



# Procedures related to the granting of Portable Document A1: an overview of country practices

*Report prepared under Contract No  
VC/2013/0300 - FreSsco  
May 2014*

Written by Prof Dr Yves Jorens and Prof Dr Jean-Philippe Lhernould

This report was prepared in the framework of Contract No VC/2013/0300 “Network of Experts on intra-EU mobility – social security coordination and free movement of workers / Lot 1: Legal expertise in the field of social security coordination and free movement of workers”. This contract was awarded to FreSsco, a network of independent experts from 32 European countries coordinated by Ghent University.



Authors:

Prof Dr Yves Jorens, professor of social security law and European social law, Ghent University.

Prof Dr Jean-Philippe Lhernould, professor of law, University of Nantes.

**Suggested citation:**

JORENS, Y. and LHERNOULD, J.-P., *Procedures related to the granting of Portable Document A1: an overview of country practices*, FreSsco, European Commission, May 2014, 45 p.

**Disclaimer:**

This document has been prepared for the European Commission. However, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

© European Union, 2014

Reproduction is authorised provided the source is acknowledged.



## Table of Contents

Executive Summary .....	5
1 Introduction .....	8
1.1 The introduction of the principle of sincere cooperation into the Coordination Regulations.....	8
1.2 The principle of sincere cooperation applied to certificates issued by Member States: CJEU case law and the codification by the Coordination Regulations .....	9
1.3 Portable Document A1 purposes .....	11
1.4 The objectives and structure of the report.....	12
2 The granting stricto sensu of portable document A1 .....	14
2.1 Institutions competent to grant PD A1 .....	15
2.1.1 Central vs local granting.....	15
2.1.2 'Per scheme' vs transversal granting .....	16
2.2 Standard procedures for PD A1 granting .....	18
2.2.1 The implementation of e-procedures .....	18
2.2.2 Issuing processes .....	22
2.2.3 Information-sharing policies.....	26
2.3 The status of PD A1 when the applicable legislation is provisional .....	26
3 Difficulties arising after PD A1 has been issued or denied (follow-up).....	28
3.1 Refusal: internal administrative or judicial procedures .....	29
3.2 The cancellation of PD A1 .....	30
3.2.1 The procedure .....	30
3.2.2 Information-sharing.....	30
3.2.3 Information about changes in the factual situation .....	34
3.2.4 Retroactively solving double insurance situations .....	36
3.3 The withdrawal of PD A1 .....	38
3.3.1 Dialogue between the issuing country and the other country .....	38
3.3.2 The conciliation procedure .....	39
3.3.3 Reactions in the event of fraud.....	40
4 Conclusion .....	43

## Executive Summary

The principle of sincere cooperation recognised in the European treaties, as well as in the Coordination Regulations, is the key for a successful implementation of the Coordination Regulations. Good cooperation implies the exchange of information between the institutions as well as the persons covered by the Coordination Regulations. In several cases, the CJEU has stressed that countries should rightly comply with the principle of sincere cooperation for issuing certificates. These rulings apply to portable documents like the A1 form (PD A1), a crucial document that should guarantee the compliance with the general principle that a person is only subject to one applicable legislation. CJEU case law has laid down a two-fold principle of cooperation, according to which a certificate issued by a Member State is binding to other Member States and the dialogue between institutions may help to resolve the disputes between the Member States, possibly leading to the withdrawal of the certificate by the issuing country.

The first part of the report relates to the procedures used for granting the PD A1 forms. With respect to the granting of PDs A1 the coordination rules are flexible. No detailed rule is provided about the process leading to the issuing of these certificates. Member States can freely determine the issuing procedures as long as the certificates carry out the proper assessment of the fact and ensure the correctness of the information contained in that certificate. The internal procedures to grant PD A1 show a great variety of practices among the Member States. PDs A1 are issued either at national level by one single institution or at local level by several institutions. The central approach seems to prevail. Often it is argued that centralisation is a good way to address complicated cases and preserve a uniform application and interpretation of the rules of conflict of law. However, although the system of granting PDs A1 at local level may be less reliable to a certain extent, it can bring more flexibility and may be more in tune with the objectives of efficiency, active assistance, rapid delivery and accessibility. It could also allow a better control of fraud. For the delivery of PD A1, often the national distinction on the basis of the professional status of the persons is followed. Here, each scheme sets and follows its own issuing procedure, including the application form, IT tools and staff.

Many countries apply electronic procedures to grant PD A1. Countries who use an automated procedure also highly recommend the extension of this system to all countries. It is considered that an electronic procedure has several advantages as it guarantees a higher degree of standardisation and quality, and at the same time reduces the duration of the whole procedure as well as the administrative burden for the applicants. Moreover, e-procedures are said to be much less burdensome for administrations. Sometimes e-procedures are combined with more traditional paper procedures, which is also done in sensitive or complex situations. Most countries apply separate questionnaires for employees and for self-employed persons. Most countries usually provide national (sometimes very detailed) templates for the applicants to fill out. Such templates are very different between countries. While some of the procedures lead to an immediate issuing of the documents, this can take several weeks or even months in other States.

The report mentions some of the problems that are complicating and may endanger the correct implementation of the rules of conflict of law. A crucial element is the need for all parties involved to have access to relevant and up-to-date information even if it is a sensitive matter, since it is related to administrative work for countries. Access to information by the issuing institution is crucial in order to know whether the PD A1 requested should be delivered. E-procedures facilitate the process, especially when searches are automatically done in various databases. However, many countries also fear that in some cases exchanges of information could be an unnecessary burden. The debate between 'more information' or 'less information' seems to divide countries. In the event of refusal by the competent authority to issue a PD A1 there are no procedures generally applicable in all Member States and it seems necessary to encourage countries to arrange such internal procedures. Yet, some problems are also highlighted that complicate the delivery of PDs A1, such as the system of the provisional determination of the applicable legislation. The reports show that the procedure under Article 16 of Regulation (EC) No 987/2009 is not always complied with, as the system is described as a source of confusion, unclear and burdensome.

The second part of the report focuses on problems and difficulties that arise after PDs A1 are issued or denied (in the event of refusal, cancellation or withdrawal of these forms). Here as well the importance of obtaining information is demonstrated. Exchange of information is necessary when institutions want to check if workers are subject to the correct legislation. Even if it is a source of additional work for institutions, receiving correct information is a preliminary condition to be able to withdraw a PD A1. This access to and exchange of information has led to systems that entail copies being sent to other countries and a whole process of storage. Despite the fact that it can be burdensome, the storage of A1 certificates is considered as an effective way to run across double insurance cases from the vast number of certificates.

The cancellation of PDs A1 is often connected to the difficulties caused by changes in the factual situation. Several Member States have also referred to double insurance situations being solved retroactively and the difficulties they face in this respect. This last issue is a typical example of difficulties that arise after PDs A1 have been issued. Different problematic situations may arise: on the one hand, situations in which a person is covered by the social security legislation of two Member States at the same time, and on the other hand, a situation in which the employers involved were unaware of each other's existence or of the decisions made. The Member States' accounts reveal that several questions remain. Apart from the difficulties the Member States and their institutions face, the effect on the individual involved cannot be forgotten either. Repayment procedures are often difficult and complex.

The possible cancellation of PDs A1 is differently organised across the different Member States. Often, only a very rudimentary or inadequate regulatory framework exists concerning the withdrawal of PDs A1. Also here, the smooth exchange of information between Member States is important, not least as Member States are not allowed to unilaterally withdraw PDs A1 granted by other Member States.

A dialogue and conciliation procedure has been set up at European level. It should support the good cooperation between Member States when withdrawing PDs A1.

Several Member States have pointed out difficulties and shortcomings surrounding the dialogue between the different countries involved in the withdrawal of a PD A1, and the procedure is not always seen as sufficiently effective. It seems necessary to make the conciliation procedure more efficient by revising it and installing a much stricter timeframe.

Throughout the report, several suggestions, inspired by the Member States, are made that could contribute to solving some of the problems in a flexible way and in line with the spirit of sincere cooperation between Member States. They can be regarded as 'soft' analysis or 'soft' guidance. Taking into account administrative burden, a code of good conduct with minimum standards could be set with respect to the timing for issuing PDs A1 or the extension of e-procedures, access to e-application forms, including the PD A1 authentication system and filling out documents online. A good cooperation could be better achieved by developing some common standard rules and codes of conduct on a European level that could avoid differences between websites regarding the conditions to grant PD A1 certificates: e.g. a standard application form across Europe. Also some additional European practical guidance on issues such as what should happen when an institution is dealing with incomplete forms could be welcome.

The report also shows that specific problems need ad hoc solutions. References have been made to procedures that deal with the provisional determination of the applicable legislation, the retroactive solving of double insurance situations, a rationalisation of the storage and/or transfer of PDs A1, and a more effectively working dialogue in conciliation procedures. Some additional European action is welcomed, as practice has demonstrated that the supervision of whether the procedure to deliver a PD A1 is complied with, causes a lot of teeth gnashing, asking for a better cooperation. It has been noticed that in some countries either the court or the legislature has decided not to wait for Europe to take possible measures and to take action themselves.

In our conclusions we propose to introduce some guidelines or practices on a European level either by using soft law or by modifying the regulations.

## 1 Introduction

Pursuant to the principle of sincere cooperation laid down in Article 4(3) TFEU, the Member States must, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. They must take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising from the Treaties or from the acts of the institutions of the Union. They must facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Sincere cooperation between Member States is uneasy to achieve in the field of social security coordination. In particular, sincere cooperation is essential to ensure that PDs A1 are delivered in conformity with the rules on applicable legislation. The history of coordination rules shows that, due to various causes such as the complexity of regulations, the administrative burden implied, the difficulty of access to updated and accurate information as well as the diversity of individual cases, Member States are constantly under pressure to comply with Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 as interpreted by the CJEU. The internal organisation of social security schemes, which are subject to various constraints (administrative organisation, budgetary issues, IT policies, staff awareness in the area of EU rules), is a parameter to take into consideration when assessing how EU law, particularly coordination rules, are being implemented in the light of the principle of sincere cooperation.

Cooperation between Member States is key to the successful implementation of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009. Failure to cooperate may lead to undesirable situations. For instance, a person may be deprived of benefits, may receive a lower amount than expected, may be insured in the wrong Member State or may be subject to double insurance. The lack of cooperation can also have negative effects for countries, especially if benefits or insurance are unfairly granted. Problems of cooperation may ultimately increase the burden for national administrations which, for instance, may have to retroactively resolve difficulties relating to the incorrect application of coordination rules. Inefficient cooperation leads to highly time-consuming activities.

### 1.1 The introduction of the principle of sincere cooperation into the Coordination Regulations

Persons to whom coordination rules apply are subject to the legislation of a single Member State (Regulation (EC) No 883/2004, Article 11(1)). Compliance with this core coordination principle requires an efficient cooperation between countries, particularly where a person's situation is closely connected to two or more countries. PD A1 granting rules are key to comply with the single applicable legislation principle. The principle of sincere cooperation has been explicitly inserted into the Coordination Regulations.



According to Article 76(2) of Regulation (EC) No 883/2004, the authorities and institutions of the Member States must lend one another their good offices and act as though implementing their own legislation. The authorities and institutions of the Member States may communicate directly with one another and with the persons involved or their representatives (Article 76(3)). Good cooperation also means timely reactions: the institutions shall respond to all queries within a reasonable period of time (Article 76(4)).

Good cooperation is based on the exchange of information. In this respect, the institutions and persons covered by the Coordination Regulations have a duty of mutual information to ensure the correct implementation of this Regulation (Article 76(4)). If the institutions must provide the persons concerned with any information required to exercise the rights conferred on them by the Regulation, the persons concerned must also inform the institutions of the competent Member State and of the Member State of residence as soon as possible of any change in their personal or family situation which affects their right to benefits under this Regulation (Article 76(4)). A lot of attention is given to the quality of information: exchanges between Member State authorities and institutions and persons must be based on principles of public service, efficiency, active assistance, rapid delivery and accessibility.<sup>1</sup>

## **1.2 The principle of sincere cooperation applied to certificates issued by Member States: CJEU case law and the codification by the Coordination Regulations**

The CJEU ensures that countries rightly respect the principle of sincere cooperation for the issuing of certificates.

E-forms, which used to be granted by Member States under Regulation (EC) No 1408/71, were at the centre of a case involving a retiree who resided in one Member State (where he was insured) and who had been subject to hospital surgery in another Member State during a visit to a family member. Even though he had an E111 form (occasional care) delivered by the competent institution of the State of insurance, the sickness fund of the country where the care had been provided asked the competent institution of the State of insurance to send an E112 form (planned care). The request was turned down. Consequently, the retiree had to pay for the cross-border care and could not be reimbursed in the State of insurance. For the CJEU, "*The institutions of the place of stay and the place of residence jointly assume the task of applying Articles 31 and 36 of Regulation No 1408/71 and Articles 31 and 93 of Regulation No 574/72, and must, in accordance with Article 10 EC and Article 84 of Regulation No 1408/71, cooperate in order to ensure that those provisions are applied correctly and, consequently, that the rights conferred on pensioners and members of their families by Article 31 of Regulation No 1408/71 with a view to facilitating the freedom of movement of those insured persons are fully respected*".<sup>2</sup>

<sup>1</sup> Article 2(1) of Regulation (EC) No 987/2009; Decision No A1 of 12 June 2009.

<sup>2</sup> Case C-326/00, Ioannidis.

In other words, the duty to cooperate is shared by all countries involved in a given situation. For the same reason, the CJEU ruled in another case that *"Where a claim for an award has been submitted to an institution of a Member State, it is incumbent on that institution, pursuant to Article 5 of the Treaty and Article 84 of Regulation 1408/71, to cooperate with the competent institutions of the other Member States in order to proceed with the award and apportionment."*<sup>3</sup>

The need for a close cooperation and for acknowledging forms or documents issued by one country is emphasised in cases dealing with E101 forms. It is necessary to go back to the *Fitzwilliam* case,<sup>4</sup> where the CJEU set as a principle that *"As regards the competent institutions of the Member State to which workers are posted, it is clear from the obligations to cooperate arising from Article 5 of the Treaty that these obligations would not be fulfilled - and the aims of Article 14(1)(a) of Regulation No 1408/71 and Article 11(1)(a) of Regulation No 574/72 would be thwarted - if the institutions of that Member State were to consider that they were not bound by the certificate and also made those workers subject to their own social security system".* As a result, *"in so far as an E 101 certificate establishes a presumption that posted workers are properly affiliated to the social security system of the Member State in which the undertaking providing temporary personnel is established, such a certificate is binding on the competent institution of the Member State to which those workers are posted".* Consequently, *"as long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of a Member State to which workers are posted must take account of the fact that those workers are already subject to the social security legislation of the State in which the undertaking employing them is established and that institution cannot therefore subject the workers in question to its own social security system."*

In the same case, the CJEU also sets out a basis for a dialogue between Member States: *"it is incumbent on the competent institution of the Member State which issued the E 101 certificate to reconsider the grounds for its issue and, if necessary, withdraw the certificate if the competent institution of the Member State to which the workers are posted expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because the information does not correspond to the requirements of Article 14(1)(a) of Regulation No 1408/71".* Should the institutions concerned not reach agreement *"it is open to them to refer the matter to the Administrative Commission".* Ultimately, if the AC does not succeed in reconciling the points of view of the competent institutions, *"the Member State to which the workers concerned are posted may, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, at least bring infringement proceedings under Article 170 of the EC Treaty".*

The *Fitzwilliam* case lays down a two-fold principle of cooperation: a certificate issued by a Member State is binding to other Member States; a dialogue between institutions may help resolve the dispute between the Member States involved, possibly leading to the withdrawal of the certificate by the issuing country.

---

<sup>3</sup> Case C-335/95, Picard.

<sup>4</sup> Case C-202/97, Fitzwilliam.

The administrative dialogue between Member States is all the more crucial as the CJEU ruled that *"a court of the host Member State is not entitled to scrutinise the validity of an E 101 certificate as regards the certification of the matters on the basis of which such a certificate was issued, in particular the existence of a direct relationship between the undertaking which posted the worker and the posted worker himself."*<sup>5</sup> In other words, as long as it has not been withdrawn or declared invalid, a certificate takes effect in the internal legal order of the Member State to which the workers concerned are posted and, therefore, binds its institutions, including domestic courts. The legal value of E101 certificates has been confirmed in subsequent cases.<sup>6</sup>

Article 5 of Regulation (EC) No 987/2009 codifies the case law of the CJEU and sets standard procedures common to all documents issued by the institutions of Member States. As a principle, these documents must be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued. When there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document must ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. Ultimately, *"where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall endeavour to reconcile the points of view within six months of the date on which the matter was brought before it."* The procedure of dialogue and conciliation has been detailed by Decision No A1 of 12 June 2009.

The legal value of PD A1 has been stressed by the CJEU and subsequently by regulations. It is therefore important to determine the purposes of such certificates: this work will be done in the next section.

### 1.3 Portable Document A1 purposes

In line with the principle of a single applicable legislation, a PD A1 concerns the social security legislation which applies to a person and confirms that this person has no obligations to pay contributions in another Member State. It establishes a presumption that the holder is properly affiliated to the social security system of the Member State which has issued the certificate.

PDs A1 are well-known for posting cases. As the CJEU stated, by granting such a certificate, *"the competent institution of the Member State in which an undertaking providing temporary personnel is established declares that its own social security system will remain applicable to posted workers for the duration of their posting. By virtue of the principle that workers must be covered by only one social security*

---

<sup>5</sup> Case C-2/05, *Herbosch Kiere*.

<sup>6</sup> Case C-178/97, *Banks*: an E101 form can be issued retroactively.

*system, the certificate, in comprising this declaration, necessarily implies that the other Member State's social security system cannot apply.”<sup>7</sup>*

PDs A1 are used for various cases covered by Title II of Regulation (EC) No 883/2004: the pursuit of activities in two or more Member States; ‘Article 16 agreements’; civil servants; mariners; flight or cabin crew members; contract staff of the European Communities. Given the complexity of the applicable rules, risks of PD A1 misuses are real. Some situations are sensitive: posting, ‘Article 16 agreements’ and the pursuit of activities in two or more Member States. The report will mainly focus on these options even if, in practice, problems related to PD A1 granting are mainly related to the rules of conflict of law of Article 13 of Regulation (EC) No 883/2004 (pursuit of activities in two or more Member States).

The issuing of a certificate may be more complex when the determination of the applicable legislation is provisional. For persons who pursue activities in two or more Member States, it is incumbent on the designated institution of the place of residence to determine without delay the legislation applicable to the person concerned. That initial determination is however provisional.<sup>8</sup> Also, when there is a difference of views between the institutions or authorities of two or more Member States concerning the determination of the applicable legislation, the person concerned must be made provisionally subject to the legislation of one of those Member States.<sup>9</sup> In such cases, the competent institution can either issue a PD A1 immediately or wait until the applicable legislation becomes definitive.<sup>10</sup> The status of certificates issued during the provisional period raises problems which will be discussed in the report.

## **1.4 The objectives and structure of the report**

The approach of coordination rules is very different whether they concern, on the one hand, the granting of a PD A1 and, on the other hand, the follow-up of certificates after they have been issued.

With regard to the granting of PD A1 *stricto sensu*, coordination rules are flexible and provide limited guidance. Whereas the AC lays down the structure, content, format and detailed arrangements for the exchange of documents,<sup>11</sup> and whereas Regulation (EC) No 987/2009 sets out the information policy impacting the granting of PD A1,<sup>12</sup> regulations provide no detailed rule (except for provisional certificates) about the process leading to the issuing of a certificate. This flexibility reflects the fact that Member States retain the power to organise their internal procedures in the field of social security.<sup>13</sup>

---

<sup>7</sup> Case C-202/97, *op cit*.

<sup>8</sup> Article 16 of Regulation (EC) No 987/2009.

<sup>9</sup> Article 16 of Regulation (EC) No 987/2009.

<sup>10</sup> Practical Guide, page 37.

<sup>11</sup> Article 4(1) of Regulation (EC) No 987/2009. Rules for exchanging data between institutions are also set by Articles 2 to 4 of Regulation (EC) No 987/2009.

<sup>12</sup> See for instance Articles 15 and 19 of Regulation (EC) No 987/2009.

<sup>13</sup> Case 238/82, *Duphar*.

When designing their internal rules of issuing, Member States are nevertheless influenced by the principle of sincere cooperation. In particular, procedures must be based on the principles of public service, efficiency, active assistance, rapid delivery and accessibility. The *Format* case<sup>14</sup> gives additional and concrete guidance to Member State institutions about the method of granting: the Court indeed indicates that "*When assessing the facts with a view to determining the social security legislation applicable for the purposes of issuing an E 101 certificate, the institution concerned may where appropriate take account not only of the wording of contractual documents, but also of factors such as the way in which employment contracts between the employer and the worker concerned had previously been implemented in practice, the circumstances surrounding the conclusion of those contracts and, more generally, the characteristics and conditions of the work performed by the company concerned, in so far as those factors may throw light on the actual nature of the work in question.*" Also, "*it is incumbent on the institution concerned, whatever the wording of those contractual documents, to base its findings on the employed person's actual situation*".

All in all, Member States have an important margin of discretion for designing the PD A1 granting procedure. The objective of the report is to explore the national procedures, differences between them, to focus on exchange of experience, innovative approaches as well as challenges and common problems relating to the granting of PD A1 (see 2).

Difficulties that arise after issuing (or refusing to issue) a PD A1 are subject to a stricter control by the Coordination Regulations. As described above, the process is based on a dialogue between countries involving in a last stage, if necessary, the AC. However, the implementation and the efficiency of the whole Regulation process are debated. The report aims to assess administrative problems, exchange of experience and challenges related to the follow-up of granting a PD A1 (see 3).

The analysis will be conducted on the basis of the questionnaire replies distributed to the Member States on 14 February 2014 (note from the Secretariat of 3 February 2014 AC 023/14).

We will also indicate to what extent some of these national approaches and procedures may be seen as administratively burdensome or, on the contrary, easier to handle for countries. This does not mean that a complete impact assessment will be undertaken. This is feasible neither on the basis of the answers received nor due to the short timeframe to write this report. In general, the assessment of the administrative burden is hard to make. For instance, the fact that more information is exchanged does not in itself imply that there is additional administrative burden. Some measures may imply extra work which is compensated by the reduction of the workload for the administrations when investigating the cases. Also, administrative burden depends on the procedures which the countries use (electronic/paper) and on internal administrative organisation.

---

<sup>14</sup> C-115/11, *Format*.

## 2 The granting *stricto sensu* of portable document A1

We already mentioned that while the AC lays down the structure, content, format and detailed arrangements for the exchange of documents and SEDs, Member States can freely determine the issuing procedure of PD A1 as long as the certificates carry out a proper assessment of the facts and ensure the correctness of the information contained in that certificate.<sup>15</sup> We also know that the quality of the internal procedure is very important since documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of Regulation (EC) No 883/2004 and of Regulation (EC) No 987/2009, and supporting evidence on the basis of which the documents have been issued must be accepted by the institutions of the other Member States.<sup>16</sup>

The analysis of internal procedures to grant PD A1 on the basis of the questionnaire replies shows a great variety of practices. The structure of internal social security schemes, the administrative background of each country, the volume of PDs A1 issued every year may contribute to explain the differences. They concern the institutions competent for granting the PD A1 (see 2.1) and the standard procedure applied for issuing (see 2.2). The report will also focus on the status of PD A1 when the applicable legislation is provisional (see 2.3).

On the basis of the national reports we could deduct the following main challenges, which will be discussed further in detail below.

**Table 1 – Main challenges when granting PDs A1**

To make sure the PD A1 issuing rules have been well applied by the institutions
To ensure that the PD A1 issuing rules are applied uniformly within a country
To obtain reliable information (from the applicant, through databases in the issuing country or from other countries) needed to issue the PDA1
To handle the provisional application of the applicable legislation
To grant PD A1 without unreasonable administrative burden

<sup>15</sup> Case C-115/11, *op cit.*

<sup>16</sup> Article 5(1) of Regulation (EC) No 987/2009.

## 2.1 Institutions competent to grant PD A1

Certificates issued by the institution of a Member State are binding on other Member States. In the context of Regulation (EC) No 987/2009, the word “institution” has a broad meaning. It refers to domestic institutions entitled to issue certificates (such as PD A1).<sup>17</sup> Countries may grant the certificate at central or local level (see 2.1.1). They may follow an organisation per scheme or implement a transversal system of PD A1 granting (see 2.1.2).

### 2.1.1 Central vs local granting<sup>18</sup>

Replies to the questionnaire indicate that PDs A1 are issued either at national level by one single institution or at local level by several institutions. The central approach seems to prevail, like in Belgium,<sup>19</sup> Denmark,<sup>20</sup> Finland,<sup>21</sup> Croatia,<sup>22</sup> Ireland,<sup>23</sup> Lithuania,<sup>24</sup> Latvia,<sup>25</sup> Luxembourg,<sup>26</sup> Malta, the Netherlands,<sup>27</sup> Romania,<sup>28</sup> Slovenia,<sup>29</sup> Sweden,<sup>30</sup> Estonia<sup>31</sup> or the UK.<sup>32</sup> Centralisation is said to be a good way to address complicated cases and to preserve a uniform application and interpretation of the rules of conflict of law. Centralisation is depicted as allowing an “expedient service” (LU).

The system consisting of granting PDs A1 at local level may be less reliable to a certain extent,<sup>33</sup> but it can bring more flexibility and may be more in tune with the objectives of efficiency, active assistance, rapid delivery and accessibility. A system of local level issuing may tackle fraud more efficiently; it may also facilitate communication with the applicant and the understanding of the facts necessary to assess whether the certificate should be issued or denied. The PD A1 can be granted by the local health care insurance institution (FR), by the local social insurance institution (DE, PL, IT, ES), by one of the institutions in charge of applying international conventions, such as the *Caisses de compensation* (CH), by the local social insurance agency (SK). The local institution in charge of issuing the PD A1 can

---

<sup>17</sup> See also the definition of the word “Institution” in Article 1(p) and 1(q) of Regulation (EC) No 883/2004.

<sup>18</sup> See Table 1 below for an overview.

<sup>19</sup> Granted by the National Social Security Office (NSSO for employees and civil servants).

<sup>20</sup> Granted by the Danish Pensions Agency.

<sup>21</sup> Granted by the Finnish Centre for Pensions.

<sup>22</sup> Granted by the Croatian Pension Insurance Institute.

<sup>23</sup> Granted by the Department of Social Protection.

<sup>24</sup> Granted by the State Social Insurance Fund Board.

<sup>25</sup> Granted by the State Social Insurance Agency.

<sup>26</sup> Granted by the *Centre commun de la sécurité sociale*.

<sup>27</sup> Granted by the *Sociale Verzekeringsbank*.

<sup>28</sup> Granted by the National House of Public Pensions.

<sup>29</sup> Granted by the Health Insurance Institute of Slovenia.

<sup>30</sup> Granted by the *Försäkringskassa*.

<sup>31</sup> Granted by the Estonian Social Insurance Board (Foreign Benefits Office).

<sup>32</sup> Granted by the HM Revenue and Customs.

<sup>33</sup> Do all institutions of a said country apply the same criteria? Are there risks that inappropriate conditions are set?

be a rather independent or a decentralised body of the national social security institution (CZ, HU).

It is interesting to note that, in some countries, a mixed system is applied. This means that the PD A1 will be delivered, within the same country, at national or at local level. The issuing level will depend on the nature of the request. In particular, in some countries where the certificate is normally issued by local institutions, the central institution delivers the PD A1 based on 'Article 16' requests (CZ, FR). A mixed system also applies in Hungary<sup>34</sup> and Croatia.

In some countries where many PDs A1 are issued, there is trend toward staff specialisation. This human resource policy is usually implemented by countries issuing PD A1 at central level, but it is also observed by other countries (see e.g. FR).

Staff specialisation and centralisation may be considered a good way of rationalising administrative burden.

### **2.1.2 'Per scheme' vs transversal granting<sup>35</sup>**

National social security systems are usually divided into schemes usually based on the professional status. Does PD A1 follow the 'scheme organisation' and is it granted within the scheme? Or is the issuing of PDs A1 common to all schemes?

The questionnaire highlights the fact that, for the delivery of PD A1, the division per scheme is frequent. In such case, each scheme sets and follows its own issuing procedure, including the application form, IT tools and staff. In Belgium, PD A1 can be issued by the employees' scheme, by the self-employed scheme or by the mariners' scheme. In Poland, the certificate can be issued by the general scheme (ZUS) or by the farmers' scheme (KRUS). In France or in Greece, PD A1 is issued per scheme.

Questions can be raised about the efficiency of the procedure as well as the quality of PDs A1 issued by schemes which deliver a limited amount of certificates every year. The danger of a lack of harmonisation between the issuing institutions of the same country can be reduced by the enforcement of common procedures applicable to all competent institutions; a synergy of means between local institutions and the emergence of specialists of A1 certificates among the administrative staff (FR). When a PD A1 can be issued by various institutions in one country, there is even the risk that it may be issued by unauthorised institutions (EL). A lack of homogeneity inside a country may in the end be a source of additional administrative burden.

Many countries provide for a unified system of PD A1 granting. Certificates are issued at central level by a national institution. This is obviously true in countries where social security is based on one single scheme, but also in countries where a small number of PD A1 applications is issued.

---

<sup>34</sup> For postings and activities in two or more Member States, the application is sent to the county government office and, for other cases, to the National Health Insurance Fund.

<sup>35</sup> See Table 1 below for an overview.



**Table 2 – Institutions competent to grant PD A1**

Country	Central/Local	Comments	Good practices
AT	Central		
BE	Central	Issuing per scheme	
BG	Central		
HR	Local/Central <sup>36</sup>		
CY	Central		
CZ	Local/central <sup>37</sup>		
DK	Central		
EE	Central		
FI	Central		
FR	Local/central <sup>38</sup>	Issuing per scheme	Staff specialisation
DE	Local		
EL	Local	Issuing per scheme	
HU	Local/central <sup>39</sup>		
IS			
IE	Central		
IT	Local		
LV	Central		
LI			
LT	Central		
LU	Central		
MT	Central		
NO			
PL	Local	Issuing par scheme	
PT	-		
RO	Central		
SK	Local		
SI	Central		
ES	Local		
SE	Central		
CH	Local		Other social security institutions are informed of PD A1 issuing
NL	Central		
UK	Central		

<sup>36</sup> Central for issuing PD A1 for civil servants, mariners, flight crew or cabin crew members, persons pursuing an activity in two or more Member States, contract staff and exceptions according to Article 16 of Regulation (EC) No 883/2004. For posting, the granting is made at local level.

<sup>37</sup> Central when the certificate is requested on the grounds of Article 16 of Regulation (EC) No 883/2004.

<sup>38</sup> Central when the certificate is requested on the grounds of Article 16 of Regulation (EC) No 883/2004.

<sup>39</sup> For postings and activities in two or more Member States, the application is sent to the county government office and, for other cases, to the National Health Insurance Fund.

## 2.2 Standard procedures for PD A1 granting

The countries' replies to the questionnaire insist on three points. The move towards e-procedures (totally or partially replacing paper procedures) is at the centre of the PD A1 issuing process (see 2.2.1). If the choice of the instrument is crucial, the procedure itself is subject to many remarks by countries which highlight common procedures, exchange of experience and suggestions for improvement (see 2.2.2). The same holds true for information-sharing policies (see 2.2.3).

### 2.2.1 The implementation of e-procedures<sup>40</sup>

Many countries apply electronic procedures to grant PD A1. Countries who use an automated procedure highly recommend the extension of this system to all countries.

In some countries, this is a fully electronic procedure, where the application can be downloaded from a website, filled out electronically by the applicant, and sent back by email or by a secure e-application to the competent institution which issues the PD A1 electronically (AT, BE, BG, EE, HU, LV, NL). The applicant usually registers on a dedicated website application where the e-application can be filled out online or downloaded. The PD A1 is delivered in an 'e-box' or sent by email. The PD A1 may be delivered automatically if information provided by the applicant indicates that the conditions for granting the PD A1 are met without any doubt (BE, LU), or will be subject to an analysis by a staff member. Even when the process is entirely automated, sensitive or complex applications remain subject to a manual checking (see box below). With e-procedures, applicants can track the progress of their applications using their (secure) accounts/homepages. Details of the certificates issued (such as the PD A1) can be viewed and printed from the applicant's homepage (NL).

E-procedures can be combined with more traditional paper procedures. A choice can indeed be given to applicants: they can follow an e-procedure or alternately submit an application manually (EE, FI). The staff may also decide whether the application will be assessed automatically or manually (NL, SI). A company or a person must be given a specific e-signature issued by the competent authorities. Such a signature may be submitted to the compliance with certain requirements (DK).

E-procedures can be hard to implement. In some countries, due to technical problems, certain categories of applicants still need to use the paper applications (FI). Changes in coordination rules also require modifying IT policies, which is a source of complexity (EE).

The advantages of an electronic procedure are underlined. It guarantees a higher degree of standardisation and quality, and reduces at the same time the duration of the whole procedure. Moreover, e-procedures give rise to less administrative burden (CH).

---

<sup>40</sup> See Table 2 below for an overview.

#### **Exchange of experience: manual procedures for sensitive or complex applications**

In some countries where an e-procedure is used, applications are treated manually in three situations: if an automatic search in other databases provides information about the company or the worker showing that the conditions for a PD A1 certificate may not be fulfilled (for instance, the worker has already been posted); on the basis of the responses on the application form; for requests based on Article 16 of Regulation (EC) No 883/2004 (BE). Activities in multiple countries are treated manually (LU). An initial assessment is made of whether requests by the applicant may be dealt with automatically (an applicant with an 'approved' status) or whether they must always be dealt with by a member of staff (an applicant with a 'rejected' status) (NL).

*Administrative burden:* While adding manual procedures to electronic procedures might be seen as leading to more administrative work, it might in certain circumstances be considered as beneficial for a better control of possibly suspicious situations.

In some cases, the procedure is hybrid. It is carried out partly by electronic means and partly manually. For instance, employers and employees can apply by email, electronically or with an 'e-box' system. Once the application has been filled out, a staff member determines if the information is complete, compares it with the additional data provided by the applicant (contract of employment, business licence etc), and compares it with data in the available registers and databases. The certificate is sent by post or collected by the applicant (CZ, IE, RO). The information can be partly filled in automatically whereas missing data are completed manually (LT). Some countries have initiated steps towards e-procedures in connection with the implementation of EESSI on a national level (DK). One question remains: to what extent will the electronic procedure be connected with EESSI?

Some countries keep applying an entirely paper procedure (CH). They indicate that an e-procedure will soon be available.

It could be suggested that minimum standards are set with regard to the extension of e-procedures, access to e-application forms and filling out documents online and issuing the form electronically.

**Table 3 – The implementation of e-procedures**

Country	E-procedure	E-application form	Filling out form online	E-granting	Good practices
AT	Yes	Yes	Yes	Yes	Application form available on paper and electronically, or sent on request by email or post and soon available by data transfer
BE	Yes <sup>41</sup>	Yes	Yes	Yes	Automated procedure
BG	Yes <sup>42</sup>	Yes	Yes	Yes	PD A1 copy to employer and employee
HR	Yes	Yes	No	No	
CY	No	No	No	No	
CZ	Yes	Yes	No	No	
DK	Yes	Yes	Yes	No <sup>43</sup>	Foreign companies can choose between e-procedure/paper
EE	Yes <sup>44</sup>	Yes	Yes	Yes <sup>45</sup>	
FI	Yes <sup>46</sup>	Yes	Yes	Yes	Automated procedures with some countries
FR	Yes	No	No	No	
DE	Yes	-	-	-	
EL	Yes <sup>47</sup>	-	-	-	
HU	Yes	Yes	Yes	Yes	
IS					
IE	Yes	Yes	Yes	No	

<sup>41</sup> In the scheme for employees. Manual procedure in specific cases.

<sup>42</sup> Manual procedure in specific cases.

<sup>43</sup> In the process of developing a system that supports secure email exchange with companies and persons.

<sup>44</sup> Paper application is possible.

<sup>45</sup> After the PD A1 is issued, the Estonian Social Insurance Board sends the original signed certificate on paper to the applicant.

<sup>46</sup> The paper procedure remains possible and, in some cases, is the only option.

<sup>47</sup> In some schemes.

Country	E-procedure	E-application form	Filling out form online	E-granting	Good practices
IT	Yes	Yes		Yes	Automated procedure using worker's tax code
LV	Yes <sup>48</sup>	Yes	Yes	Yes	
LI					
LT	Yes	No	No	-	
LU	Yes <sup>49</sup>	Yes	Yes	Yes	Automated procedure
MT	-	-	-	-	
NO					
PL	Yes <sup>50</sup>	Yes	Yes	-	
PT	-	-	-	-	
RO	Yes <sup>51</sup>	Yes	Yes	-	
SK	-	-	-	-	
SI	Yes	Yes	-	-	
ES	-	-	-	-	
SE	Yes	Yes	Yes	No	Document is printed, stamped, signed and sent on paper to the relevant parties
CH	No	No	No	No	
NL	Yes	Yes <sup>52</sup>	Yes	Yes	Initial assessment of whether request may be dealt with automatically or dealt with by a member of staff
UK	Yes	Yes	Yes	-	

<sup>48</sup> Employers who apply for the PD A1 for the first time must hand in an application form and supply additional information.

<sup>49</sup> Except for applications based on activities in multiple countries.

<sup>50</sup> Paper application is possible.

<sup>51</sup> Paper application is possible.

<sup>52</sup> Not for self-employed persons.

### 2.2.2 Issuing processes<sup>53</sup>

Many countries report that they apply separate questionnaires depending on the nature of the application. There can be a questionnaire for employees and a questionnaire for self-employed persons (BE, CY, EE, FI, FR, IE, LT, MT, PT, SK, UK); more rarely the questionnaire is identical (HU). There can also be a specific questionnaire for civil servants (EE, FI, HR<sup>54</sup>), and some countries make a distinction between posting and multiples activities (BE, CY, FR, HR, HU, LT). For 'Article 16' applications as well, there can be a specific questionnaire (BE).

If the PD A1 is harmonised, there are usually national templates for the applicants to fill out. Such templates are very different between countries. They may include questions and requests aiming to ensure that the issuing of the certificate is justified according to their understanding of the rules on applicable legislation. Consequently, national templates are not homogeneous. In some cases, the application is very detailed; it is less demanding in some other countries. Information requested from applicants may be different if the application is based on posting or multiple activities (CY).

An interview is often carried out with the applicant when it is a first time application (CY, HR, IE), when the application needs clarification (FR, HR, MT) or even on a systematic basis (CZ). On-site labour inspections can be performed (CY) or additional information requested from the employer (SI). Granting the document may be subject to a sworn statement (EL). In order to avoid fraud and abuse, some countries implement procedures of PD A1 authentication. Such procedures include a system of numbering, embossing, ink stamping and signing of the certificate (IE) or a system using an official seal (HR). In Denmark (DK) a system of unique serial numbers and electronic stamps of the competent institution and a system of signature were introduced. In general, e-authentication procedures, more reliable and less time-consuming, should be promoted.

#### **Exchange of experience: avoiding PD A1 misuse**

Additional questions are posed for first time applicants (UK).

Direct contact between the applicant and the civil servant in charge of making the decision is prohibited (LV).

The application form for the posting of employed persons must be completed and signed by the employer and the company's official seal must be affixed (HR).

The timing of issuing is not often mentioned. Countries using an automated system can deliver the form in a very short amount of time, immediately or within one day

<sup>53</sup> See Table 3 below for an overview.

<sup>54</sup> A request for issuing PD A1 for civil servants is submitted without any formal requirements by official letter or email containing all necessary information.

(SI), within 12 hours or within five days (BE), or two days (LU). In some Member States, the deadline is laid down by internal regulations (EE,<sup>55</sup> HR<sup>56</sup>, HU,<sup>57</sup> PL,<sup>58</sup> SK<sup>59</sup>). Countries also highlight that the assessment of quantitative criteria (i.e. marginal activity, substantial activity) is a huge administrative burden since data available vary considerably in quantity, quality and format. The verification of data increases delays, sometimes up to several months (SE). Such diversity is problematic. Should a code of conduct setting time limits to issue a PD A1 be discussed between countries?

**Countries' suggestions for improvement: the harmonisation of national templates and renovated PDs A1**

**Proposition 1:** A standard application form across all Member State with the same questions (IE).

**Proposition 2:** Additional information could be required on the form such as the nature of the activity of the (posted) worker or self-employed worker, and the nature of the activity of the sending/receiving companies; access to posting for the replacement of a posted person (FR).

**Proposition 3:** A PD A1 handbook (PL).

*Administrative burden:* Even though the adaptation to a new system of national templates could be a source of administrative difficulties in the short-term, the development of common guidelines and a template for filling in applications might be considered beneficial for the administrative handling of certificates, as it could contribute to a better common understanding of the rules and conditions of the Coordination Regulations.

---

<sup>55</sup> 30 days.

<sup>56</sup> 30 days.

<sup>57</sup> 30 or 21 days.

<sup>58</sup> 7 days.

<sup>59</sup> 45 days.

**Table 4 – Issuing processes**

Country	Separate forms employees/self-employed persons	National template	Timing of issuing	Good practices
AT	No	Yes	-	Attention given to the determination of place of residence
BE	Yes <sup>60</sup>	Yes	From 12 hours to 5 day max.	Assessment based on multiple information databases
BG	-	-	-	
HR	Yes	Yes	From 24 hours to 30 days max.	Decisions are subject to an appeal procedure
CY	No <sup>61</sup>	Yes		Interview <sup>62</sup> /on-site inspections
CZ	Yes	Yes	-	Systematic interview
DK	-	Yes	-	Decision on applicable legislation in the same document as A1 certificate
EE	Yes	Yes	within 30 days	Most applications are electronic
FI	Yes	Yes	-	Issuing by one centralised institution
FR	Yes	Yes		Visits at the employer's site
DE	Yes	Yes	-	
EL	Yes <sup>63</sup>	-	-	
HU	No <sup>64</sup>	Yes	Within 30 or 21 days	Decisions are subject to an appeal procedure
IS				
IE	Yes	Yes	-	Phone/email interviews
IT	-	-	-	Type of employment contract is

<sup>60</sup> Forms are separate for employees and self-employed persons; there are also specific forms for posting and for multiple activities.

<sup>61</sup> There are separate forms for posting and multiples activities.

<sup>62</sup> For first-time request.

<sup>63</sup> Per-scheme approach.

<sup>64</sup> There are separate forms for posting and multiples activities.



Country	Separate forms employees/self-employed persons	National template	Timing of issuing	Good practices
				particularly looked at
LV	-	-	-	No direct contact between persons applying for AI and civil servants taking decisions
LI				
LT	Yes	Yes	-	Decisions are subject to an appeal procedure
LU	Yes	Yes	Within 2 days	
MT	Yes	Yes	-	Automatic granting to companies used to asking AI forms
NO				
PL	Yes	Yes	7 days max.	Option between electronic and paper application
PT	Yes	-	-	
RO	-	-	-	
SK	Yes	Yes	45 days max.	Applications available on website and local branch offices
SI	-	Yes	Immediately/one day	
ES	-	-	-	
SE	Yes	Yes	Up to several months	
CH	-	-	-	Other institutions (e.g. sickness, accident at work, pension plans) are informed of PD AI issuing
NL	Yes	Yes	-	
UK	Yes	Yes	-	Additional questions to first-time applicants

### **2.2.3 Information-sharing policies**

For the correct implementation of rules of conflict of law and thus to know where contributions should be paid and benefits granted, employers and workers must have access to relevant and up-to-date information about the criteria set out for the granting of PD A1. Many countries provide information about PD A1 related questions on a website. The information can be available in English or other foreign languages, but sometimes can be found only in the national language. A lack of accessibility of information will impede the free movement of workers and services; it may also cause an incorrect application of coordination rules. The information available may vary from State to State.<sup>65</sup>

Access to information by the issuing institution is crucial in order to know whether the PD A1 requested should be issued. E-procedures facilitate the process, especially when searches are automatically done in various databases. This is important when the certificate is claimed for a period of posting. However, many countries also fear that in some cases exchanges of information could be an unnecessary burden. The debate between 'more information' or 'less information' seems to divide countries. Assessing the past and future factors is not always an easy task. When assessing the facts with a view to determining the social security legislation applicable for the purposes of issuing a PD A1, the institution concerned may take account of factors such as the way in which employment contracts between the employer and the worker concerned had previously been implemented in practice, the circumstances surrounding the conclusion of those contracts and, more generally, the characteristics and conditions of the work performed by the company concerned, in so far as those factors may throw light on the actual nature of the work in question.<sup>66</sup> If assessment should be based on past and current events, it must also anticipate future events, which is particularly difficult regarding situations such as the expected duration of the posting and the location where work activities will be undertaken.

An accurate assessment depends on accessibility to relevant and reliable information, whether the information is provided by the applicant, has been stored in databases by the issuing country or has been sent by other countries.

## **2.3 The status of PD A1 when the applicable legislation is provisional**

Article 16 of Regulation (EC) No 987/2009 sets up a system of provisional determination of the applicable legislation when a person normally pursues an activity in two or more Member States. This rule impacts the conditions of delivery of PD A1. Indeed, if the designated institution of the place of residence determines without delay the legislation applicable to the person concerned, that initial determination is provisional. The institution informs the designated institutions of each Member State in

---

<sup>65</sup> Cyprus refers to "A1 document stating applicable legislation decision, letter for each individual separately, letter with a list of names, emails with list of names and the wording varies from State to State".

<sup>66</sup> C-115/11, *op cit*.

which an activity is pursued of its provisional determination. The provisional determination of the applicable legislation becomes definitive within two months of the institutions designated by the competent authorities of the Member States concerned being informed of it.

In practice, the Article 16 procedure is not always respected.<sup>67</sup> The system is described as a source of confusion (IE), unclear (NL), and burdensome (LT), notably because it does not fit a system of paper exchange (BE, CZ) or when the person has no legal/insurance bond with the State of residence (RO). The procedure entails an obligation to forward both the initial provisional determination of the applicable legislation and the subsequent definitive determination to all Member States in which work is performed: this is generating a too high (and unnecessary) volume of information exchanged (SE). The provisional affiliation slows down the process of determining the applicable legislation. It increases the burden of Member States since the person/employer may seek information in States other than the State of residence (BE). Institutions of Member States are also not always able to investigate whether the PD A1 was correctly issued during the two-month period (CZ).

#### **Exchange of experience: bilateral agreements and informal processes**

**Example 1:** A bilateral agreement between Estonia and Finland (ETK) covers the sector of transportation. Finnish transportation companies can submit applications for PD A1 certificates to the ETK irrespective of the employees' State of residence. If the employee of the transportation company is residing in Estonia, the ETK receives the application from the employer. The ETK sends a secured email to the Estonian Social Insurance Board stating that Finnish legislation seems to be applicable. The Estonian Social Insurance Board checks the social insurance information about the person concerned (is there other employment/self-employment in Estonia?) and sends the decision to the ETK by secured email. The ETK issues a PD A1 if Finnish legislation can be applied. If Finnish legislation cannot be applied and Estonian legislation is applicable, the ETK transfers the application to the Estonian Social Insurance Board.

**Example 2:** Denmark and Norway have concluded a bilateral agreement with the purpose to reach final decisions in cases where medical staff residing in Denmark are permanently employed in Denmark and get a short-term temporary job in Norway.

**Example 3:** The request for a provisional determination of the applicable legislation may be submitted without formal requirements (no application form) in an official letter or email together with the documentation required (HU).

In many cases the parties involved have no interest in clearing the case; social security institutions lack the means to push on (FI). Furthermore, a Member State may issue a PD A1 (considering it is competent) without asking the advice of the State of residence (NL). A large number of attestations issued by various countries may circulate at the same time (SE).

<sup>67</sup> See also note AC 462/13 and note AC 367/11.

**Countries' suggestions for improvement: how to facilitate a smoother application of Article 16 of Regulation (EC) No 987/2009?**

**Proposition 1:** To reduce the number of provisional decisions by skipping the 'provisional affiliation procedure' when it clearly appears from the facts which legislation is applicable. Should there be any objections to the decision in question, these would be analysed with respect to the deadlines given by the Regulation for the provisional decision (SE).

**Proposition 2:** In order to avoid confusion between provisional and definitive PDs A1, only the competent Member State should issue a PD A1; a letter from the Member State of residence should be sufficient to notify about a provisional decision (IE).

**Proposition 3:** The institution of the place of residence should not only send the decision on the provisional determination of the applicable legislation, but also additional information and other evidence about the person's situation (LT).

*Administrative burden:* If the duty for countries to follow a common pattern and adapt national practices is considered as a burden, a revision of Article 16 of Regulation (EC) No 987/2009 according to these proposals could contribute to a smoother and less burdensome application of this rule.

Article 6 of Regulation (EC) No 987/2009 also provides for a system of provisional application of a legislation of a Member State: when there is a difference of views between the institutions or authorities of two or more Member States concerning the determination of the applicable legislation, the person concerned must be made provisionally subject to the legislation of one of those Member States.<sup>68</sup> However, Article 6 of Regulation (EC) No 987/2009 only applies when there is a difference of views between the institutions or authorities of two or more Member States concerning the determination of the applicable legislation. If there is no such difference of views, in which Member State does the employer pay contributions if there is a gap between the time of commencement of employment and the time the employee receives the applicable legislation decision? (CY)

### **3 Difficulties arising after PD A1 has been issued or denied (follow-up)**

PD A1 forms granted by the competent institutions of a Member State cannot be withdrawn unilaterally by the institutions of another Member State. Otherwise the system based on the sincere cooperation between the Member States' competent institutions could be at risk.<sup>69</sup>

This is the reason why Decision No A1 by the Administrative Commission, in tune with Article 5 and 6 of Regulation (EC) No 987/2009, establishes a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable

<sup>68</sup> An order of priority is determined by the same provision.

<sup>69</sup> C-202/97, Fitzwilliam, 51; C-2/05, Herbosch Kiere, 30-33.

legislation and the provision of benefits under Regulation (EC) No 883/2004. This dialogue and conciliation procedure aims at a closer cooperation and at accelerating the achievement of a solution in the event of a conflict.<sup>70</sup> In the first phase of the dialogue procedure, the institution approached is supposed to conclude its investigation within three months after having received a request. This term can be extended with three months if necessary. If an agreement cannot be reached in this first phase or if the investigation cannot be closed within six months, the contact persons may try to either reach an agreement within six weeks, or directly present the case to the Administrative Commission, who, subsequently, tries to find a solution within six months. To do so, a Conciliation Board may be called upon, which will further attempt to mediate and will provide legal advice.

On the basis of the national reports we could deduct the following main challenges which will be discussed further in detail below.

**Table 5 – Challenges when dealing with difficulties after PDs AI have been issued or denied**

How to challenge refused PDs AI
To inform other Member States about issued PDs AI and the legal value of PD AI copies
Conditions for the cancellation of PDs AI
PD AI withdrawal conditions and consequences (especially in the event of retroactivity)
The application of the dialogue and conciliation procedure when withdrawing PDs AI
How to react to fraudulent PDs AI?

### 3.1 Refusal: internal administrative or judicial procedures

Although there are no procedures generally applicable in all Member States, several of them mention the availability of administrative and/or judicial proceedings in the event of refusal by the competent authority to issue a PD A1. In Lithuania, information concerning appeal procedures is provided simultaneously when the employer, self-employed person or worker is informed about the decision concerning the granting of the PD A1. The same applies in Croatia. If the employer, employee or self-employed person does not agree with the decision made by the competent authority, they can appeal to the State Social Insurance Fund Board, which is established under the Ministry of Social Security and Labour. If there is still disagreement after the appeal has been examined by the State Social Insurance Fund Board, the person can apply to

<sup>70</sup> Commission 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 [2010] C106/01.

the court. In Hungary, appeal proceedings can be initiated against decisions relating to the issuance or denial of a PD A1, as these are administrative decisions under Hungarian law. In Poland as well, appeal before the court is possible after the cancellation of a PD A1. Overall, despite the promising attempts already started up in several Member States, the right to challenge the refusal of a PD A1 is not a general practice.

Even if it is a source of additional burden, it seems necessary to encourage countries to arrange internal procedures in the event of refusal of a PD A1, to inform all persons concerned as well as other competent institutions about the right to challenge a refusal.

## **3.2 The cancellation of PD A1**

### **3.2.1 The procedure**

The Member States' accounts have made it clear that the cancellation of the PD A1 is so far not uniformly organised across the different Member States. While sometimes cancellation procedures are introduced, in other cases standard procedures have not been established yet. Some set particular conditions to be fulfilled, while others do not. Poland specifies that the cancellation of the PD A1 is possible if it was issued on the basis of false information provided. The Polish Social Insurance Institution, supervised by the Ministry of Labour and Social Policy, states that it would in that case annul the PD A1 and issue a relevant administrative decision, which is open to appeal before the court. Apart from this, Poland also specifies that it would be no luxury to provide more guidance for the Member States in order to develop a uniform practice concerning inter alia the cancellation of the PD A1. Estonia mentions the availability of a cancellation form (*Tühistamise avaldus*) that can be used to cancel both an application and a PD A1 itself. In Croatia, if the PD A1 was issued on the basis of false information or in other cases stipulated by internal rules, the competent institution withdraws or declares the PD A1 invalid and reaches a relevant administrative decision. Instructions on legal remedies are contained in such a decision. The competent institutions in the Member States concerned are notified in writing of the annulment or repeal of PD A1.

Despite additional burden it may involve for countries, clarification and common standards about internal cancellation procedures would benefit both the Member States and the authorities involved, as well as employers and employees.

### **3.2.2 Information-sharing<sup>71</sup>**

While we have already mentioned the importance of information-sharing for issuing the PD A1, exchange of information is also necessary when institutions want to check

---

<sup>71</sup> See Table 4 below for an overview.

if employed or self-employed people are subject to the correct legislation. Receiving correct information is a preliminary condition to be able to withdraw a PD A1.

The circulation of information between countries is a condition for the good application of rules of conflict of law. This is however a complex subject to tackle since it is related to how much additional administrative work countries can handle and if it is worth the trouble. Rules concerning PD A1 transfers to other countries are sometimes qualified as burdensome, especially when communication is on paper and by post (AT). The system of transfer is not homogeneous across countries. Due to IT difficulties, the notification might even take specific forms.<sup>72</sup> According to the countries, the scope and method of cooperation may vary. For instance, when a PD A1 has been issued under Article 12, Article 11(3) or Article 11(4) of Regulation (EC) No 883/2004, the issuing country may notify the relevant authorities of all Member States that wish to be notified of posting situations; when a PD A1 has been issued under Article 13, the issuing country notifies the authorities of all Member States in which work activities are undertaken (UK). A copy is also sent to the employer and the employee (DK). Another difficulty relates to the issuing of certificates 'just in case' (one is not sure if the posting will materialise) (Finland).

It seems necessary to clarify the need for copies and their legal value. In this respect, whereas some countries would like to make it compulsory to transfer a copy of a PD A1 to the other Member State(s) concerned, some other countries would rather reduce the flow of copies by not sending a PD A1 copy to all countries concerned when the activity is carried out in more than one country. National institutions may have concluded agreements with some Member States aiming to not sending copies of the PD A1 (UK).

Having to deal with incomplete national templates and/or A1 forms may cause difficulties. Should they be rejected automatically? Should they be completed by the institution after an exchange with the applicant? Can they be completed directly by staff on the basis of other data available? Can some questions be left unanswered because they are not essential (e.g. no indication of the employee's birth place)?

Countries have usually implemented a system of PD A1 storage. Negative decisions may also be stored (CZ). The storage of A1 certificates is considered as "an effective way to run across double insurance cases from the vast number of certificates" (FI). It allows "a follow up of mobile workers and companies" (FR). Could it be envisaged to create a common database in which every country uploads the PD A1 it issues and to which all other countries have direct access via an online tool?

#### **Exchange of experience: storage of PDs A1**

Some countries store all PDs A1 they receive from other countries and feed them into databases which they will be able to use for assessment of further applications.

<sup>72</sup> Notifications in Excel format (IE).

With regard to the circulation of information after the issuing of the PD A1, some countries stress that it is difficult to receive information on income drawn by the worker in other countries (FR, LT).

**Countries' suggestions for improvement: how to rationalise the storage of PD A1?**

**Proposition 1:** to set common standards concerning the exchange of information and to create a European database collecting all PDs A1 (FR, LU, SK).

**Proposition 2:** to make it mandatory for employees to have the PD A1 with them at all times at their workplace (NL).

*Administrative burden:* An obligation to store all PD A1 certificates might lead to more administrative burden. However, the creation of a European A1 database where all PDs A1 are stored would contribute to a considerable decrease of the administrative burden. Member States would not be obliged to send copies of the delivered PD A1 certificates to the concerned Member States and would be able to much better and more quickly check the existence of PD A1 forms without the need for an extensive exchange with the competent institutions in the other Member States.



**Table 6 – Information-sharing policies**

Country	PD A1 storage	Copy sent to other country(-ies)	Good practices
AT	Yes <sup>73</sup>	Yes	
BE	Yes	Yes	Automatic search through multiple databases
BG	Yes	-	
HR	Yes	Yes	Comprehensive database
CY	-	-	
CZ	Yes <sup>74</sup>	Yes <sup>75</sup>	Website information in 3 languages
DK	-	Yes	
EE	Yes	Yes	Automatic search through multiple databases
FI	Yes	Yes	Centralisation of A1 issuing
FR	Yes <sup>76</sup>	Yes	Follow-up of workers patterns and company practices
DE	-	-	Application form indicates the consequences of providing incorrect or inaccurate information
EL	-	-	
HU	Yes	-	
IS			
IE	Yes	No <sup>77</sup>	
IT	Yes	Yes	
LV	Yes	Yes	A1 issued by other Member States and received are registered
LI			
LT	Yes	-	Stored information allows to reduce time for the examination of further applications
LU	-	-	
MT	-	-	Regular website update
NO			
PL	-	-	
PT	-	-	
RO	-	-	

<sup>73</sup> A copy of the PD A1 is always retained by the issuing Austrian health insurance institution; some of these institutions have already constructed an electronic archive for this purpose.

<sup>74</sup> Copy of A1 issued and copy of negative decisions.

<sup>75</sup> Copy to the institution of the country where the person pursues a gainful activity (if this competent institution of the Member State is listed in the State requesting the sending of copies). Agreements with some Member States on not sending copies of the A1 certificate.

<sup>76</sup> Most certificates are collected in a database run by the Cleiss.

<sup>77</sup> Notifications in Excel format.

Country	PD A1 storage	Copy sent to other country(-ies)	Good practices
SK	Yes	Yes	
SI	Yes	-	
ES	-	Yes	
SE	Yes	Yes	
CH	Yes	Yes	
NL	Yes	Yes	
UK	Yes <sup>78</sup>	Yes <sup>79</sup>	Database of all workers that have remained subject to the legislation of another country whilst working in the UK under Article 16 of Regulation (EC) No 883/2004

### 3.2.3 Information about changes in the factual situation

The cancellation of PDs A1 is often connected to the difficulties that arise when there are changes in the factual situation. Changes in the factual situation cause difficulties on several levels. First, it is difficult for the competent authorities to check the factual situation regularly to examine whether or not there are changes. The administrative work involved is huge. Estonia mentions that such checks take place to ensure that that the persons involved are still subject to Estonian law. These checks revolve in particular around the correct payments of social security contributions. Finland explicitly stresses the difficulties accompanying these factual changes, referring to the need to clarify the facts in difficult cases as the most burdensome aspect of the A1 procedure. A second difficulty concerning the follow-up of changes in the factual situation is that an effective follow-up inevitably requires the cooperation of different actors. The first source to collect such information from are the persons and authorities involved, but practice shows that both employers, employees and authorities in other Member States are often quite reluctant to answer questions and sometimes do not even provide the information requested. Finland specifies that this happens most often when the conditions of the case are unclear and difficult to verify (e.g. working countries, employer, working periods etc). In this respect, several Member States, such as Lithuania and Italy, stress that information provided by the applicant is verified by using databases maintained by different national public administrations. France, however, also points out that aiming for sufficient and up-to-date information underlines the need to inform employers and employees of the necessity to immediately communicate changes in their factual situation; often, they only discover the need for this when actually requesting support. Greece also suggests an EU-wide obligation to inform insurance institutions in the event of changes of an insured party's employment status.

<sup>78</sup> Each PD A1 is given a unique reference number.

<sup>79</sup> When a PD A1 has been issued under Article 12, Article 11(3) or Article 11(4) of Regulation (EC) No 883/2004, we notify the relevant authorities of all Member States that wish to be notified of posting situations in their territory. When a PD A1 has been issued under Article 13, we notify the authorities of all Member States in which work activities are undertaken.

Concerning the information provided, Lithuania applies extensive control. After the information has been collected from the employer or self-employed person via specific forms, the Foreign Benefits Office analyses this information provided, in order to determine whether the conditions and criteria applicable when pursuing activities in two or more Member States are fulfilled. When doing so, the Foreign Benefits Office has the option to request additional information and check the information available using different registers and databases, also from other institutions such as the register of persons insured by state social insurance, using tax authorities information, or using the register of Lithuanian residents. A problem often encountered in this process, is that competent institutions in other Member States often only communicate the decision on the applicable legislation for Article 16 applications, without any other information or evidence. This makes evaluation very difficult and generates a need for additional communication with all actors, making the process more cumbersome and less efficient. Good communication and information exchange between institutions involved within and across country borders is unquestionably crucial. In this respect, some interesting practices have already started to develop: Estonia, for instance, mentions the existence of a monthly information exchange on all issued and cancelled PDs A1 between the Estonian Social Insurance Board and the Estonian Tax and Customs Board.

Poland gives the example of a person changing his or her surname during the period of validity of a PD A1, and raises the question whether and how this should impact the PD A1's validity. Should the form's period of validity be shortened to the last day the previous surname is in force, followed by the issuance of a second form for the rest of the period under the new surname? Or should the original PD A1 remain valid, accompanied by a second one issued on the day of the surname change, causing two PDs A1 to be valid simultaneously in that second period? Or does the original document remain valid, requiring only a notification of the surname change via mail? Poland points out that there are similar difficulties when changes are made in the address of the place of employment in the receiving State.

A common problem is caused by a change of name of the form holder. The following example may be given: Ms Kowalska's PD A1 form has been issued, as she has been posted to Belgium for the period from 1 January 2013 to 31 December 2014. On 1 February 2014, she changed her surname to Nowak. Having learnt of the change, should the institution which has issued the PD A1 form cancel that form, and replace it with two PD A1 forms: one for the period from 1 January 2013 to 31 January 2014, when the previous surname was in force, and another one for the period from 1 February 2014 to 31 December 2014, when the new surname is in force?

The second option is to uphold the validity of the original PD A1 form and grant a new one for the period from 1 February 2014 to 31 December 2014 – as a result, two PD A1 forms would be valid during that period. The third option is to inform the competent institution of the receiving State of the change via mail. In this case, the PD A1 form issued for the period from 1 January 2013 to 31 December 2014 would retain its validity throughout the whole period.

### 3.2.4 Retroactively solving double insurance situations

PD A1 forms may be granted retroactively. The CJEU has ruled that there is nothing to prevent the PD A1 from producing retroactive effects.<sup>80</sup> Some PDs A1 are indeed granted retroactively, sometimes years after the occurrence of the facts.

#### **Exchange of experience: issuing PDs A1 retroactively**

If the issuing of a PD A1 is requested for a past period the employer is asked why the PD A1 is necessary for this past period. At the same time the employer is requested to provide evidence that the posting has really happened already in the past to have all necessary information in case the foreign institutions ask why the PD A1 was issued retroactively. This procedure should avoid that employers who start to have problems with the institutions of the place of work of their employees try to retroactively escape the obligation to insure their employees in the Member state where they work (AT).

A situation that leads to many problems is when a PD A1 has been granted but needs to be withdrawn as the legislation is not applicable.

Several Member States have referred to cases in which double insurance situations are solved retroactively and the difficulties they face in this respect.

Different problematic situations may arise: on the one hand, situations in which a person is covered by the social security legislation of two Member States at the same time, and on the other hand, a situation in which the employers involved were unaware of the other's existence or of the decisions made. The Member States' accounts reveal that several questions remain: how should this kind of situation be dealt with, taking into account the limitations of the information available? Who should be responsible for the follow-up of the payment of social security premiums if a PD A1 was issued for a retroactive period? And how to go about the fact that a person may lose benefits if social security premiums are not paid retroactively? The lack of information (Have contributions been paid abroad? Have benefits been received?) makes it very difficult to know whether back payments should be made (FI). From an administrative point of view, the resolution of all consequences relating to retroactively granting a PD A1 is a heavy burden (FI).

The Member States' accounts reveal several difficulties concerning the working procedure used to deal with retroactive cases. To be able to properly deal with such cases, authorities have two sources to rely on for information. First, the account provided by the applicant itself, and second, the information provided by the relevant authorities in the own and in other Member States. Both options entail difficulties: the

---

<sup>80</sup> Case C-178/97, *op cit*. In this respect the possession of a PD A1 is not a constitutive condition. In a recent case the CJEU is asked (Case 189/14, *Bogdan Chain*) whether the fact that the competent institution has not issued a PD A1 excludes the application of Article 13(1)(b) of Regulation (EC) No 883/2004 (working in two countries) when the second State where the person would perform activities could not be determined at the moment a PD A1 was requested. The fact that a person would work in two countries could not yet be taken into account due to the temporary activities in other Member States.

applicant itself may not provide all or completely correct information, which can extensively complicate the work of the authorities depending on such information (DU, EL). Meanwhile, cooperation between different authorities might not always go smoothly either. Cooperation with authorities in other Member States might prove to be even more tedious for several reasons, such as e.g. language. Nonetheless, several Member States have pointed out that cooperation takes place between authorities in the own and in other States. In this respect, the Czech Republic mentions cooperation between the competent institution for health insurance and the Czech Social Security Administration, also when contacting authorities in other Member States. This is however only done in doubtful cases, when the information provided by the applicant does not suffice.

However, although such interinstitutional contact already takes place, there is still room for improvement. The Czech Republic suggests to develop a procedure similar to that applied in the case of a final settlement of provisionally determined applicable legislation. Finland also explicitly points out the challenge of retroactively solving double insurance situations, and mentions that registration of the PDs A1 is an effective way to identify double insurance. Nonetheless, registration itself still is confronted with practical problems, especially concerning documents issued in other Member States, as some Member States do not provide accounts of the documents issued. It is stressed, however, that up-to-date information about cancellation of PDs A1 is exactly what is needed. Concerning the regulatory framework, it was also pointed out that the provisions of Regulation (EC) No 987/2009 concerning the insurance premiums are sometimes considered to be insufficiently unambiguous to properly deal with situations of retroactivity.

Another reported difficulty concerns limits reached by the Regulation itself: Article 16 may not enable competent Member State A (where the person should be insured) to claim insurance contributions incorrectly paid to Member State B to be transferred directly to the Member State A, but only to request for help in claiming the amount due from the employer who has incorrectly paid the insurance contributions to Member State B (FI).

Apart from the difficulties the Member States and their institutions are faced with, the effect on the individual involved cannot be forgotten either. Repayment procedures are often difficult and complex. In this respect, the Czech Republic mentions that under Czech legislation overpaid premiums can only be repaid five years after the initial payment at the latest. If the retroactive period is longer, the employer will have paid double insurance premiums for one particular period, and from the same income. Thus, the individual falls victim to the system, although not having violated any rule or obligation. Other Member States have referred to the problematic nature of the retroactive solving of double insurance situations as well, such as Latvia and Greece.

A common problem is the relation between the retroactive PDs A1 and prescription rules. It may be only years after the payment of contributions that a PD A1 is issued. Consequently, the person may have wrongly paid contributions and received benefits in one country. Reversely, he or she may have not paid contributions or received benefits in the competent country. To what extent national rules of prescription can go against the retroactive granting of the PD A1? According to settled case law of the

CJEU "in the absence of European Union rules in the field, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law, provided that such rules are not less favourable than those governing similar national actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness) (see, *inter alia*, Joined Cases C-89/10 and C-96/10 *Q-Beef and Bosschaert* [2011] ECR I-7819, paragraph 32)."

**Countries' suggestions for improvement: how to better deal with consequences relating to retroactive PD A1 certificates?**

**Proposition 1:** the procedure provided for the settlement of provisionally determined applicable legislation could be transposed and adapted to retroactive PDs A1 (CZ);

**Proposition 2:** Regulation (EC) No 987/2009 should include provisions that would oblige the other Member State to pay back the insurance contributions directly to the competent Member State (FI).

*Administrative burden:* The development of a procedure to apply in the event of double insurance and retroactive application of the PD A1 certificates might lead to a less tedious exchange of information, which would consequently be less burdensome. In addition, it would be very beneficial for the person concerned.

### 3.3 The withdrawal of PD A1

It is clear from the Member States' accounts that in many cases, there is only a very rudimentary and inadequate regulatory framework concerning the withdrawal of PDs A1 (FR), or even no structured procedure at all (CY). The explicit mention of this lacuna might be considered an indication that the lacuna itself did not go unnoticed by the authorities faced with it, thus revealing the need to bridge this gap.

#### 3.3.1 Dialogue between the issuing country and the other country

Sincere cooperation between Member States is not only a key element for the recognition and issuance of PDs A1; it is just as important concerning the withdrawal of such documents. Several Member States, however, have pointed out difficulties and shortcomings surrounding dialogue between the different countries involved in the withdrawal of a PD A1 (FR, BE), such as long periods and a high degree of complexity.

Although the importance of information exchange has been stressed by different Member States, such as Hungary, practice shows the possibilities are limited: as security reasons compel several Member States not to send paper copies to other Member States (SE), other options are being explored. In this respect, Ireland sends digital files with details to Member States wishing to be notified of posting situations on their territories. Practices concerning information exchange seem to remain

fragmentary, but efforts such as these do reveal the willingness and efforts to enhance the interstate information exchange. Furthermore, the information actually exchanged generates further issues. France mentions that the supply of data coming from other Member States can vary considerably both in terms of quality as well as quantity. Also Cyprus mentions the administrative burden thereof. Lithuania also points out that difficulties to verify the information provided by companies or workers often results in other Member States disagreeing with the initial decision about which legislation is applicable, putting forward additional information on the activities that have taken place on their territory. Although such information exchange is welcomed, this information only reaches the Lithuanian authorities after the end of the posting period. Having to review and adapt the applicable legislation for posting periods retroactively, however, causes administrative and financial problems for institutions as well as employers and employees involved. This situation stresses two crucial findings: first, that information exchange is needed and useful, and secondly, that it urgently needs to become more efficient and timely.

### **3.3.2 The conciliation procedure**

Information difficulties manifest themselves on several levels, but not in the least concerning social security and the calculation of social security contributions. In this respect, Lithuania points out that it has difficulties collecting the necessary information to make the calculations, as some authorities in other Member States refuse to provide sufficient information concerning a person's income, especially when it is a self-employed person.

In order to facilitate and clarify dialogue concerning the information exchange for social security issues, the EC established a negotiation and conciliation procedure in Decision A1.<sup>81</sup> However, several Member States still consider this procedure to be insufficient. First, it has been stressed that its multiplicity of stages draws out the procedure and encourages time wasting: France has pointed out that the standard procedure may take up to 14 months, and only if the deadlines are met, which does not always go without saying. Especially considering what is at stake for the employee, the employer and the social security bodies, the time periods should be kept concise. Furthermore, rapid procedures are crucial to block fraud, taking into account the flexibility and legal certainty inherent in the free provision of services. Second, practice shows that Decision A1 is incapable of sufficiently persuading Member States to cooperate with due diligence, as there are no satisfactory responses when they refrain from doing so.

Several specific difficulties have been identified by France, supported by Belgium. First, it has been pointed out that, as a withdrawal request has to be based on factual evidence, the issuing institution must be capable of quickly assessing whether or not it has the same point of view concerning the legal analysis as the requesting institution.

---

<sup>81</sup> Commission 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 [2010] C106/01.

Taking this into account, France suggests to abolish the option of extending the requested institution's deadline in the first phase. Because of the necessity of factual evidence, the absence of a consensus will obviously be considerably sooner than six months. Second, the optional second stage of the dialogue procedure has been considered redundant, as the conciliation procedure offers the opportunity to bring the matter before the Conciliation Board. This second stage of the dialogue procedure is therefore merely again providing an opportunity to extend the timeframe. Third, Decision A1 does not provide for explicit guidelines on what happens when an issuing authority fails to reply or to act with due diligence vis-à-vis requesting institutions. Decision A1 now seems to consider this constitutes a lack of agreement on part of the issuing State; nonetheless, this should be taken up explicitly. Furthermore, taking into account the possible length of the procedure and the possibility of a lack of due diligence, France suggests it should be possible for the procedure to be driven forward on the initiative of only one Member State. Finally but not unimportant, France states that the dialogue and conciliation procedure are ineffective, simply because of the lack of a mandatory impact of the end result – an AC decision which is binding on the parties as an outcome would give the procedure more strength.

It seems necessary to make the conciliation procedure more efficient by revising it and installing a much stricter timeframe. This might also make the procedure less burdensome.

### **3.3.3 Reactions in the event of fraud**

The Member States' accounts only offer a limited view on sanctions and penalties to be applied in the event of fraud. Several Member States do stress that fraudulently obtained PDs A1 are withdrawn (LT), but do not specify any other or additional measures. Overall, the range of measures put in place by Member States to counter fraud is still fragmentary. In addition, the information available on both theory and practice in this respect remains very limited. Clearly, there is still room for improvement both concerning the Member States' framework and actions, and concerning the information available on the matter.

The supervision of whether the procedure to deliver a PD A1 is complied with can cause a lot of teeth gnashing. Inspection services sometimes find that someone does not have a certificate of posting, but that they cannot subject the person to their national social security, because he or she delivers an A1 form afterwards. A situation which inspection services often face are mistakenly, incompletely or even incorrectly completed forms. Often Member States are of the opinion that the dialogue and conciliation procedure is not always working effectively in all situations. As a result, there is a growing necessity of closer cross-border cooperation between the competent inspection services with a view to fighting social security fraud. However, some countries have decided not to wait for Europe to take possible measures, but to take action itself.

In France, on 11 March 2014 the highest court, i.e. the French Court of Cassation, disregarded CJEU case law in two judgements – without making a request for a



preliminary ruling to the CJEU.<sup>82</sup> In a criminal case against two airline companies who have their operational base in France, the competent Court of Appeal had sentenced these companies for not registering the airline staff which they employed from France with the competent French social security institution. These companies had E101 certificates for these employees which, among others, the Spanish competent institution delivered based on the posting rules of Regulation (EC) No 1408/71. The Court of Appeal had sentenced both companies, as French law was intentionally and knowingly evaded with the purpose of making the workers cheaper.<sup>83</sup> In other words, they abused the posting rules. Still, the company dismissed this argument, claiming that this could not have been the purpose if the company concerned had E101 certificates that were legitimately delivered: the company could in good faith assume that this staff was subject to Spanish social security legislation. In its judgements, the French Court of Cassation followed this argumentation by the French Court of Appeal.

In Belgium, the legislature even intervened. The Programme Act of 27 December 2012 implemented a special anti-fraud rule which allows Belgium to unilaterally withdraw a certificate of posting.<sup>84</sup> The legislature opted to fight fraud by making use of the legal concept of abuse. *"If, with regard to an employee or self-employed worker, the Coordination Regulation provisions are applied to a situation in which the conditions laid down in the Regulations and clarified in the Practical Guide or in the Administrative Commission Decisions are not complied with, thereby aiming to circumvent Belgian social security law which was to be applied to that situation if said Regulation provisions and administrative provisions were correctly complied with, this shall be considered abuse with regard to the rules to determine the applicable legislation in the European Coordination Regulations."*<sup>85</sup> *If the national judge, a public institution of social security or a social inspector establishes this type of abuse, the employee or self-employed worker will be subjected to Belgian social security legislation if this legislation should have been applied. The institution or the inspector is to provide the proof for this abuse."*<sup>86</sup> The Belgian legislature's intention is clear. The idea is that, if 'abuse' is believed to have been committed, the A1 form can simply be disregarded unilaterally and that Belgian social security can thus be declared applicable, and so from the moment it was supposed to be applicable originally. Thus, Belgium does not wait for the competent institutions of the State of origin to possibly withdraw the A1 form, and therefore the dialogue and conciliation procedure does not have to be concluded. If Belgian law was judged not to be applicable, the European dialogue and conciliation procedure would be used, however. However, the compliance of this rule with European law gives rise to questions, which is the reason why the EC initiated an infringement procedure against Belgium.

---

<sup>82</sup> CASS France, 11 March 2014, No 1078 and 1079, available at:  
[http://www.courdecassation.fr/IMG///CC\\_crim\\_arret1078\\_140311.pdf](http://www.courdecassation.fr/IMG///CC_crim_arret1078_140311.pdf) and  
[http://www.courdecassation.fr/IMG///CC\\_crim\\_arret1079\\_140311.pdf](http://www.courdecassation.fr/IMG///CC_crim_arret1079_140311.pdf).

<sup>83</sup> "la société [...] ayant, d'évidence, volontairement méconnu ces règles pour se placer sous un régime social et fiscal moins lourd et plus permissif".

<sup>84</sup> The Programme Act of 27 December 2012, Belgian Official Journal of 31 December 2012, second edition.

<sup>85</sup> The Programme Act of 27 December 2012, Belgian Official Journal of 31 December 2012, second edition, Article 23.

<sup>86</sup> See Article 24 and 25 of the Programme Act of 27 December 2012.

These reactions demonstrate that the CJEU's case law on the legal validity of PD A1 documents raises concerns when dealing with apparent examples of fraudulent use and either the judiciary or the legislature show some resistance. The CJEU may have to further clarify or refine its case law.

It can be mentioned here that the point of view is awaited of the CJEU, who was recently requested to judge the validity of an E101 certificate.<sup>87</sup> This case is about an E101 certificate that was delivered by the Luxembourg competent institution for a 'Rhine boatman'. Yet, pursuant to Article 7(2) of Regulation (EC) No 1408/71 Rhine boatmen remained subject to the Agreements of 27 July 1950 and 30 November 1979 concerning social security for Rhine boatmen and, consequently, not to the European regulations. Nonetheless, the Luxembourg competent institution had delivered an E101 certificate for such a person. As a result of the dispute with the Dutch institution, the Court of Appeal in 's Hertogenbosch has asked the CJEU what the value is of such a certificate when it turns out that the details which it contains are obviously false or when the certificate was delivered in a situation to which Regulation (EC) No 1408/71 is not applicable.

---

<sup>87</sup> C-72/14, X v Directeur van het onderdeel Belastingregio.

## 4 Conclusion

The principle of sincere cooperation is paramount for the good functioning of the EU Coordination Regulations. Good cooperation depends on the exchange of information. The PD A1 serves this purpose to a big extent. However, whereas the Coordination Regulations do determine the structure, content, format and exchange of these documents, there are hardly any indications about the process leading to the issuing and withdrawal of these forms. There is room for flexibility. This sometimes leads to difficulties and challenges that might have an impact on the principle of sincere cooperation. Member States have adopted administrative procedures and approaches.

Throughout the report we have given an overview of national practices and proposed solutions for improvement by the Member States. The table below summarises these findings.

**Table 7 – An overview of some practices and suggestions for improvement proposed by the Member States**

When granting PD A1 documents	When dealing with difficulties after PDs A1 have been issued or denied
The application of electronic procedures. However, even in case of automatic e-applications, manual procedures can sometimes be used for sensitive or complex applications.	To arrange internal procedures aimed at contesting/challenging refusal of a PD A1 or to have more clarification on internal cancellation procedures.
Avoiding the misuse of PDs A1 by asking additional questions in the event of a first application or when there is a need for further clarification; or e-authentication of PD A1 forms; or to forbid that there is direct contact between the applicant and civil servant.	The circulation of information about granted or denied PD A1 forms by storing these forms in databases. Common standards could be developed including the creation of a European database or obliging employees to have the PD A1 with them at the workplace.
The development of more standardised templates throughout the EU; adding additional information to the PD A1 on the nature of the activity, both by the person concerned and by the sending/receiving companies; or the development of a PD A1 handbook.	To find solutions in the event of problems resulting from retroactive PDs A1: either by investigating the reasons why a PD A1 needs to be issued retroactively, or by improving the procedure when a PD A1 has to be withdrawn as the legislation is not applicable (either by transposing the procedure for the settlement of the provisionally determined applicable legislation or by directly paying back the contributions to the competent State).
To find a solution for the application of the rules on the provisional application of PDs A1: a better exchange of information or smoother application by simplifying or limiting the procedure.	To improve the regulatory framework concerning the withdrawal of PDs A1 by making the dialogue and conciliation procedure more efficient by revising it and installing a much stricter timeframe.

The report was structured around two parts. While the first part relates to the procedures used for granting the PD A1 forms, the second part focuses on problems and difficulties that arise after PDs A1 are issued or denied (in the event of refusal, cancellation or withdrawal of these forms).

When looking at the process for granting PD A1 forms, at all stages of the process, e-procedures are promoted by countries who already apply them. Whether or not e-tools are implemented, countries try to provide specific procedures to ensure that PDs A1 are rightly delivered: interviews, on-site visits, requests for additional information.

Countries have developed pragmatic practices. They facilitate access to information for workers and employers, usually with a website where information is available in more than one language; they find ways to harmonise rules of PD A1 granting within their country; they negotiate bilateral agreements to smoothen the process; they have a system of PD A1 storage.

However, the system is far from smooth and some suggestions can be made. The suggestions combine the objective of encouraging more efficient practices with the need for flexibility.

Minimum standards could be set with regard to the extension of e-procedures, access to e-application forms and filling out documents online and issuing the form electronically. They could also deal with e-authentication procedures.

A standard application form across all Member States could be promoted. It could be completed by a PD A1 handbook and by guidelines concerning the timeframe for issuing a PD A1.

The status of PD A1 when the applicable legislation is provisional needs to be improved. There are ways to reduce the number of provisional decisions. In parallel, practices concerning PD A1 issuing during the provisional period should be harmonised.

The status of PD A1 copies ought to be clarified: when should copies be sent and which value should a copy have? In this respect, a common database in which every country uploads the PD A1 it issues and to which all other countries have direct access via an online tool would be a good improvement.

In the second part of the report, it was established that it seems necessary to encourage countries to provide internal procedures in the event of refusal of a PD A1. Also, clarification and common standards about internal cancellation procedures would benefit both the Member States and the authorities involved, as well as employers and employees.

Rules about the retroactive granting of PD A1 should be refined. Discussions should take place on when and to what extent retroactive issuing should be allowed. Procedures applicable and consequences of a retroactive PD A1 (the obligation to reimburse contributions, the impact on benefits, the status of internal prescription rules) should also be reconsidered.

Finally, it seems necessary to make the conciliation procedure more efficient by revising it and installing a much stricter timeframe.

All these elements could promote information-sharing which is required for good administrative cooperation. In addition, it might also contribute to countering fraud which is sometimes connected to PDs A1 and endangers the good functioning of the Coordination Regulations.

It therefore seems recommendable to find out to what extent some of these practices and suggestions as developed by the Member States could be taken on board to improve the working of the PD A1 documents. In this respect, several Member States argue in favour of more common European procedures or guidelines. For this reason, we believe such European (soft) guidelines might be preferable rather than just an ad hoc solution where a method or approach followed in one Member State could be transferred to another Member State.

It could be envisaged to introduce the following guidelines or practices on a European level either by using soft law or by modifying the regulations:

- to set up minimum standards with regard to the extension of e-procedures, access to e-application forms and filling out documents online and issuing the form electronically;
- to develop a European standard for a common application template;
- to develop common standards concerning the exchange of information (when issuing as well as when withdrawing PDA1s) and to create a common database in which every country uploads the PD A1 it issues and to which all other countries have direct access via an online tool;
- to develop a procedure to better deal with consequences relating to retroactive PD A1 certificates;
- to make the conciliation procedure more efficient by revising it and installing a much stricter timeframe;
- to clarify how Member States can react when they are confronted with fraudulent PDs A1.