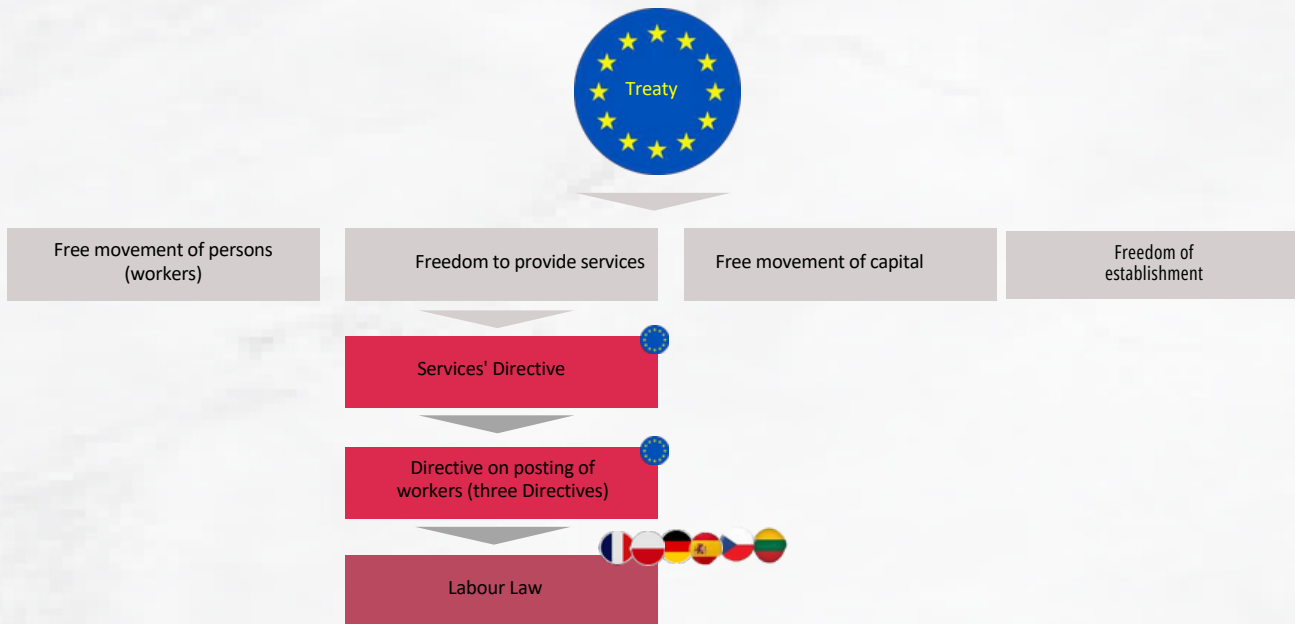


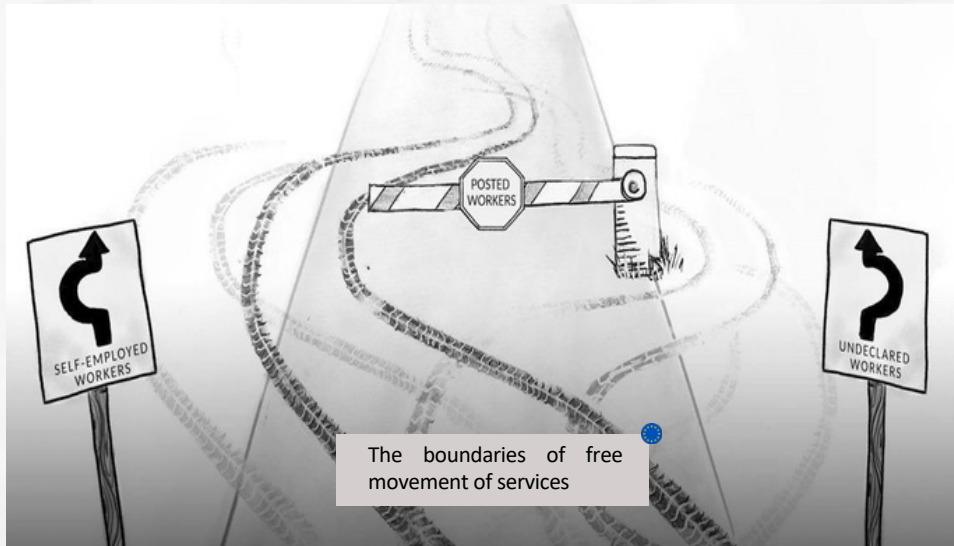
Prof. Marek Safjan Court of Justice of the European Union

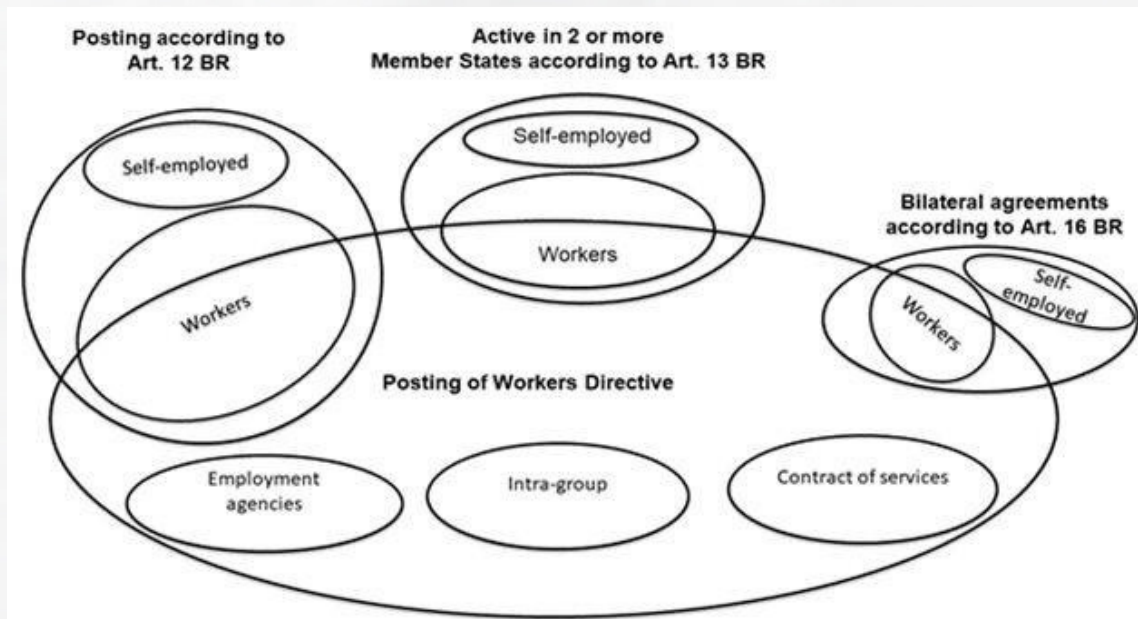


Article 56
(ex Article 49 TEC)

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

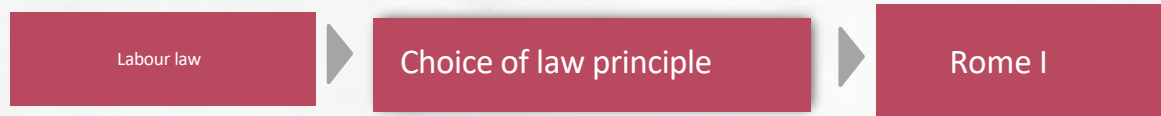






Part I

Labour law Terms and conditions of employment



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)

Article 8

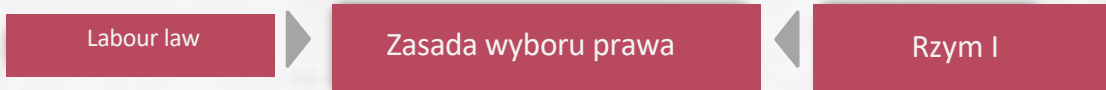
Individual employment contracts

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.



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Labour law

Basic Directive

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

Article 3

Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:
 - by law, regulation or administrative provision, and/or
 - by collective agreements or arbitration awards which have been declared universally applicable (...)

Labour law

Basic Directive

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Labour law

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Labour law

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Prawo pracy

Basic Directive

Article 3

Terms and conditions of employment

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual holidays;
- (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work;
- (f) 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;
- (g) equality of treatment between men and women and other provisions on non-discrimination.

Labour law

Basic Directive

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Labour Law

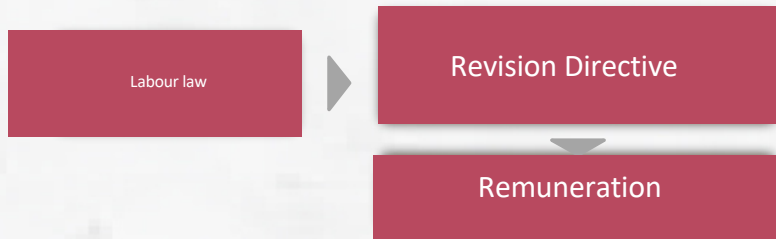
Basic Directive

Article 3

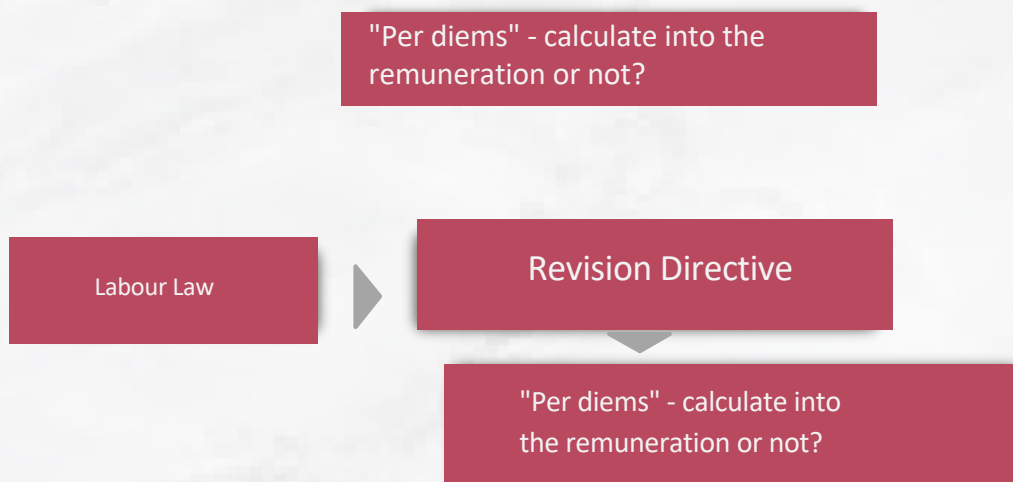
Terms and conditions of employment

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- b) minimum paid annual holidays;
- c) remuneration; including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
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- (f) 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;
- (g) equality of treatment between men and women and other provisions on non-discrimination.





For the purposes of this Directive, the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8.



Article 3 (7)

Allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. The employer shall, without prejudice to point (h) of the first subparagraph of paragraph 1, reimburse the posted worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship.

Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure.’;

Labour Law

Revision Directive

Article 3

Terms and conditions of employment

- a) maximum work periods and minimum rest periods;
- b) minimum paid annual holidays;
- c) remuneration; including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
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Labour law

Revision Directive

c) remuneration;

(...)

(h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work;

(i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons;

Point (i) shall apply exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work..



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Labour law

Revision Directive

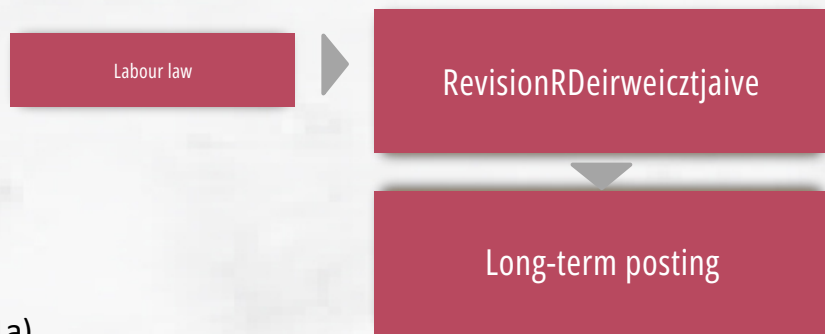
(...)

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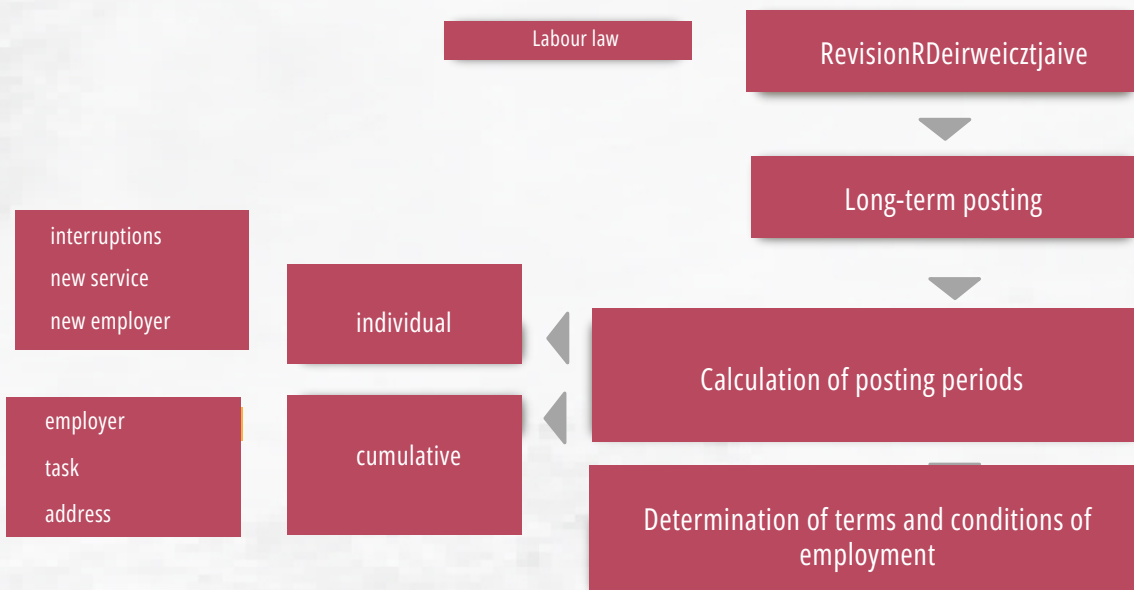


Article 3 (1a)

Where the effective duration of a posting exceeds 12 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, all the applicable terms and conditions of employment (...)

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interruptions

new service

new employer

individual

Calculation of posting periods

§ 13c AEntG

Calculation of the duration of employment in Germany

(5) If a worker continues to be employed in Germany pursuant to paragraph 1, 2 or 3 immediately after being employed pursuant to paragraph 1, 2 or 3, **the periods of employment in Germany shall be aggregated** for the purpose of calculating the period of employment in Germany.

(6) If a worker is employed in Germany and this is not employment in accordance with paragraphs 1, 2 or 3, all periods of continuous employment in Germany must be taken into account in calculating the period of employment in Germany.

employer

task

address

cumulative

Calculation of posting periods

§ 13c AEntG

Calculation of the duration of employment in Germany

(4) The interruption of an employee's work in Germany is not considered a termination of employment in Germany for the purposes of calculating the duration of employment in Germany. Periods during which the main obligations of the parties to the employment contract are suspended or during which the employment takes place abroad are not taken into account in the calculation of the duration of employment.

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"Motivated notification"

A posting entrepreneur (service provider) must submit "a motivated notification"

Practical guide on posting:

the extension cannot be subject to an authorisation procedure

(it is a "notification", not a "request").

However, Member States may require that service providers give reasons for the extension.



"Long-term posting" + cumulative period of posting ,

"Where the service provider submits a motivated notification the Member State where the service is provided shall extend the period referred to in the first subparagraph to 18 months.

Where an undertaking as referred to in Article 1(1) , replaces a posted worker by another posted worker performing the same task

the same task

at the same place, the duration of the posting shall, for the purposes of this paragraph, be the cumulative duration of the posting periods of the individual posted workers concerned.

The concept of "the same task at the same place" shall be determined taking into consideration, inter alia, the nature of the service to be provided, the work to be performed and the address(es) of the workplace.



Single official national website

Article 1 (2) (para 4) of the Revision Directive [revised

Article 3 (1) (para 4) of the Basic Directive 96/71/CE]

Member States shall ensure that the information provided on the single official national website is accurate and up to date. The Commission shall publish on its website the addresses of the single official national websites.

Article 5 (2) of the Enforcement Directive 2014/67/EU

In order to bring about further improvements with respect to access to information, Member States shall: a) indicate clearly, in a detailed and user-friendly manner and in an accessible format on a single official national website and by other suitable means, which terms and conditions of employment and/or which parts of their national and/or regional law are to be applied to workers posted to their territory (...).

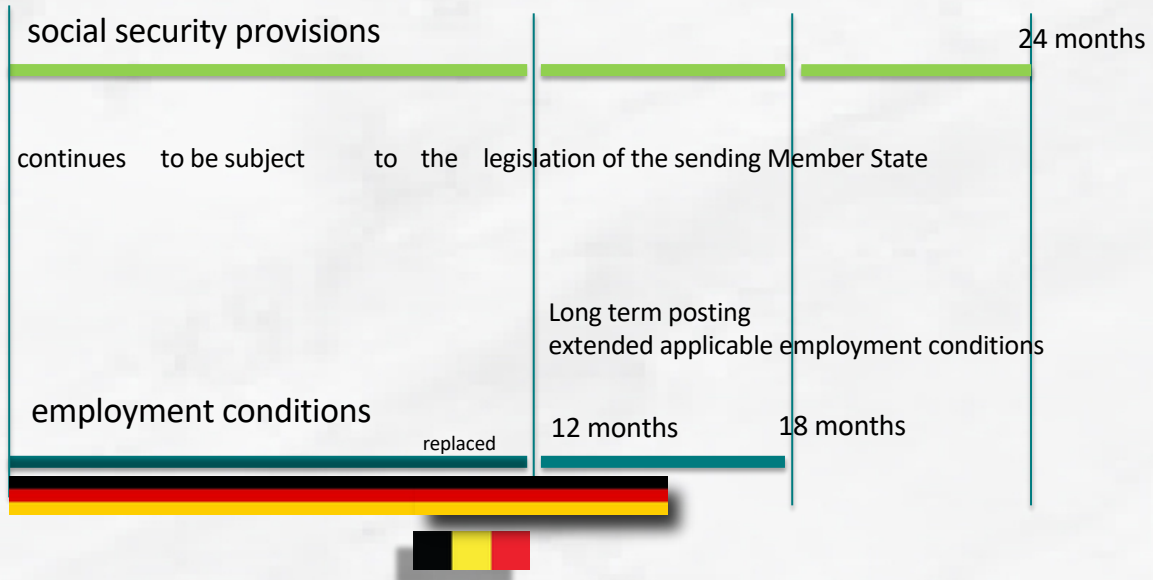


Single official national website

Article 1 (2) (para 5) of the Revision Directive

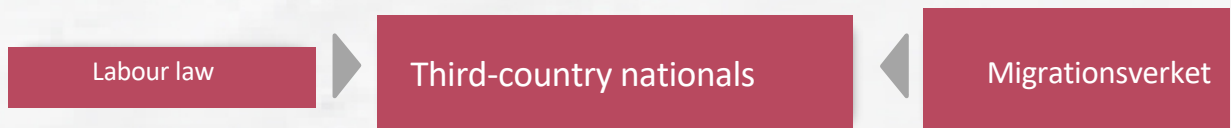
[revised Article 3 (1) (para 5) of the Basic Directive 96/71/CE] Where, contrary to Article 5 of Directive 2014/67/EU, the information on the single official national website does not indicate which terms and conditions of employment are to be applied, that circumstance shall be taken into account, in accordance with national law and/or practice, in determining penalties in the event of infringements of the national provisions adopted pursuant to this Directive, to the extent necessary to ensure the proportionality thereof.'

Calculation of posting periods



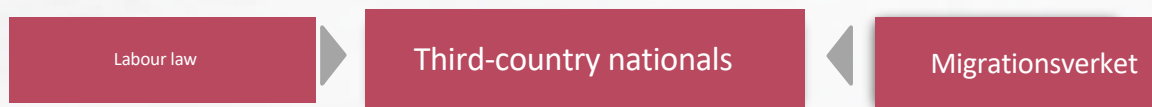


Article 3 (1-6)
[norms compelling the application of the law of the host State]
shall not prevent application of terms and conditions of employment
which are more favourable to workers



Order of the Court of 26 April 2023 in C-629/22 A.L. v Migrationsverket

[para 27] Article 6(2) of Directive 2008/115 must be interpreted as meaning that the competent authorities of a Member State are required to permit a third-country national staying illegally on the territory of that Member State who holds a valid residence permit or other authorisation offering a right to stay issued by another Member State to go to that other Member State before they adopt, if the circumstances so require, a return decision in respect of such a national, even though those authorities consider it likely that that national will not comply with a request to go to that other Member State.



Order of the Court of 26 April 2023 in C-629/22 A.L. v Migrationsverket

[para 42] Article 6(2) of Directive 2008/115 must be interpreted as meaning that where, contrary to that provision, a Member State does not permit a third-country national staying illegally on its territory to go immediately to the Member State which issued him or her with a valid residence permit or other authorisation offering a right to stay before it adopts a return decision in respect of that national, the competent national authorities, including national courts hearing an appeal against that return decision and the accompanying entry ban, are required to take all necessary measures to remedy a national authority's failure to fulfil obligations arising from that provision.

Labour law

Third-country nationals

SN & others

C- 0/22 SN & others

✓Pending case

✓Hearing on 21 Sept 2023,

Opinion of the Advocate General

A. Rantos on 30 Nov 2023



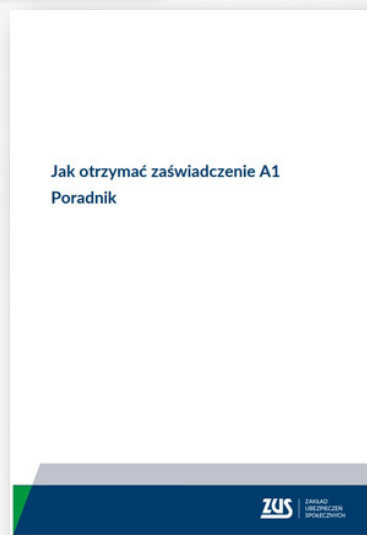
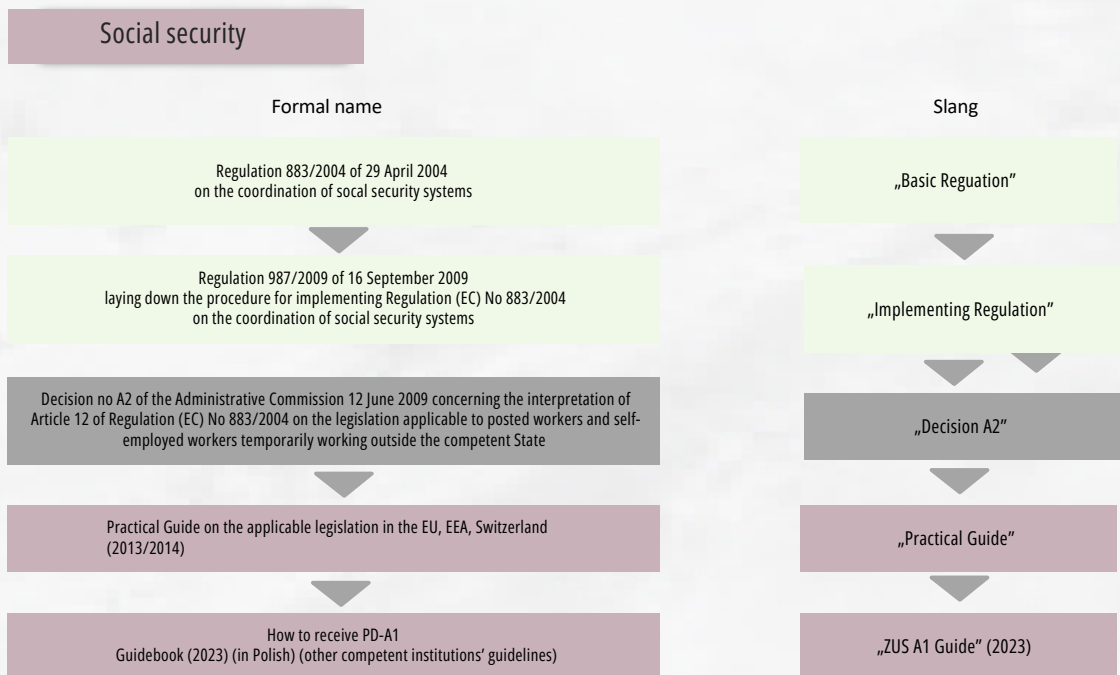
CONSTRUCTION OF STORAGE TANKS

Entrust the production and installation of
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Part II

Social security



Social Security

lex loci laboris

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

- (15) It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.
- (17) With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his activity as an employed or self-employed person.
- (18) In specific situations which justify other criteria of applicability, it is necessary to derogate from that general rule.

Social Security

lex loci laboris

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

Article 11

General rules

1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only.

Such legislation shall be determined in accordance with this Title.

3. (...)

a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

(...)

e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.

Social Security

„Twelve“

TITLE II
DETERMINATION OF APPLICABLE LEGISLATION
Article 12
Special rules

1. 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 twenty-four months and that he is not sent to replace another person.

Social Security

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Social Security

„Twelve“

prior to posting
posted person
employer's normal activity 24 months
non-replacement

Social Security

„Twelve“

„subject to the legislation prior to posting“

Art. 14 (1) Regulation 987/2009

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’ 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 employment, the person concerned is already subject to the legislation of the Member State in which his employer is established.

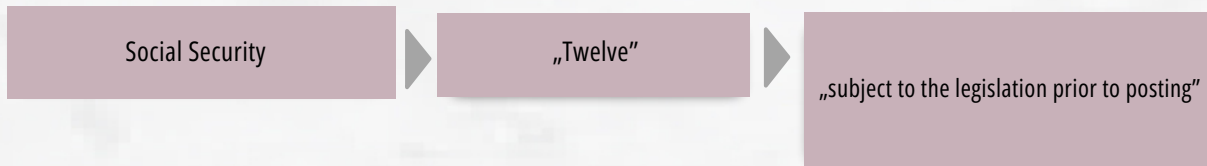
prevents:

- reverse posting
- low contribution

tourism

Practical Guide

A period of at least one month can be considered as meeting this requirement, with shorter periods requiring a case by case evaluation taking account of all the factors involved.



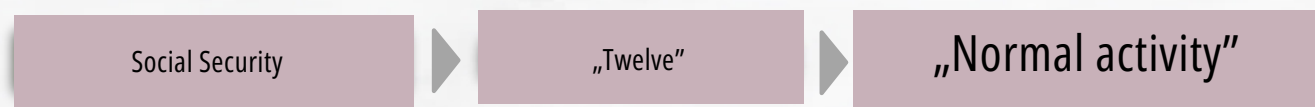
(...) as an indication, having been subject to the legislation of the Member State in which the employer is established for at least one month can be considered as meeting the requirement referred to by the words ‘immediately before the start of his employment’. Shorter periods would require a case-by- case evaluation taking account of all the other factors involved

Decision # A2

A period of at least one month can be considered as meeting this requirement, with shorter periods requiring a case by case evaluation taking account of all the factors involved.

Practical Guide

subject to the legislation or insured in the scheme



Art. 14 (2) Regulation 987/2009

the words ‘which normally carries out its activities there’ shall refer to an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question. The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out.



In order, where necessary and in cases of doubt, to determine whether an employer ordinarily performs substantial activities in the territory of the Member State in which he/she is established, the competent institution in the latter is required to examine all the criteria characterising the activities carried on by that employer, including the place where the undertaking has its registered office and administration, the number of administrative staff working in the Member State in which it is established and in the other Member State, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, the turnover during an appropriately typical period in each Member State concerned and the number of contracts performed in the sending State.

This is not an exhaustive list, as the criteria should be adapted to each specific case and take account of the nature of the activities carried out by the undertaking in the State in which it is established.

Decision # A2

turnover
25%
Practical Guide



(b) Brief interruption of the worker's activities with the undertaking in the State of employment, whatever the reason (holidays, illness, training at the posting undertaking ...), shall not constitute an interruption of the posting period

Interruption

Decision # A2

(c) Once a worker has ended a period of posting, no fresh period of posting for the same worker, the same undertakings and the same Member State can be authorised until at least two months have elapsed from the date of expiry of the previous posting period. Derogation from this principle is, however, permissible in specific circumstances.

Reset

Decision # A2

Social Security

„Twelve“

„Non-replacement“

In exceptional circumstances it would be possible to replace a person who has already been posted, provided the period allowed for the posting has not been completed. An example where this might arise would be a situation where a worker was posted for 20 months, became seriously ill after 10 months and needed to be replaced. In that situation it would be reasonable to allow another person to be posted for the remaining 10 months of the agreed period.

Practical Guide

The ban on replacing a posted person by another posted person must be considered not only from the perspective of the posting State but also from the perspective of the receiving State. The posted worker cannot be immediately replaced in receiving Member State A by a posted worker from the same undertaking of posting Member State B, nor by a posted worker from a different undertaking based in Member State B or a posted worker from an undertaking based in Member State C

Social Security

„Twelve“

„Non-replacement“

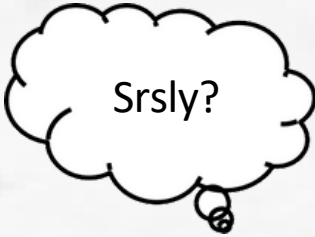
When a posted worker is immediately replaced by another posted worker the newly posted worker shall be attached to the social security legislation of the State of work from the beginning of his/her activity because the exception of Article 12 of Regulation 883/2004 does not apply any more to him/her.

Practical Guide

Persons who go as second are deprived of the right to have their insurance periods protected against fragmentation – questionable in the light of equal treatment

Social Security

„Twelve”



prior to posting
posted person
employer's normal
activity 24 months
non-replacement

Social security

„Thirteen”

A person who normally pursues an activity as an employed person in two or more Member States shall be subject to:

- (a) the legislation of the Member State of residence if he pursues a substantial part of his activity in that Member State or if he is employed by various undertakings or various employers whose registered office or place of business is in different Member States, or
- (b) the legislation of the Member State in which the registered office or place of business of the undertaking or employer employing him is situated, if he does not pursue a substantial part of his activities in the Member State of residence.

Social security

„Thirteen”

A person who normally pursues an activity as an employed person in two or more Member States shall be subject to:

(a) the legislation of the Member State of residence if he pursues a substantial part of his activity in that Member State or if he is employed by various undertakings or various employers whose registered office or place of business is in different Member States, or

(b) the legislation of the Member State in which the registered office or place of business of the undertaking or employer employing him is situated, if he does not pursue a substantial part of his activities in the Member State of residence.

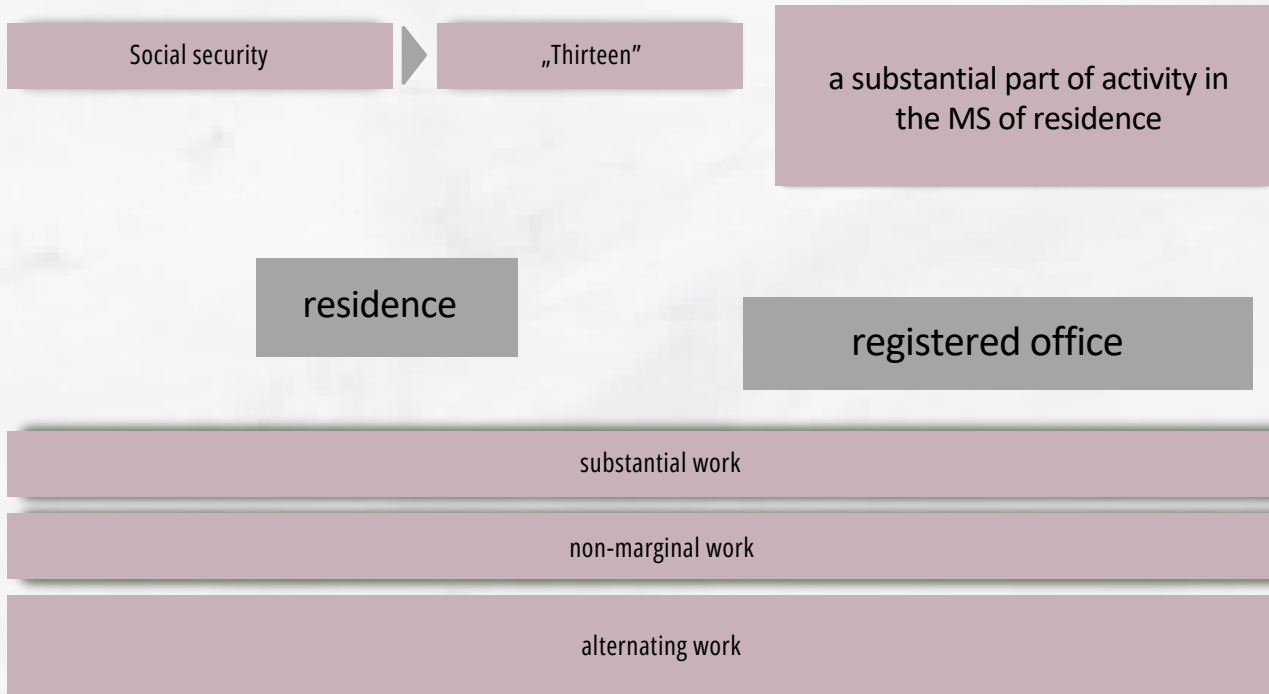
Social security

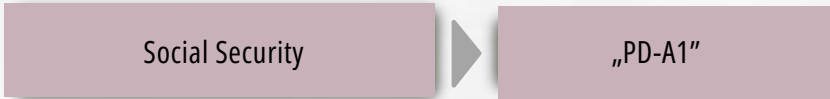
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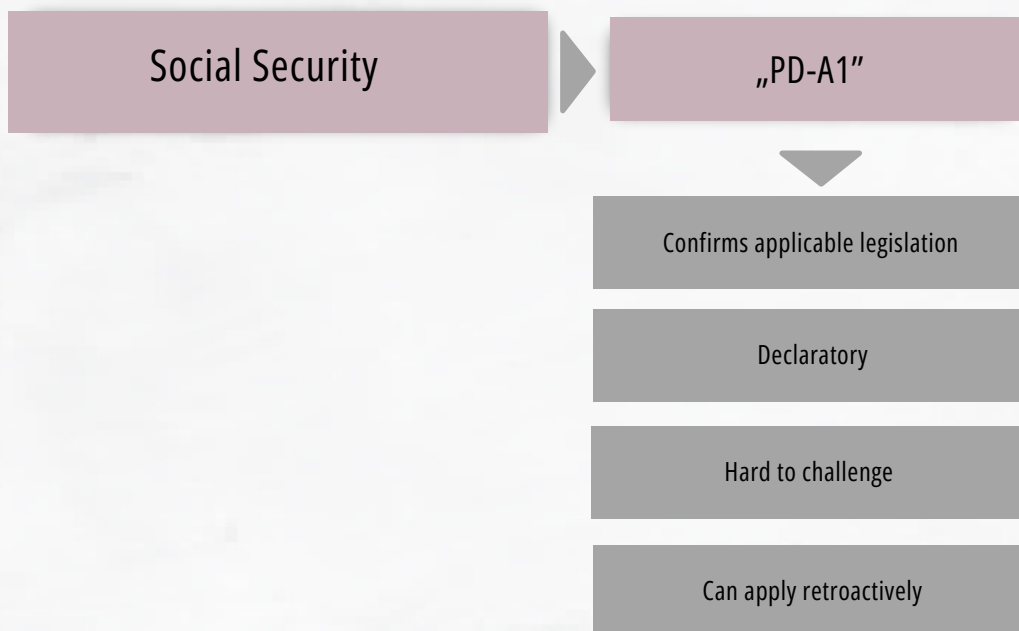
(b) the legislation of the Member State in which the registered office or place of business of the undertaking or employer employing him is situated, if he does not pursue a substantial part of his activities in the Member State of residence.





Portable Document A1
declaratory decision issued by a competent institution of a Member State to confirm that the moving person is subject to the social security legislation of the Member State which has issued the document

Although it is related to social security only, it often serves as a proof of genuine posting



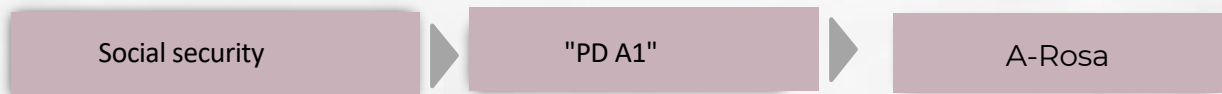




Part III

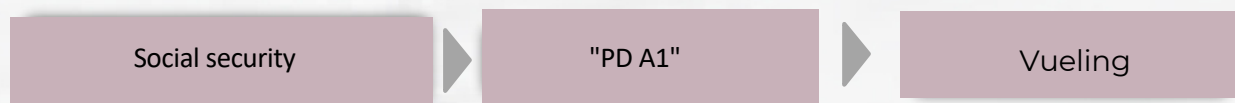
Social security

Court of Justice of the European (CJEU) on applicable legislation



CJEU judgment of 27 April 2017 in C-620/15 A-Rosa Flussschiff GmbH

[para 61] E 101 certificate [currently – PD A1 certificate] (...) is binding on both the social security institutions of the Member State in which the work is carried out and the courts of that Member State, even where it is found by those courts that the conditions under which the worker concerned carries out his activities clearly do not fall within the material scope of that provision of Regulation No 1408/71.



CJEU judgment of 2 April 2020 in joint cases C-370/17 and C-37/18 Vueling

[para 86] (...) a court or tribunal of a Member State [*with respect to*] E 101 [PD A1] certificates (...) [*might indicate that the*] had been fraudulently obtained or used for workers employed in that Member

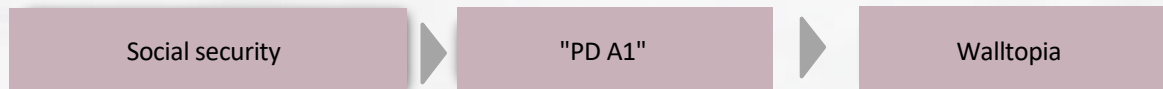
State, may make a finding of fraud and consequently disregard those certificates only when it

has satisfied itself that:

– first, the procedure [of conciliation] laid down in Article 84a(3) of that regulation [*Regulation No 1408/71, currently 883/2004*] was promptly initiated and the competent institution of the issuing Member State was thus put in a position to review the grounds for the issue of those certificates in the light of the concrete evidence submitted by the competent institution of the host Member State that indicates that those certificates were fraudulently obtained or relied on, and

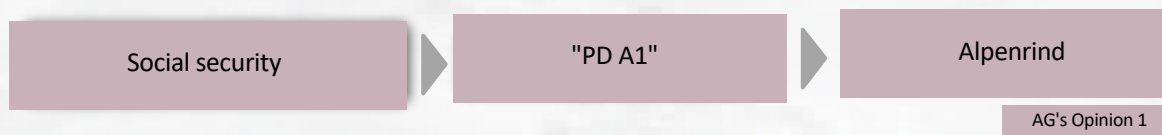
– second, the competent institution of the issuing Member State has failed to undertake such a review and has failed to make a decision, within a reasonable time, on that evidence, cancelling

or withdrawing the certificates at issue, where appropriate.



CJEU judgment of 25 October 2018 in C-451/17 Walltopia

51 (...) Article 14(1) of Regulation No 987/2009, read together with Article 12(1) of Regulation No 883/2004, must be interpreted as meaning that an employee recruited with a view to being posted to another Member State must be regarded as having been ‘just before the start of his employment ... already subject to the legislation of the Member State in which his employer is established’, within the meaning of Article 14(1) of Regulation No 987/2009, even if that employee was not an insured person under the legislation of that Member State immediately before the start of his employment, if, at that time, that employee had his residence in that Member State, which is for the referring court to ascertain.

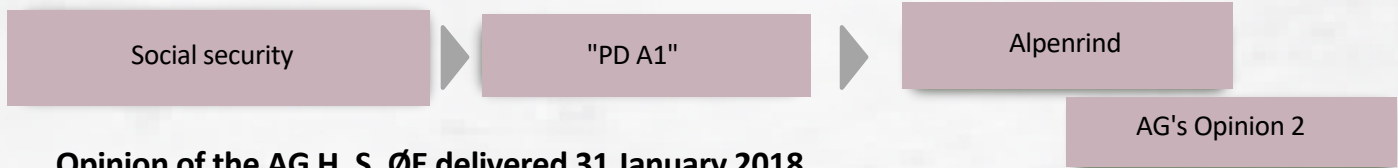


Opinion of the AG H. S. ØE delivered 31 January 2018 in C-527/16 Alpenrind

93 (...) I nonetheless consider that it argues in favour of the interpretation to the effect that the non- replacement condition is not intended to avoid successive postings by different employers. Taken literally, the words ‘sent to replace’, which appears in all the language versions of Article 12(1) of Regulation No 883/2004, apart from the German version, means in my view that the worker is sent by the employer in order to replace another posted worker.

94 Save in a case of abuse, the posting by employer B is not intended to replace a worker posted by employer A. The purpose of such a posting is rather to provide a service in the host Member State. I would add, in that regard, that it is not even certain that employer B is aware of the earlier posting by employer A.

95. (...) to my mind the words ‘sent to replace’ support the argument that the non-replacement condition must be considered solely from the viewpoint of the employer that posts the worker (...).

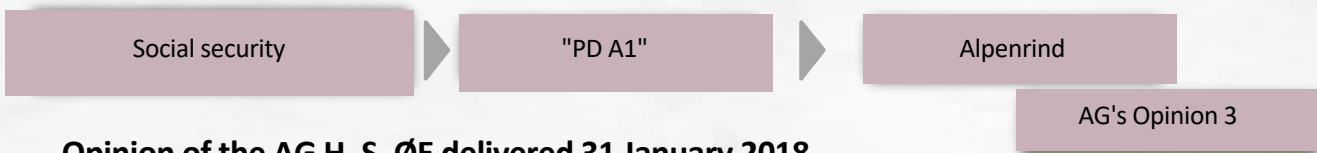


Opinion of the AG H. S. ØE delivered 31 January 2018

96 I therefore consider that there is no ‘replacement’ within the meaning of Article 12(1) of Regulation No 883/2004 where employer B posts a worker in order to carry out work that was previously carried out by a worker posted by employer A.

In other words, I consider that there is nothing to prevent employer B from making such a posting.

It also follows that the recipient of the service in the host Member State is not prevented from making use of successive and separate contracts with different undertakings relating to the performance of the same work by posted workers who are not subject to the social security system of the host Member State.

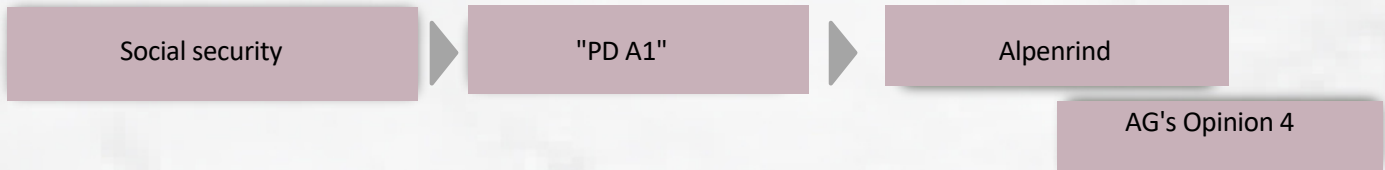


Opinion of the AG H. S. ØE delivered 31 January 2018

97 (...) an interpretation to the contrary would have the consequence that employer B would be placed in a less favourable position than that of employer A solely because employer A was the first to take advantage of the possibility provided for in Article 12(1) of Regulation No 883/2004(the ‘first come, first served’ principle).

In my view there is no suggestion that the EU legislature intended such a result.

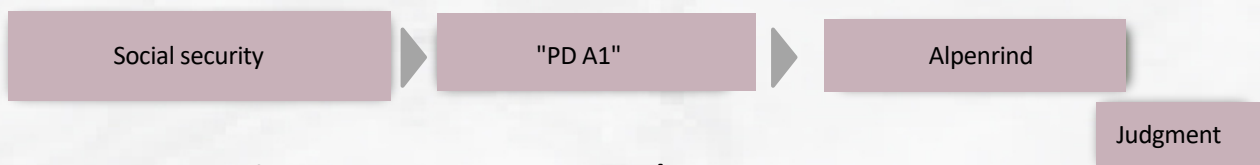
To my mind, such an interpretation would therefore introduce a new condition into that provision which is not apparent from its wording, which in my view would be contrary to the principle of the legal certainty of those concerned.



Opinion of the AG H. S. ØE delivered 31 January 2018

100 (...) the broad interpretation of the non-replacement condition, according to which it would also cover successive postings by different employers, is liable to undermine the objectives pursued by Article 12(1) of Regulation No 883/2004.

It will be recalled that that provision is aimed, in particular, at promoting freedom of movement of workers and also at encouraging economic interpenetration while avoiding administrative complications, in particular for workers and undertakings.



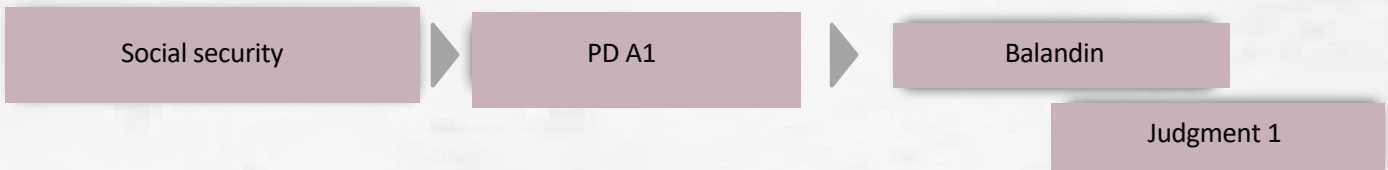
CJEU judgment of 6 September 2018 in C-527/16 Alpenrind

99

(...) the recurrent use of posted workers to fill the same post, even though the employers responsible for posting workers are different, does not comply with the wording or the objectives of Article 12(1) of Regulation No 883/2004 and is not consistent with the context of which that provision is part, so that a person posted cannot benefit from the special rule laid down in that provision if he replaces another worker.

100

(...) Article 12(1) of Regulation No 883/2004 must be interpreted as meaning that, if a worker who is posted by his employer to carry out work in another Member State is replaced by another worker posted by another employer, the latter employee must be regarded as being 'sent to replace another person', within the meaning of that provision, so that he cannot benefit from the special rules laid down in that provision in order to remain subject to the legislation of the Member State in which his employer normally carries out its activities [sending MS]. The fact that the employers of the two workers concerned have their registered offices in the same Member State or that they may have personal or organisational links is irrelevant in that respect.

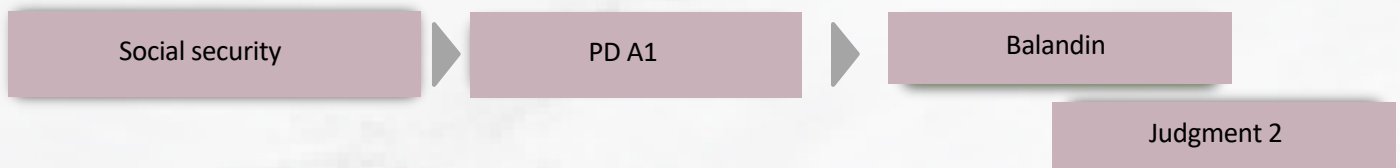


CJEU judgment of 24 January 2019 in C-477/17 Balandin

[para 38] (...) as is apparent from recital 11 of Regulation No 1231/2010, the concept of ‘legal residence’ within the meaning of that regulation, reflects the EU legislature’s decision to submit the extension of the personal scope of Regulations Nos 883/2004 and 987/2009 to nationals of third countries subject to the prior condition that they remain lawfully on the territory of the relevant

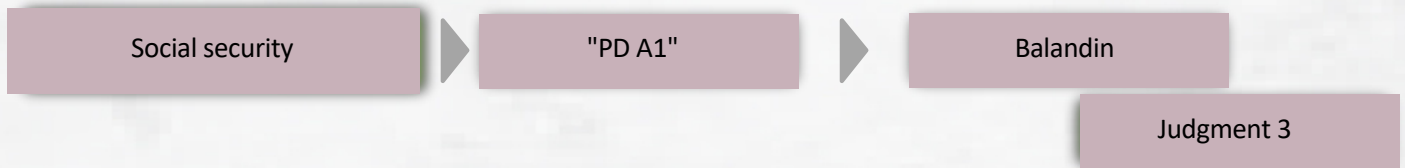
Member State. Thus, that concept differs from that of ‘residence’ within the meaning of Article 1(j) of Regulation No 883/2004.

[para 40] (...) page 6 of the explanatory memorandum to the proposal for a Council Regulation [1231/2020] also specifies that, in order to qualify for the rights derived from the provisions of Regulation No 883/2004 in a second Member State, those nationals do not necessarily have to satisfy the residency requirement, but may simply move, provided that their presence within the territory of that State complies with its legislation on entering and staying therein.



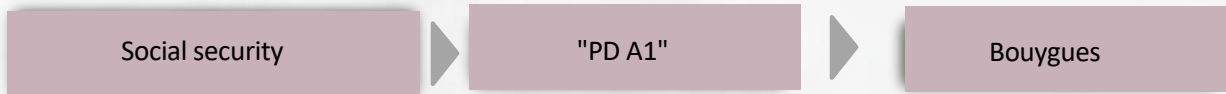
CJEU judgment of 24 January 2019 in C-477/17 Balandin

[para 41] Therefore, both the duration of the presence of those nationals on the territory of a Member States and the fact that they retain their centre of interest in a third country are not relevant, as such, in order to establish whether they are ‘legally resident in the territory of a Member State’ within the meaning of Article 1 of Regulation No 1231/2010.



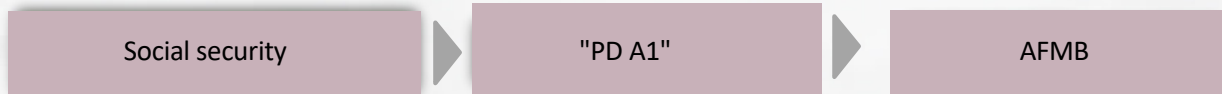
CJEU judgment of 24 January 2019 in C-477/17 Balandin

[para 47] (...) Article 1 of Regulation No 1231/2010 must be interpreted as meaning that third country nationals, such as those at issue in the main proceedings, who temporarily reside and work in different Member States in the service of an employer established in a Member State, may rely on the coordination rules laid down by Regulations Nos 883/2004 and 987/2009 in order to determine the social security legislation to which they are subject, provided that they are legally staying and working in the territory of the Member States.



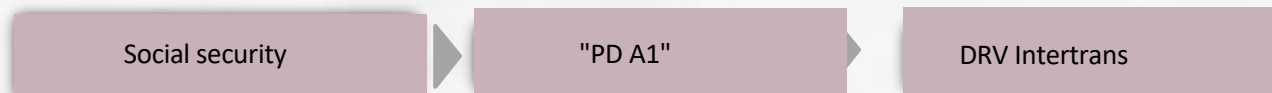
CJEU judgment of 14 May 2020 in C-17/19 Bouygues travaux publics

[para 54] Article 11(1)(a), Article 12a(2)(a) and (4)(a) of Regulation No 574/72 and Article 19(2) of Regulation No 987/2009 must be interpreted as meaning that an E 101 Certificate issued by the competent institution of a Member State, under Article 14(1)(a) or Article 14(2)(b) of Regulation No 1408/71, to workers who are employed in the territory of another Member State, and an A 1 Certificate, issued by that institution, under Article 12(1) or Article 13(1) of Regulation No 883/2004, to such workers, are binding on the courts or tribunals of the latter Member State solely in the area of social security



CJEU judgment of 16 July 2020 in C-610/18 AFMB

[para 82] Article 14(2)(a) of Regulation (EEC) No 1408/71 (...), and Article 13(1)(b)(i) of Regulation (EC) No 883/2004 (...), must be interpreted as meaning that the employer of an international long-distance lorry driver, for the purposes of those provisions, is the undertaking which has actual authority over that long-distance lorry driver, which bears, in reality, the costs of paying his or her wages, and which has the actual power to dismiss him or her, and not the undertaking with which that long-distance lorry driver has concluded an employment contract and which is formally named in that contract as being the employer of that driver.



CJEU judgment of 2 March 2023 in joined Cases C-410/21 & C-661/21 DRV Intertrans

[para 84(1)] Article 5 of Regulation (EC) No 987/2009 (...), must be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State is binding upon the institutions and courts of the Member State in which the work is carried out, including where, following a request for reconsideration and withdrawal sent by the competent institution of that latter Member State to the issuing institution, that institution has declared that it has provisionally suspended the binding effects of that certificate until such time as it decides definitively on that request.

However, in such circumstances, a court of the Member State in which the work is carried out, seised in the context of criminal proceedings brought against persons suspected of having fraudulently obtained or used the same A1 certificate, may find that there has been fraud and consequently disregard that certificate, for the purposes of those criminal proceedings, provided that,

- first, a reasonable period has elapsed without the issuing institution having reconsidered the grounds for issuing that certificate and having adopted a decision on the specific evidence submitted by the competent institution in the host Member State, which gave rise to the view that that certificate had been obtained or invoked fraudulently, as the case may be, by cancelling or withdrawing the certificate in question and,

- second, that the guarantees inherent in the right to a fair trial which must be afforded to those persons have been respected.

Social security

"PD A1"

ZUS O/Toruń

Opinion of the AG De la Tour of 22 June 2023 in C-422/22 Zakład Ubezpieczeń Społecznych Oddział w Toruniu

[para 61]

I propose that the Court answer the questions for a preliminary ruling referred by the Sąd Najwyższy (Supreme Cour, Poland) as follows:

Articles 5, 6 and 16, on the one hand, and Articles 2 and 20, on the other hand, of Regulation (EC) No 987/2009

(...),

1. must be interpreted as meaning that an institution which has found, following verifications carried out on its own initiative, that it has incorrectly issued an A1 Certificate, may withdraw it without first initiating a dialogue and conciliation procedure with the competent institutions of the Member States concerned with a view to determining the applicable legislation.

However, that institution is required to inform the competent institutions of the Member States concerned of its withdrawal decision as soon as possible.

Social security

"PD A1"

ZUS O/Toruń

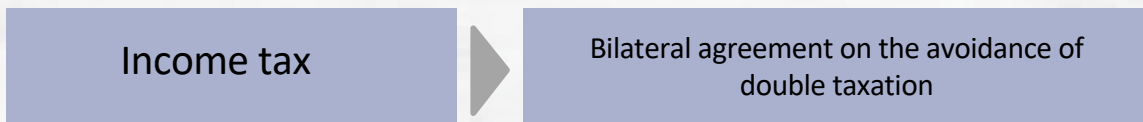
Ruling of 16 November 2023 in C- 22/22 Zakład Ubezpieczeń Społecznych Oddział w Toruniu

An institution which has found, following verifications carried out on its own initiative, that it has incorrectly issued an A1 Certificate, may withdraw it without first initiating a dialogue and conciliation procedure with the competent institutions of the Member States concerned with a view to determining the applicable legislation. However, that institution is required to inform the competent institutions of the Member States concerned of its withdrawal decision as soon as possible.



Part IV

Income tax



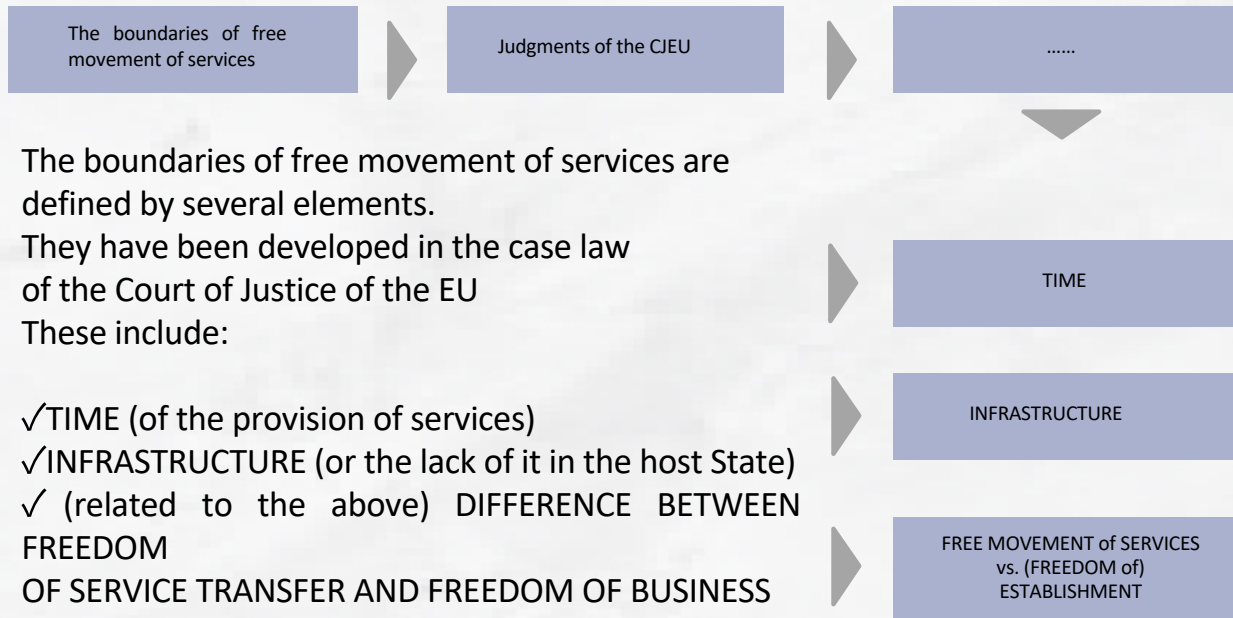
Income from work incurred in two MS is taxed in one MS only

The 183 days rule

Part V

Boundarries of freedom to provide services

Freedom to provide services vs. Freedom of establishment



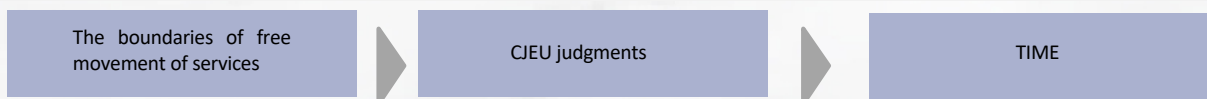
The boundaries of free movement of services are defined by several elements.

They have been developed in the case law of the Court of Justice of the EU

These include:

- ✓ TIME (of the provision of services)
- ✓ INFRASTRUCTURE (or the lack of it in the host State)
- ✓ (related to the above) DIFFERENCE BETWEEN FREEDOM OF SERVICE TRANSFER AND FREEDOM OF BUSINESS

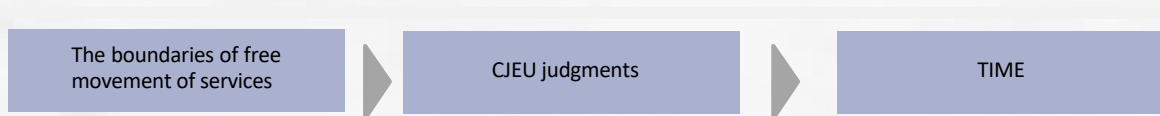
According to CJEU case law - the intention of the (posting) entrepreneur should be the decisive factor



TIME (of service provision)

"It is also apparent from established case law that there is no provision in the Treaty to determine in the abstract the duration or frequency beyond which the provision of a particular service or a particular type of service can no longer be considered to be the provision of services within the meaning of the Treaty.

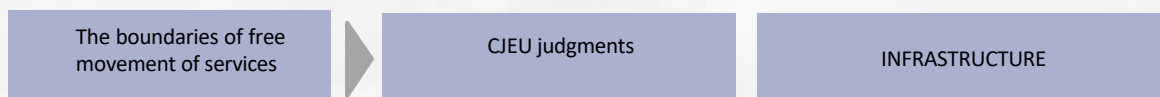
This, the concept of a service within the meaning of the Treaty may encompass services of a very different nature, including services that are provided over an extended period of time, for example, over several years."



TIME (of service provision)

The restriction related to the time premise is the performance of the activity "without foreseeable limitation in time"

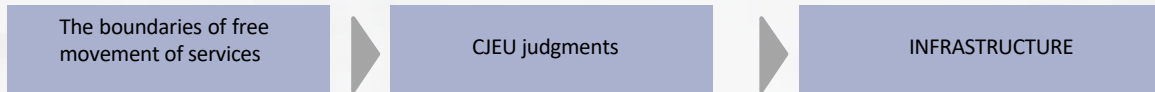
In this case, the company's activities are not subject to the provisions on freedom to provide services



INFRASTRUCTURE (the lack thereof in the host State)

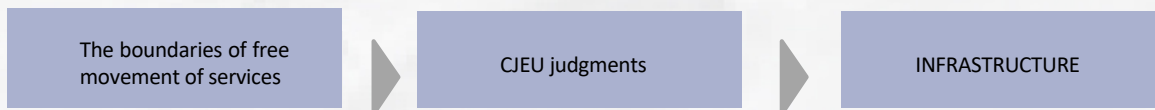
"the mere fact that an operator established in one Member State provides identical or similar services with greater or lesser frequency or on a more or less regular basis in another Member State without having in that State the infrastructure enabling it to carry on its professional activities on a stable and continuous basis (...) is not sufficient for it to be regarded as established in the said [host] Member State".

✓Lack of infrastructure in the host State according to the CJEU = possibility to legally provide services there



INFRASTRUCTURE (the lack thereof in the host State)

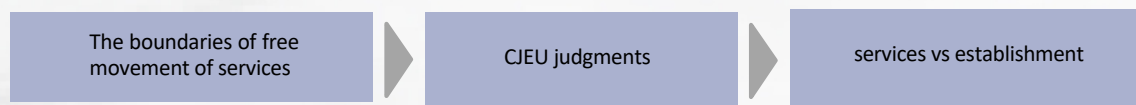
Owning and using infrastructure in the host country (especially for customer acquisition) implies exercising another (than the freedom to provide services) EU freedom - the freedom of establishment "the exercise of the freedom of establishment by an entrepreneur presupposes (the existence of) an installation which is permanent and stable (...) and which is the centre of the professional activity carried out in the State of establishment vis-à-vis an indefinite number of clients"



INFRASTRUCTURE (the lack thereof in the host State)

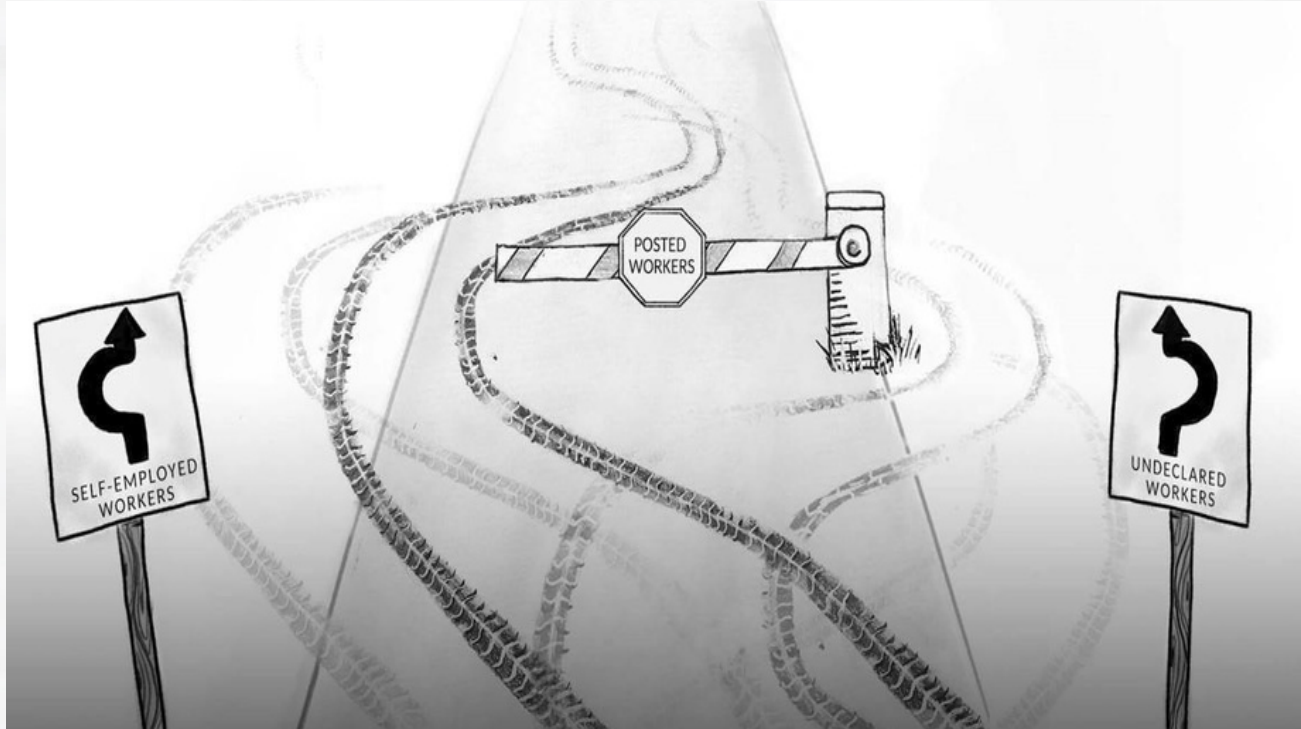
„the concept of establishment within the meaning of the Treaty provisions on freedom of establishment presupposes the actual exercise of an economic activity through a permanent establishment in that State for an indefinite period".

The CJEU, in the context of freedom of establishment, stated that "it [aims] to enable a Union citizen to participate, on a stable and continuous basis, in the economic life of a Member State other than his Member State of origin and to derive benefit therefrom by the actual pursuit of an economic activity in the host Member State for an indefinite period by means of a permanent infrastructure".



THE DISTINCTION BETWEEN FREE MOVEMENT OF SERVICES AND FREEDOM OF ESTABLISHMENT

"the freedom to provide services means, in particular, the elimination of all discrimination against a provider of services on the grounds of his nationality or the fact that he is established in a Member State other than that in which the services are provided. The requirement that an undertaking must set up a permanent establishment or subsidiary in the Member State in which it provides services directly opposes the essence of the free provision of services as it prevents service providers established in another Member State from providing services in that State."





Part VI

Challenges & Solutions

Challenges common to all areas:

- Creation of administrative obstacles by host Member States towards foreign companies posting workers
- Non-compliance with the conditions of posting by the posting companies

Challenges common to all areas:

- Posting of third-country nationals and the framework there of
- the so-called "Vander Elst visas"
- Full-scale war in Ukraine

Challenges common to all areas:

- issues concerning the provision of information ("the golden bullet of the EU legislation"?*)

**Term coined by F. De Wispelaere & L. De Smedt in "Access to information on the posting of workers: Are we blinded by the importance given by EU legislation to the single official national website?" Policy Brief 2023/5. Vienna: European Centre.*

Challenges common to all areas:

- More than 3 million enterprises, with the annual turnover of > EUR 1 500 billion
- The EU construction sector directly employs and between 2020 and 2021 had an average employment growth rate of around 3% [2023 ELA Strategic Analysis]

Challenges common to all areas:

- Letter-box companies in the construction sector
- Bogus self-employment
- Fraudulently obtained PD A1 forms
- Overtime and underpayment as non-respect of working conditions
- Digitalisation in the sector (or lack thereof?)

The so-called
**Vander
Elst visa?**



Full-scale war in Ukraine (as seen from Poland)

- 1.35 million Ukrainian citizens before 24 February 2022
- 1.55 million Ukrainian citizens who arrived after 24 February 2022

Challenges in the care sector

- European Care Strategy
- Council Recommendation on access to affordable high-quality LTC

European Care Strategy



European Care Strategy

- Atypical forms of employment and the development of platform work are playing an increasingly important role in care, resulting in limited access for carers to social protection, labour rights and health and safety at work
- The Commission calls on the Member States to implement ILO Convention 189 on domestic workers

In this regard, the Commission calls on Member States "to take steps to formalise and regulate the specific situation of domestic workers and live-in carers".

European Care Strategy

Objectives of the European Care Strategy

- Use existing EU funds to enable citizens to have equal access to high- quality long-term care, in particular community-based and home- based care
- enable older people to remain in their own homes for as long as possible- improve working conditions and access to training to increase the professional competence of carers
- to review, in cooperation with EU agencies, compliance with EU standards on working conditions, including home care

Council Recommendation on access to affordable high-quality LTC



Council Recommendation on access to affordable high-quality LTC

(25) This Recommendation builds on Union law regarding transparent and predictable working conditions, such as Parliament and of the Council, Directive (EU) 2019/1152 of the European Parliament and of the Council and Directive (EU) 2022/2041 of the European Parliament and of the Council, regarding work-life balance, such as Directive (EU) 2019/1158 of the European Parliament and of the Council, and regarding health and safety at work (...)

Council Recommendation on access to affordable high-quality LTC

3. For the purpose of this Recommendation, the following definitions apply:

(a) ‘long-term care’ means a range of services and assistance for people who, as a result of mental and/or physical frailty, disease and/or disability over an extended period of time, depend on support for daily living activities and/or are in need of some permanent nursing care. The daily living activities for which support is needed may be the self-care activities that a person must perform every day, namely activities of daily living, such as bathing, dressing, eating, getting in and out of bed or a chair, moving around, using the toilet, and controlling bladder and bowel functions, or may be related to independent living, namely instrumental activities of daily living, such as preparing meals, managing money, shopping for groceries or personal items, performing light or heavy housework, and using a telephone;

Council Recommendation on access to affordable high-quality LTC

3. For the purpose of this Recommendation, the following definitions apply:
[...]

(c) ‘home care’ means formal long-term care provided in the recipient’s private home, by one or more professional long-term care workers;
[...]

(f) ‘informal care’ means long-term care provided by an informal carer, namely someone in the social environment of the person in need of care, including a partner, child, parent or other person, who is not hired as a professional long-term care worker;

Solutions common to all areas:

- Making the freedom to provide services reality (as much as possible) – it could be helped by one of the most recent initiatives in this respect - Enrico Letta's draft Report on the Future of the Single Market

Solutions common to all areas:

- Report called for by the European Council of 30 June 2023. It called "for an independent High-Level Report on the future of the Single Market to be presented at its meeting of March 2024 and invites the incoming presidencies of the Council and the Commission to take this work forward, in consultation with the Member States".

Solutions common to all areas:

- Development of digitalisation initiatives, as provided for in the Communication from the Commission of 6 Sept 2023 on digitalisation in social security coordination: facilitating free movement in the Single Market, COM(2023) 501 final

Solutions common to all areas:

- Commission called on Member States inter alia to:
- accelerate the national implementation of the Electronic Exchange of Social Security Information (EESSI) so that it is fully operational by the end of 2024 across Europe ;
- fully engage in the European Social Security Pass (ESSPASS) pilot activities

Solutions common to all areas:

- Commission called on Member States inter alia to (continued):
- deliver more social security coordination procedures fully online. To that end, according to the Commission, the Member States can build on the Single Digital Gateway Regulation, which foresees a fully online delivery of some important administrative procedures to citizens and businesses by 12 December 2023 at the latest.

Solutions common to all areas:

- Commission called on Member States inter alia to (continued):
- work towards introducing EU Digital Identity (EUDI) wallets, which will allow EU citizens to carry digital versions of entitlement documents, such as the European Health Insurance Card (EHIC)

Temporary protection of Ukrainian citizens in the EU

- Temporary protection mechanism was first activated on 4 March 2022 – only a few days after Russian armed forces launched a large-scale invasion of Ukraine

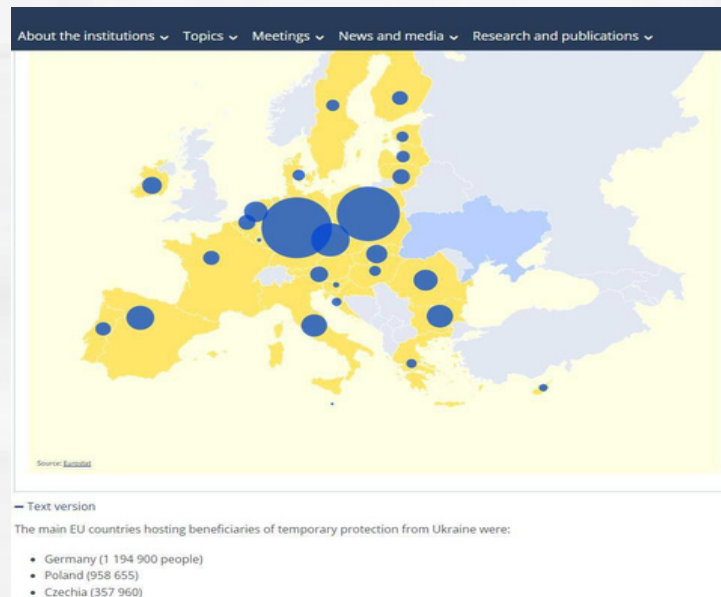
Temporary protection of Ukrainian citizens in the EU

- Recently, the Council agreed to extend the temporary protection for people fleeing from Russia's war of aggression against Ukraine from 4 March 2024 to 4 March 2025.
- EU Member States are now to follow suit

Temporary protect

- Main EU countries hosting beneficiaries temporary protection from Ukraine

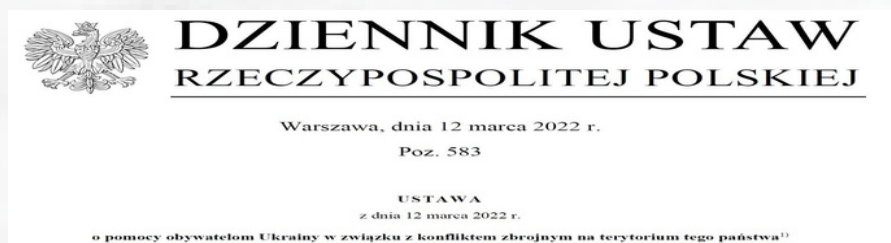
[source: Consilium.europa.eu Pres
Release of 28 Sept 2023]



Full-scale war in Ukraine - solutions

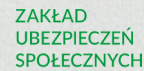
Legislative reaction in Poland:

Special Law of 12 May 2022 relations to the armed conflict on the territory of that state
(Special Law on Ukraine)





Cooperation as a key to overcoming challenges in the field posting of workers from care, construction, transport and agriculture sectors



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