HUNGARIAN LABOUR LAW
E - J O U R N A L

Posted Workers and the Coordination of Social Security Systems[1]

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1. Introduction, the territorial boundaries of social security law

Social security law is traditionally bound by territorial limits. The rights for benefits and the obligations to pay contributions are generally limited to residents or citizens of the given country. This gives rise to uncertainty for workers moving to other countries to work, where they might become uninsured or be obliged to pay double contributions. For the same reasons social security law might be an obstacle for companies to extend beyond national borders.

These considerations led countries to conclude international treaties to regulate the social security status of migrant workers. By the time of the First World War, 11 bilateral agreements were concluded in Europe.[2] With the European integration, it became clear that the free movement of workers could not be established without the coordination of the national social security systems, even if Member States did not wish to harmonise their very different national social security law. Member States jealously guard their sovereignty in the sphere of social security, but coordination was necessary to overcome the obstacles of the territorial nature of national social security systems.[3] For that matter, the first regulation was adopted as early as 1958,[4] while the current measure is in force since 2010.[5]

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2 Jaan Paju: *The European Union and Social Security Law*. Portland, Hart, 2017. 12–13.

3 Philippa Watson: *EU Social and Employment Law*. Oxford, Oxford University Press, 2014. 71–72.

4 See the relevant Regulations in chronological order: Règlement 3/1958 concernant la sécurité sociale des travailleurs migrants; Regulation 1408/71/EC of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

5 Regulation 883/2004/EC of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (hereinafter: Regulation).

According to one of the main principles of social security coordination within the EU, in cases involving an international element it shall always be clear which legal system to apply to the employee.[6] Persons falling under the scope of social security coordination shall be subject to the legislation of a single Member State only, which is – as a general rule – the Member State where the person pursues the activity as an employed or self-employed person (*lex loci laboris*).[7] However, this general rule does not apply to posted workers. Such persons habitually work in one Member State (sending or home state) and pursue their activity in another Member State (host state) only temporarily. According to Article 12 of the Regulation, in these situations the person remains subject to the social security system of the original state.

This paper focuses on the legal status of posted workers in the coordination of social security systems. First the aims of the regulation will be explored, than we turn to a detailed assessment of the preconditions to apply the posting exception. While EU law basically seeks to ensure the free movement of workers and services, it is also necessary to stop misuse. In the latter case law plays a pivotal role, so the relevant decisions will be examined too. Finally, after a short comparison to posted worker's legal status in labour law, I draw some concluding remarks.

2. The aims and elements of the posting exception

The aims of the posting exception are manifold. With the application of the main rule, posted workers were subject to the host state's social security law, although they might stay there only for a relatively short period of time. It would result in the application of different social security systems even within one month, while the worker most probably would be unable to make use of most benefits in the host state, as most national legislative systems generally exclude short periods from certain social benefits.[8]

From the aspect of the employer, cross-border service providers were required to be aware of the social security legislation of another Member State,[9] and the posting employer would lose the possible benefits of the more favourable social security obligations in the sending state. In fact, differences in social security contribution rates across Europe, as well as in wage levels and taxation rules, make it possible, through posting, to have different labour costs by reason of the legislation of the State where the worker is posted from.[10] Moreover, the frequent switch in the applicable system would give

6 Gellérné Lukács, Éva – Kovács, Réka: Szociális biztonsági koordináció és munkaerőmozgás – az Alpenrind-eset és az Osztrák Legfelsőbb Közigazgatási Bíróság ítélete. *Európai Tükör*, 2019/03. 81.

7 Regulation 883/2004/EC Art. 11 (1) and (3)a.

8 Frans Pennings: *European Social Security Law*. Intersentia, 2015. 112.

9 Fürjes, Annamária: Szociális *biztonsági koordináció az Unióban, különös tekintettel a nyugdíjakra.* Doktori *értekezés*. Szeged, Szegedi Tudományegyetem ÁJK Doktori Iskola, 2014. 73.

10 Stefano Giubboni – Feliciano Iudicone – Manuelita Mancini – Michele Faioli: *Coordination of Social Security Systems in Europe.* Study for the European Parliament's Committee on Employment and Social Affairs, 2017. 55.

rise to doubts of double contributions.[11] These unnecessary administrative burdens could impede the freedom to provide services of employers which post workers to Member States other than that in which they are established, as well as the freedom of workers to move to other Member States.

The exception also aims at encouraging economic interpenetration whilst avoiding administrative complications, especially for workers and undertakings. The purpose of the posting exception is thus to avoid, for workers, employers and social security institutions, the administrative complications which would result from the application of the general rule.[12]

Nonetheless, to avoid misuse, the Regulation prescribes a set of preconditions to apply the posting exception. The rule reads as follows: 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.[13]

The elements of the definition are the following:

- the employee is posted to another Member State to perform work on the employer's behalf,
- the employer normally carries out its activities in the sending state,
- the employee is subject to the legislation of the sending state,
- the anticipated duration of the posting does not exceed 24 months,
- the employee is not sent to replace another posted person.

This article of the Regulation was further elaborated by the Implementing Regulation[14] and by the decisions of the Administrative Commission for the Coordination of Social Security Systems (hereinafter: Administrative Commission).[15] Below I analyse the elements of the posting exception considering also these instruments and the relevant practice of the Court of Justice of the European Union (hereinafter: CJEU or Court).

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11 While it is among conflict of law rules' basic aims to avoid double payment of contributions. Heinz-Dietrich Steinmeyer: Determination of the legislation applicable. In: Maximilian Fuchs – Robertus Cornelissen (eds.): *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009.* Beck, 2015. 154.

12 Administrative Commission for the Coordination of Social Security Systems, 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, 2010/C 106/02, Preamble (1) and (2).

13 Regulation 883/2004/EC Art. 12 (1).

14 Regulation 987/2009/EC 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.

15 Regulation 883/2004/EC Art. 71–72.

3. Preconditions of the posting exception

3.1. The employee is posted to another Member State to perform work on the employer's behalf

Posting presupposes that the employee remains under the subordination of the employer who sends him/her to the host state, meaning that the work is being performed for that employer and that there continues to exist a direct relationship between the worker and the posting employer. A number of elements have to be taken into account to evaluate this factor, 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.[16] Nevertheless the local client of the posting employer might give instructions to the employee,[17] for instance on how the service shall exactly be provided, as this does not change the subordination bond between the employee and the posting employer.

The term "employer" is not defined in the Regulation. In complex organisations or in a network of contracts it could be challenging to identify the entity which could be labelled as employer in the application of the Regulation. The CJEU follows a teleological interpretation and it examines not only who appears formally as the employer in the employment contracts, but also who is actually exercising the employer's rights.

In a recent case[18] long-distance lorry drivers were employed by a company formed in Cyprus, which concluded "fleet management agreements" with transport undertakings established in the Netherlands. Under these contracts the Cypriot company took charge of the management of the heavy goods vehicles operated by the Dutch undertakings, on behalf of and at the risk of those undertakings. The Cypriot company also entered into employment contracts with the drivers. Before the conclusion of these contracts, the drivers concerned had never lived nor worked in Cyprus. When those contracts were performed, they continued to live in the Netherlands and worked, on behalf of the Dutch transport undertakings, in two or more Member States. The Court had to decide on the matter whether the Cypriot company or the Dutch transport companies shall be held as employer in the application of the Regulation.

The CJEU declared that, as a general rule, the relationship between an "employer" and the "personnel" employed implies the existence of a hierarchical relationship. It is necessary to take account of the objective situation of the employed person concerned and all the circumstances of the employment. Consequently, an international long-distance lorry driver must be regarded as being employed, not

16 Administrative Commission Decision No. A2 point 1.

17 Pennings op. cit. 112.

18 C-610/18. AFMB e.a. Ltd v Raad van bestuur van de Sociale verzekeringsbank [ECLI:EU:C:2020:565].

by the undertaking with which he or she has formally concluded an employment contract, but by the transport undertaking that has actual authority over him or her, that does, in reality, bear the costs of paying the wages, and that has the actual power to dismiss him or her.[19]

Interestingly, the CJEU found that temporary work agencies might also rely on the posting exception. In this special form of employment the work is performed for a third party (the user company) and not under the supervision of the employer (the temporary work agency) with whom the employment contract is concluded. Thus the essence of the service is the lending of workforce to the user. In the Manpower case,[20] the CJEU had to decide in which country shall the social security contributions be paid in respect of a French temporary agency worker who was posted to a German user company. The Court examined in detail the relations between the three parties. It found that the centre of the legal relationship was the French temporary work agency. This company paid the salary and could dismiss the worker for any misconduct by him in the performance of his work with the hiring undertaking. Further the hiring undertaking was indebted not to the worker but only to his employer. On the other hand, the employee was required to comply with the working conditions and discipline laid down by the internal rules of the user company. Considering the above, the CJEU concluded that the French company (the agency) was the employee's employer and thus it could rely upon the posting exception.

In practice it could be also difficult to adjudge whether the exception applies to situations where the employee is sent to a subsidiary or representation office of the posting employer. Given the close bond between the posting employer and the recipient, it could be questionable who instructs and controls the worker. If it is still the posting employer who pays the wages, a continuous bond of instructions can be established and the aim of the posting is to perform a specific task, the posting exception shall be applied.[21] Organic ties exist between the sending company and posted person where it is clear who ultimately pays him and who, for example, has the right to dismiss him.[22]

The Administrative Commission finds the posting exception applicable to situations when the employee is posted to one or more other undertakings in the same host state, in so far as, however, the worker continues to carry out his work for the undertaking which posted him. This may be the case, in particular, if the undertaking posted the worker to a Member State in order to perform work there successively or simultaneously in two or more undertakings situated in the same Member State. The essential and decisive element is that the work continues to be carried out on behalf of the posting undertaking.[23] Similarly, if more postings to different Member States immediately follow each other shall in each case give rise to a new posting within the meaning of Article 12.[24]

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19 C-610/18. para. 53., 60., 75.

20 C-35/70. Manpower v Caisse primaire d'assurance maladie de Strasbourg [ECLI:EU:C:1970:120].

21 Steinmeyer op. cit. 168.

22 Maarten Van Zeben – Peter Donders: Coordination of Social Security: Developments in the Area of Posting. *European Journal of Social Security*, 2001/2. 110.

23 Administrative Commission Decision No. A2 point 3(a).

24 Administrative Commission Decision No. A2 point 3(a).

However, there can no longer be any guarantee of maintaining the direct relationship if the undertaking to which the worker has been posted places him/her at the disposal of a third undertaking, be it in the same or in a different Member State. Also, it is not considered to be a posting if 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.[25] Similarly, if it is only the recruitment which takes place in one Member State, but the employment takes place in a second Member State, the situation does not constitutes posting, as the employee is not sent to work to another country.[26]

3.2. The employer normally carries out its activities in the sending state

The posting exception can only be relied upon if there are significant ties between the posting employer and the Member State in which it is established. The aim of this condition is to prevent misuses by letterbox companies, which are registered in Member States with the lowest social security contributions but employ all (or major part) of their personnel in other Member States. To avoid such practices, the CJEU elaborated criteria to establish whether the posting employer normally carries out its activities in the sending state.[27]

According to the facts of the Fitzwilliam (FTS) case,[28] an Irish company employed temporary agency workers in Ireland and in the Netherlands. All of the employees were Irish nationals resident in Ireland and had an employment contract with the agency. The company did not pay contributions to the Dutch system, which practice was disputed by the Dutch authorities as they considered that the company did not carry out any substantial activity in Ireland. Out of its 22 internal staff members, only two worked in the Dutch office and between 1993 and 1996 the company earned most of its income in the Netherlands. In its judgment, the Court considered the postings exception to apply to the case, but with an additional condition. In order to benefit from the advantage afforded by that provision, an undertaking engaged in providing temporary personnel which, from one Member State, makes workers available on a temporary basis to undertakings based in another Member State must normally carry on significant activities in the sending state. The condition of "significant activities" can only be examined in the light of all circumstances of the case, the ruling provided only an indicative list of criteria to be taken into account in the assessment.[29]

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25 Administrative Commission Decision No. A2 point 4.

26 Steinmeyer op. cit. 167.

27 Steinmeyer op. cit. 169.

28 C-202/97. Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen]ECLI:EU:C:2000:75].

29 Those criteria include the place where the undertaking has its seat 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 employment contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, and the turnover during an appropriately

The CJEU has remained consistent[30] with this interpretation and has subsequently expanded its application. In the Plum case[31] it ruled in general (not only in relation to agency work) that the employer could not rely on the posting exception if the activity in the sending state was limited to internal administrative tasks and all the substantive activities were carried out in the host state. The CJEU applied the same principle in the Banks case[32] to a self-employed person temporarily working in another Member State.

The Implementing Regulation codified the above case law. It prescribes that the posting employer shall perform substantial activities in the posting state, other than purely internal management activities. Nonetheless this factor shall be adjudged by 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.[33] The Administrative Commission uses the same factors as the Court elaborated in the Fitzwilliam case.[34]

In a recent case, the CJEU gave a stricter interpretation on the posting exception in relation to temporary work agencies.[35] The case was about a Bulgarian agency which posted workers to user companies in Germany, but not provided any temporary work services in Bulgaria. The CJEU had to decide whether the agency could still rely on Article 12 and consequently its agency workers could stay under the scope of the Bulgarian social security legislation.

The Court acknowledged that the selection, recruitment and assignment of temporary agency workers to user undertakings cannot be regarded as "purely internal management activities", as that concept covers only activities of an exclusively managerial nature which are intended to ensure the effective internal functioning of the undertaking. Although those activities constitute an essential prerequisite for the subsequent assignment of such workers, it is only the assignment of those workers to user undertakings that actually generates turnover for the agency. The CJEU concluded that the fact that a temporary work agency carries out activities of selecting and recruiting workers in the Member State in which it is established, even if those activities are significant, is insufficient in itself for it to be considered that such an undertaking "normally carries out its activities" in that Member State.[36] The ruling also referred to the definition of temporary agency work in EU law, which clearly shows that

typical period in each Member State concerned. That list cannot be exhaustive; the choice of criteria must be adapted to each specific case. C-202/97. para. 40., 43., 45.

30 C-115/11. Format Urządzenia i Montaże Przemysłowe sp. z o.o. v Zakład Ubezpieczeń Społecznych [ECLI:EU:C:2012:606] para. 32.; C-2/05. Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV. [ECLI:EU:C:2006:69] para. 19.

31 C-404/98. Josef Plum v Allgemeine Ortskrankenkasse Rheinland, Regionaldirektion Köln [ECLI:EU:C:2000:607] para. 21–23.

32 C-178/97. Barry Banks and Others v Theatre royal de la Monnaie [ECLI:EU:C:2000:169], para. 25–27.

33 Regulation 987/2009/EC Art. 14 (2).

34 Administrative Commission Decision No. A2 point 1.

35 C-784/19. Team Power Europe' Eood v Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite – Varna [ECLI:EU:C:2021:427].

36 C-784/19. para. 45–50.

the purpose of the activity is assigning workers to user undertakings.[37] Finally, the Court highlighted that its interpretation is necessary to stop "forum shopping", and not to encourage agencies to choose the Member State in which they wish establish themselves on the basis of the latter's social security legislation with the sole aim of benefiting from the most favourable legislation. Such exploitation of legislation would be likely to have a "race to the bottom" effect on the social security systems of the Member States or might even lead to a reduction in the level of protection that they offer.[38]

3.3. The employee is subject to the legislation of the sending state

It is not only the legal consequence of the application of Article 12 that the employee falls under the legislation of the sending state but it is also a prerequisite. The Regulation does not require that the posted worker is socially insured in the sender state, only that he/she is subject to its legislation. Consequently, persons who fall under the scope of the sender state's social security system, but are not insured for any reason (for example, they are pensioners or economically passive for other reasons), can still rely on Article 12.[39]

This condition does not preclude that the worker has been hired especially for the fulfilment of a posting (to perform a certain task abroad), if immediately before the start of the employment, the worker is already subject to the legislation of the Member State in which his employer is established.[40] According to the Administrative Commission, having been subject to the legislation of the sending state for at least one month can be considered as meeting the requirement referred to by the words "immediately before the start of his employment". This shall not mean that shorter periods exclude the application of the posting exception, but such cases require a case-by-case evaluation taking account of all the other factors involved.[41] It is also in the interest of the worker that she/he remains under the scope of the same social security system he belonged to before the commencement of his/her new employment which starts with a posting.[42]

In the Walltopia case,[43] the CJEU declared that for the application of Article 12 it is not necessary that the worker was insured before the posting, or that he/she pursued an activity as an employed person. According to the facts of the case, a Bulgarian national who resided in Bulgaria was posted

37 C-784/19. para. 56.; directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, Art. 3.

38 C-784/19. para. 62–64.

39 Pennings op. cit. 116.

40 Regulation 987/2009/EC Art. 14 (1).

41 Administrative Commission Decision No. A2 point 1.

42 Steinmeyer op. cit. 167.

43 C-451/17. "Walltopia" AD v Direktor na Teritorialna direktsia na Natsionalnata agentsia za prihodite – Veliko Tarnovo [ECLI:EU:C:2018:861].

to the United Kingdom 10 days after the commencement of his employment contract. In the lack of the one-month prior insured period it was questionable whether the posting exception applies here. The Court decided that as the Bulgarian national did not fall under any of the special conflict of laws rules in the Regulation, he was subject to the legislation of the Member State of residence.[44] The CJEU reiterated that the conflict rules laid down by the Regulation are mandatory for the Member States and the national conditions establishing the right to affiliate to a social security scheme cannot have the effect of excluding from the scope of the legislation at issue persons to whom, pursuant to the Regulation, that legislation is applicable. In the given case only the legislation of Bulgaria was applicable to the worker immediately before the start of his employment, thus the posting exception could be applied.[45]

3.4. The anticipated duration of the posting does not exceed 24 months

An essential element of the posting exception is that the employment in the host state is of temporary nature. The previous regulation limited the anticipated duration of the posting in 12 months, with an extension of up to 12 additional months due to unforeseeable circumstances.[46] The current Regulation sets the time limit in 24 months and excludes the possibility of any extensions. The law does not contain any explicit transitional provision on aggregation of the posting periods completed under the previous and the current Regulation. The Administrative Commission nonetheless decided that all periods of posting completed under the previous regime shall be taken into consideration for the calculation of the uninterrupted posting period, so that the total period of the uninterrupted posting completed under the application of both Regulations cannot exceed 24 months.[47]

It seems clear from the wording that the duration of the work shall be examined at the beginning of the posting, as it is the "anticipated" duration which cannot exceed 24 months. It follows that if the foreseeable endurance of the work is longer than 24 months, Article 12 shall not apply.[48]

There is only one possibility to keep the worker under the legislation of the sender state after the 24 months expired. Member States (or their competent authorities) can agree to provide exceptions to the Regulation's rules on the determination of the applicable legislation (Article 12 included), on condition that it is in the interest of certain persons or categories of persons.[49] Such agreements might

44 Regulation 883/2004 Art.11 (3) point e).

45 C-451/17. para. 44–50.

46 Regulation 1408/71/EC Art. 14 (1)a.

47 Administrative Commission for the Coordination of Social Security Systems, Decision No A3 of 17 December 2009 concerning the aggregation of uninterrupted posting periods completed under the Council Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004 of the European Parliament and of the Council, 2010/C 149/04., point 1.

48 Pennings op. cit. 117.

49 Regulation 883/2004/EC Art. 16.

also have retroactive effect and it is not relevant what reasons or circumstances lead the Member States to derogate from the Regulation, until it happens in the interest of the worker.[50] Thus the conditions for applying this provision are almost entirely left to the Member States.[51] Member States can correct the social security status of workers who wrongly relied upon the posting exception (for instance, they were posted for tasks exceeding 24 months) and thus should have paid contributions to the host state. With such agreements, it is not necessary for the sending state to pay back the contributions to the worker (and/or to the posting employer) and the host state does not need to collect its own contributions.[52] However, in this way the danger of legal inequality continues to exist in the EU with respect to the maximum duration of posting, as longer maximum posting periods are possible in some Member States than in others.[53]

A brief interruption of the worker's activities in the host state, whatever the reason (e.g. holidays, illness, training at the posting undertaking), shall not constitute an interruption of the posting period.[54] Thus after such interruptions the posting period does not start over from the beginning.

There is no specific regulation for consecutive postings. For example, if the same worker performs two separate tasks for the same undertaking in the same host state, it is not clear whether these two periods shall be added together in the calculation of the time limit or not. According to the Administrative Commission, "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. Nonetheless, derogation from this principle is permissible "in specific circumstances".[55] Consequently, the Administrative Commission did not exclude the possibility that a consecutive posting could start from day 1, although no indicative examples are included in the decision. Specific circumstances could include cases where the employee performs different, not interconnected tasks, even for the same undertaking in the same Member State.

3.5. The employee is not sent to replace another posted person

The 24 months limit could be easily circumvented if upon expiry the posted worker could be substituted with another posted worker. This misuse is explicitly banned by Article 12. The previous Regulation prohibited replacement only if the first worker has completed his term of posting,[56] while

50 Case 101/83. Raad van Arbeid v P.B. Brusse [ECLI:EU:C:1984:187], para. 20–26.

51 Giubboni–Iudicone–Mancini–Faioli op. cit. 57.

52 Pennings op. cit. 126.

53 Van Zeben–Donders op. cit. 114.

54 Administrative Commission Decision No. A2 point 3(b).

55 Administrative Commission Decision No. A2 point 3(c).

56 Regulation 1408/71/EC Art. 14 (1)a.

the current text does not contain such limitation. Thus it is not clear whether under the existing rules replacement is banned in general or only if it constitutes a misuse. It seems reasonable to follow the later interpretation and not prohibit substitution for example in cases of long term illness.[57] Nonetheless it seems almost impossible to execute this rule, as it could be extremely difficult to prove – for example in the construction sector – that the worker in fact was posted to replace a previously posted person.[58]

The CJEU interprets this condition strictly and does not consider the posting exception to apply if the person arriving to replace the posted worker is employed by another employer. In a specific case, the posted workers of a Hungarian company worked for an Austrian company for 24 months. After the maximum period was exhausted, the same activity was carried out by the employees of another Hungarian company, which was organisationally linked to the first company. After another two years, the Austrian company once again signed a contract with the first Hungarian company. The CJEU ruled that Article 12 constitutes derogation from the general rule and consequently it must be strictly interpreted. The Court found that in the given case the recurrent use of posted workers to fill the same post, even though the employers responsible for posting workers are different, did not comply with the wording or the objectives of Article 12 and was not consistent with the context of which that provision is part, so that a person posted could not benefit from the special rule laid down in that provision.[59] As a result, the Hungarian posted workers could not claim to remain under the Hungarian social security system despite being employed in Austria.[60]

3.6. The legal significance of the A1 document

The correct implementation of the Regulation presupposes the cooperation and tight information ties between the competent institutions of the Member States. EU law expressly prescribes these as their mutual obligations.[61] These are especially important in case of posted workers, as the host state's authorities cannot examine whether the preconditions of the posting exceptions are met without the help of the sending state's institutions. The A1 (former E101) form has been devised as a uniform document certifying the applicable legislation. Posted workers or their employers can request the relevant national authority in the worker's residence country to provide the form.[62]

57 Steinmeyer op. cit. 170.

58 Pennings op. cit. 118.

59 C-527/16. Salzburger Gebietskrankenkasse and Bundesminister für Arbeit, Soziales und Konsumentenschutz v Alpenrind GmbH and Others [ECLI:EU:C:2018:669], para. 89–100.

60 Gellérné–Kovács op. cit. 86–87.

61 Regulation 883/2004/EC Art. 76.

62 Giubboni–Iudicone–Mancini–Faioli op. cit. 57.

Importantly, holding an A1 form is not a precondition to apply Article 12 and in practice – especially in cases of short-term postings – parties do not apply for the form before the posting.[63] However, the A1 form is the most convenient evidence to prove that the worker shall not be subject to the social security system of the host state.

The certificate issued by the competent social security authority of the sending state has been given strong legal force by the Implementing Regulation[64] and the CJEU's practice. Consequently, numerous problems may arise if the sending state's institution issues the certificate without properly examine if the conditions of the posting exception are fulfilled.[65] It is of utmost importance that legal remedies are available in case of misuses, but the system of coordination of national social security systems could not operate without the mutual acceptance of certificates being the general rule.[66] The Administrative Commission elaborated a dialogue and conciliation procedure to be followed in cases where there is doubt about the validity of a document or about the correctness of supporting evidence.[67]

Under the principle of sincere cooperation,[68] the certificates cannot be considered null and void by the host state until it is withdrawn or declared invalid by the issuing authority.[69] Neither the authorities nor the courts of the host state shall have jurisdiction in this regard, even if, in the opinion of the Administrative Commission the certificate was issued incorrectly or in case it was issued retrospectively.[70]

Nonetheless, also in accordance with the principle of sincere cooperation, if the institution of the host state contacts the issuing institution with specific information alleging abuse, it is expressly required to review the validity of such certificates and, if necessary, to withdraw them. However, the institution of the host state may not, on its own discretion, disregard the contents of the certificate, even if the workers concerned clearly do not fall within the scope of the posting exception.[71] If the issuing institution fails to carry the requested review within a reasonable period of time, the court of the host state may, within its own jurisdiction, decide to disregard the certificate, provided that the

63 Pennings op. cit. 122.

64 Regulation 987/2009/EC Art. 5.

65 Giubboni–Iudicone–Mancini–Faioli op. cit. 57–60.

66 Steinmeyer op. cit. 172.

67 Administrative Commission for the Coordination of Social Security Systems, 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.

68 Treaty on the European Union Art. 4 (3).

69 C-2/05. Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV [ECLI:EU:C:2006:69], para. 26., 31–32.

70 C-527/16., para. 47., 64., 77. Nonetheless, A1 forms are binding on the courts or tribunals of the host state solely in the area of social security, see: C-17/19. Criminal proceedings against Bouygues travaux publics and Others [ECLI:EU:C:2020:379].

71 C-620/15. para. 44., 52.

posting employer is allowed to challenge with due regard to the safeguards associated with the right to a fair trial.[72]

3.7. Self-employed persons as posted workers

Originally only employees fell under the scope of coordination of social security systems. As the free movement of self-employed persons raises the same questions in social security law as in the case of employees, with Regulation 1390/81/EEC self-employed persons became subject to the coordination measures.[73] Today, self-employed persons enjoy the same legal status as employees under Regulation 883/2004/EC[74], however the technical rules might be different stemming from the distinct structure of their employment. For example, the wording of the posting exception for the self-employed is simpler than in the case of employees, as these persons do not have an employer who could post them, rather they post themselves. Thus the bond between the worker and the employing entity is irrelevant.

In practice the classification of the worker as self-employed or as employee could be challenging. In the coordination of social security systems, there is no legal definition of either category, instead the law of the Member State where the activity is carried out shall apply.[75] Consequently, the classification of the same person in the sending and the host state might be different.[76]

The Regulation lists the following preconditions: a person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months.[77] The decisive condition is the habitual carrying out of a substantial similar activity in the Member State where the person is established.

In particular, that person must have already pursued his activity for some time before the date when he wishes to take advantage of this provision and, during any period of temporary activity in another Member State, must continue to fulfil, in the Member State where he is established, the requirements for the pursuit of his activity in order to be able to pursue it on his return.[78] The Administrative Commission listed the following exemplificative criteria to be examined in the sending state: having use of office space, paying taxes, having a professional card and a VAT number or being registered

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72 C-359/16. Criminal proceedings against Ömer Altun and Others [ECLI:EU:C:2018:63], para. 55–56. The Court confirmed its previous practice (outlined above) in: C-356/15. European Commission v Kingdom of Belgium [ECLI:EU:C:2018:555].

73 Council Regulation 1390/81/EEC of 12 May 1981 extending to self-employed persons and members of their families Regulation 1408/71/EEC on the application of social security schemes to employed persons and their families moving within the Community.

74 Steinmeyer op. cit. 157.

75 Regulation 883/2004/EC Art. 1 points a–b).

76 Pennings op. cit. 120.; Steinmeyer op. cit. 148–149.

77 Regulation 883/2004/EC Art. 12 (2).

78 Regulation 987/2009/EC Art. 14 (3).

with chambers of commerce or professional bodies. As for the temporal aspect, pursuing one's activity for at least two months can be considered as meeting the requirement referred above. Shorter periods would require a case-by-case evaluation taking account of all the other factors involved.[79] However, it is still a problem that which authority could monitor the infrastructure of the self-employed person – who posts him/herself – left in the sending state.[80]

It is also required that the activity pursued in the host state is similar to the self-employed activity normally pursued. Here the actual nature of the activity, rather than of the designation of employed or self-employed activity that may be given to this activity by the other Member State shall be considered.[81]

4. Posting in labour law and in the coordination of social security systems: a comparison

The concept of posting in the coordination of social security system has been built up for decades by the interaction between legislation and jurisdiction. The legislator incorporated the main findings of the CJEU in statutory law, which was further elaborated by case-law. However, this sophisticated concept in social security law was only partially followed when the EU adopted the first directive on the labour law aspect of posting.[82] Posted workers have a special legal status in EU labour law as well, but under a slightly different logic.[83]

As for the applicable labour law to posted workers, EU law stipulates that the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country.[84] Thus, temporary employment abroad does not change the applicable law to the employment relationship, but the employment remains under the law of the sending state (the law of the place where the regular employment takes place).[85] In a narrower sense, under EU labour law, posting means that a worker is temporarily working in another Member State to provide services. For this setting, a separate piece of legislation was adopted in 1996 in the form of the posting directive. According to this directive, if the aim of the posting is the provision of a transnational

79 Administrative Commission Decision No. A2 point 2.

80 Van Zeben–Donders op. cit. 115.

81 Regulation 987/2009/EC Art. 14 (4).

82 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 (hereinafter: posting directive).

83 For an overall comparison see: Frans Pennings: Posting and Social Security Coordination. In: Roger Blainpain (ed.): Freedom of Services in the European Union: Labour and Social Security Law. The Bolkestein Initiative. *Bulletin of Comparative Labour Relations*, 2006. 252–253.; Fekete, Sára: The Challenges of Defining Posted Workers. *Hungarian Labour Law E-Journal*, hllj.hu, 2018/01. 38–40.

84 Regulation 593/2008/EC of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) Art. 8 (2).

85 At the same time, the posted worker may also be subject to the so-called imperative rules which, because of their importance, are crucial for safeguarding the public interests in the host state. Rome I Art. 9.

service, although the worker remains subject to the labour law of the home state, the host state's law concerning the working conditions explicitly listed in the directive shall apply (the "hard core" of labour standards[86]), if it is more favourable to the worker and the posting does not last longer than 12 months and a possible extension of 6 months. An additional requirement is that the posting takes place in the framework of the performance of a service contract, intra-corporate posting or temporary agency work.[87] Consequently, the concept of posting under the directive is narrower than that of private international law, since the purpose and form of posting are irrelevant in the latter.

Therefore, the basic elements of posting in the posting directive and in the coordination of social security systems are the same (the temporary work in another country does not change the applicable law). However, there are significant differences in the details which can lead to situations when a person is considered a posted worker under the Regulation, but not for labour law purposes. For example, the worker does not travel for the purpose of providing cross-border services but for training, or the employment lasts longer than 18 months in the host state. These cases shall be considered as posting under the Regulation but not from a labour law point of view.[88]

The main differences between the directive's and the Regulation's concept are the following. As seen above, the aim of the temporary employment in the host state is irrelevant in the coordination of social security systems, while it shall take place within the framework of the provision of transnational services in the case of the posting directive. A posted worker stays under the social security legislation of the sending state and there is only one national legislation that applies during the assignment. As for the applicable labour law, the worker remains subject of the sending state's labour law, however the "hard core" of the host state's legislation shall apply, on condition that it is more favourable to the employee.[89] As a result, two Member States' law could be applied parallelly. The personal scope is also different. The posting directive applies only to employees – as defined by the law of the host state –,[90] while the Regulation covers also self-employed persons. In the latter, the basic concepts of employee and self-employed shall be applied as defined in the law of the sending state. It is rather surprising that even the maximum time limit of posting differs in the two pieces of legislation: it is 24 months in social security coordination and 12 months plus 6 months possible extension in the posting directive.[91]

The differences are summarized in the chart below.

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86 Posting directive Preamble (14).

87 Posting directive Art.1–2, Art. 3 (1a).

88 In his 1969 monograph, István Szászy suggested that the posted worker should remain under the social security system of the sending country. Furthermore, in his view, social security should be considered a specific part of labour law, so the same attaching rules are needed. Szászy, István: *Nemzetközi munkajog.* Összehasonlító *jogi tanulmány.* Budapest, Közgazdasági és Jogi Könyvkiadó, 1969. 568–569.

89 Posting directive Art. 3 (1) and (7).

90 Posting directive Art. 2 (2).

91 Posting directive Art. 3 (1a).

Chart No. 1: The concept of posting in the coordination of social security systems and the posting directive (own edition)

	Coordination of social security systems	**Posting directive**
Applicable law to the posted worker (main rule)	Sending state's law.	Sending state's law.
The role of the host state's law	Not applicable. Only one legislation applies to one period.	Applies as regards the working conditions listed in Article 3 (1) of the posting directive, if it is more favourable to the employee. The employee might be subject to two legislations.
The definition of the employee	As defined in the sending state's law.	As defined in the host state's law.
Personal scope	Employees and self-employed.	Employees.
Time limit of postings	24 months.	12 months, may be extended by 6 months.

5. Conclusions

On the basis of free movement of workers and services, EU law enables posted workers to stay under the social security system of the sending state. In this special setting, the law of the state where the activity is pursued shall not apply. This prescription removes significant obstacles away from employees working temporarily in Member States other than their usual place of work, as well as from their employers who provide cross-border services.

In the case law concerning the social security status of posted workers, two major trends can be outlined. First, the CJEU has given first priority to the relevant basic economic freedoms while the respect of the independent national social security systems enjoys much less significance.[92] However, this does not mean that no further steps are needed to break down barriers to posting. A good illustration is the incoherence of the regulation which becomes apparent when labour law and social security law are applied together. For example, posted workers working 24 months in the host state remain subject to the sending state's social security legislation, but the applicable labour law will change after the expiry of the first 18 months.

Second, if the integrity of the national social security systems is threatened by abusive practices, the Court has stood ready to intervene and elaborate on the conditions of the posting exception by strict interpretation of its statutory elements. This is apparent when posting takes the form of agency work and the actual content of the transnational service is the leasing of manpower. While agencies can still rely upon the special rules of posting, they need to have clients (user companies) also in the sending state to keep their employees under the coverage of the sending state's social security system. The intent to prevent misuse is also evident in the case law on A1 forms. The mere logic of the coordination of national systems presupposes – and the Implementing Regulation expressly

92 Paju op. cit. 74.

prescribes – that certificates issued by one Member State shall be accepted by all other Member States. Nonetheless, the CJEU has cautiously and gradually opened up some space for the courts of host states to ignore dubious certificates if the issuing authority is not cooperative.

Preventing abuse seems to be a permanent task of the CJEU, but is awaiting legislation to address the social security and labour law situation of posted workers with more coherent legal solutions.