

MoveS seminar Croatia

Posting of workers

in the context of FMW and SSC
and recent changes in EU legislation

Zagreb, 25 October 2019

Faculty of Law at the University of Zagreb

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*Faculty of Law at the University of Zagreb,
University hall, ground floor
Trg Republike Hrvatske 14*

Languages: English and Croatian Funded by the

This seminar is organised by MoveS in collaboration with the Croatian national expert: izv. prof. dr. sc. Ivana Vukorepa.

AGENDA	
Introductory session (uvodni dio)	
08.30-09.00	Registration (registracija)
09.00-09.15	Opening of the seminar (otvaranje, uvodni pozdravi) <ul style="list-style-type: none"> Izv. prof. dr. sc. Ivana Vukorepa, MoveS national and analytical expert, University of Zagreb Prof. dr. sc. Igor Gliha, Dean of the Faculty of Law, University of Zagreb
09.15-09.30	Presentation of MoveS network (prezentacija MoveS mreže) <ul style="list-style-type: none"> Izv. prof. dr. sc. Ivana Vukorepa, MoveS national and analytical expert, University of Zagreb
09.30-10.10	EC representatives: Recent developments at EU level concerning posting of workers and social security coordination (Predstavnici EK: Najnovije promjene u EU u području upućenih radnika i koordinaciji sustava socijalne sigurnosti) <ul style="list-style-type: none"> Carita Rammus, DG EMPL unit D/1 (FMW, EURES) Maria-Luiza van de Westelaken, DG EMPL unit D/2 (SSC)
10.10-10.30	Questions and discussion (pitanja i diskusija)
10.30-11.00	Coffee break (pauza za kavu)
Morning session (jutarnji dio)	
11.00-11.30	Revised Posted Workers Directive: in the service of fair labour mobility? (Revidirana direktiva o upućenim radnicima: u službi pravične mobilnosti radnika?) <ul style="list-style-type: none"> Prof. Dr. Paul Minderhoud, MoveS analytical expert, Radboud University

MoveS is an EC-funded network of independent experts from 32 European countries coordinated by Grijns and Deloitte with the support of University of Ljubljana and the University of Poitiers.

11.30-12.00	Revised Posted Workers Directive: implementation challenges (Revidirana direktiva o upućenim radnicima: izazovi u implementaciji) <ul style="list-style-type: none"> Olivera Fišeković, Ministry of Labour and Pension System
12.00-12.30	The 4 key pillars of intra-EU posting in practice: information, registration, enforcement and monitoring (Četiri ključna stupa intra-EU upućivanja radnika u praksi: obavješćivanje, registracija, provedba i praćenje) <ul style="list-style-type: none"> Frederic De Wispelaere, MoveS analytical expert, HIVA and KU Leuven
12.30-13.00	Questions and discussion (pitanja i diskusija)
13.00-14.00	Lunch (ručak) <ul style="list-style-type: none"> Restaurant Muzej, Trg Republike Hrvatske 10
Afternoon session (poslijepodnevni dio)	
14.00-14.30	Posting and social security coordination: latest CJEU case-law and amendments to EU coordination regulations (Upućivanje i koordinacija sustava socijalne sigurnosti: najnovija sudska praksa Suda EU te izmjene i dopune uredbi EU) <ul style="list-style-type: none"> Prof. Dr. Dolores Carascosa Bermejo, MoveS national and analytical expert, Pontificia Comillas University and Complutense University, Editor in Lefebvre
14.30-15.00	A1's probative value and the duty of sincere cooperation: legal framework and CJEU case law (Dokazna snaga A1 potvrde i obveza suradnje: pravni okvir i sudska praksa Suda EU) <ul style="list-style-type: none"> Izv. prof. dr. sc. Ivana Vukorepa, MoveS national and analytical expert, University of Zagreb
15.00-15.30	A1's probative value and the duty of sincere cooperation: practical experiences (Dokazna snaga A1 potvrde i obveza suradnje: iskustva iz prakse) <ul style="list-style-type: none"> Dalibor Amanović, Croatian Pension Insurance Institute
15.30-16.00	Questions and discussion (pitanja i diskusija)
16:00-16.15	Closing remarks and end of the seminar (kraj seminara)

IMPORTANT NOTICE:

- The organisers may amend the agenda.
- Participation in the seminar is free of charge. Please note that all costs connected to the attendance of the seminar (travel, accommodation) are at the participants' expense. Admission is subject to availability of seating.
- On-line registration is possible until 2 October 2019. Please register through the following link: <https://forms.gle/qBSBjom2Y3h5bwLb6>.

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MoveS

project presentation

MoveS

EU-wide network
of independent legal experts
in the fields of
free **movement** of workers (FMW) &
social security coordination (SSC)

- Funded by the European Commission (DG EMPL units D1 'FMW' and D2 'SSC')
- 32 countries covered (EU/EEA/CH)
- Implemented by Eftheia, Deloitte Advisory & Consulting, University of Ljubljana, University of Poitiers
- Four-year project (2018-2021)

Objective 1

- To provide high-quality legal expertise in the areas of FMW and SSC
 - by means of **Legal Reports**
 - by means of monthly **Flash Reports**
 - by means of **replies to ad hoc requests**

MoveS Legal Reports (2019):

- ***'Report on the preliminary assessment of the national transposition measures of Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights'***
- ***'The application of FMW and SSC by national courts'***
- ***'The Application of the Social Security Coordination rules on modern forms of family/patchwork families'***

Flash Report

- Provided to the EC on a monthly basis
- Covering national developments impacting FMW and SSC
- Based on the inputs of the 32 countries of the network

Ad hoc support

- When the investigation of specific issues requires a detailed analysis of the national legal framework

Objective 2

- To disseminate expertise and increase experts' and practitioners' knowledge
 - by organising **seminars**
 - by **sharing information**
 - by **building networks between stakeholders**

Seminars

- Ca. 10 one-day seminars a year
- Audience: Representatives of competent authorities and institutions, social partners, NGOs, judges, lawyers and academics

2019 MoveS seminar calendar

Date	Country
26/4	Lithuania
18/6	Poland
13/9	Finland
23/9	Netherlands
4/10	Spain
10/10	Estonia
25/10	Croatia
5/11	Romania
6/11	Malta
15/11	Sweden

Cooperation and networking

- **MoveS webpage (EUROPA)**

<https://ec.europa.eu/social/main.jsp?catId=1098&langId=en>

MoveS LinkedIn group:

MoveS – free movement and social security coordination

<https://www.linkedin.com/groups/4291726>

Thank you for your attention!

Contact us at:

MoveS@eftheia.eu



Posting of Workers

October 2019

Carita RAMMUS
DG Employment, Social Affairs and Inclusion
Unit EMPL/D1
Free Movement of Workers, EURES

EU Legal framework

- **Directive 96/71/EC (the Posting of Workers Directive)**
- **Directive 2014/67/EU (the Enforcement Directive on Posting)**
- **Directive 2018/957/EU (revision of the PWD)**

Directive 96/71

Directive 96/71/EC regulates three types of posting of workers (not self-employed):

- the direct provision of services by a company under a service contract
- posting in the context of an establishment or company belonging to the same group ('intra-group posting')
- and posting through hiring out a worker through a temporary work agency established in another Member State

Summary of main elements Directive 2018/957

- Legal basis
- Types of collective agreements
- Remuneration, and other core-rights
- Long-term posting
- Temporary agency work and chain posting
- Transparency of information
- Transposition and application
- Link with road transport

Legal basis

- Internal Market legal basis remains **unchanged**
- However**
- **Article 1: Subject Matter and Scope**
 - **Recalls** that the Directive ensures the **protection of posted workers**
 - and that it shall not affect the **exercise of fundamental rights**

Types of collective agreements

- Collective agreements declared ***universally applicable***:
 - **CAs observed by all undertakings in the geographical area and profession concerned**
- Member States may also apply ***generally applicable collective agreements***, provided that their application respects ***equal treatment***
 - **CAs generally applicable to all similar undertakings in the geographical area and profession and/or**
 - **CAs concluded by the most representative social partners and which are applied throughout national territory**

Remuneration

- **Remuneration**
 - Determined by the **host MS** national law and/or practice
 - Means **all the constituent elements of remuneration** rendered mandatory by national law/practice or universally applicable collective agreements

Core rights

- **Conditions of workers' accommodation**, when provided by the employer in case the worker is away from the regular place of work
- **Allowances or reimbursement of expenditure to cover travel, board and lodging expenses** for workers away from home for professional reasons during the posting assignment

Long-term posting

- When the **effective duration** of a posting **exceeds 12 months...**
- ...the undertakings apply all the remaining terms and conditions of employment set by law or collective agreement.
- Upon **motivated request** by service provider, the period will **extend to 18 months**

Temporary agency work

- **Chain postings** – if a TA worker is sent by a user undertaking to carry out work in the territory of another MS, the worker is considered to be posted there by TAW, who is the employer and has to comply with the rules of the posting directives.
- Obligation for user undertakings to **inform TAW of the terms and conditions of employment** it applies

Transparency of information

- Availability of information on the single official national website regarding:
 - **The constituent elements of remuneration,**
 - **All the terms and conditions of employment**
- Obligation of accuracy and update of information
- Proportionality of sanctions in case of inaccurate info

Other issues

- Strengthened administrative cooperation – obligation to obtain info also from other authorities
- Posting allowances
- Bogus posting – worker concerned cannot be subjected to less favourable conditions than those applicable to posted workers

Link with road transport

- **Synchronisation clause** with *lex specialis* currently under negotiation
- **Review clause after 5 years** to assess the need for further measures

Transposition and application

- Transposition and application after 2 years – **30 July 2020**

Next steps

- Subgroup of Expert Committee on Posting of Workers to assist MS in the transposition of the Directive has held already 5 meetings
- Participation of social partners as observers at every third meeting
- Subgroup will adopt a report reflecting the discussions. Report will not be legally binding nor representing official views of MS or COM

Latest developments

- *Practical guide on posting published on 25/09*
 - **Living Document, will be updated**
 - **Will be available in all languages**

- *Implementation report of the Enforcement Directive on Posting*

Thank you!



MoveS seminar Zagreb

Current developments on social security coordination at EU level

**Revision of social security coordination rules,
ELA, Brexit**

**Luiza van de Westelaken
European Commission, DG EMPL
Unit D2 – social security coordination**

Revision of the social security coordination Regulations



State of play – formal steps

- Provisional agreement achieved between the European Parliament, the Council and the European Commission (March 2019)

<https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf>

- No qualified majority in Council (March 2019) and postponement of first reading vote in European Parliament (April 2019)
- Legislative process to resume.

Main changes

- Applicable legislation
- Unemployment benefits
- Family benefits
- Long-term care
- Equal treatment

Applicable legislation

- Period of prior affiliation of 3 months
- Period of interruption of 2 months
- Replacement prohibition extended to self-employed persons
- Prior notification in all cases of sending in advance (except business trips)
- Criteria for location of registered office/place of business (Article 13)

Unemployment benefits

- Aggregation: Minimum qualifying period of 1 month
- Export: Increase to a minimum of 6 months with possible extension to the whole period of entitlement
- Frontier workers: Change of competence after 6 months of activity

Family benefits

- Distinction between family benefits intended to replace income due to child-raising (individual right), and other family benefits
- Option for Member States to pay benefits in full
- Differential supplement: two calculations

Long-term care and Access of economically inactive mobile citizens to social benefits

- **LTC**
- Definition and coordination according to sickness rules (Art. 20 excluded)
- List of benefits by the Administrative Commission
- Derogation to coordinate under other chapter if more favourable (in an Annex)
- **Access of inactives to social benefits**
- Reference to CJEU judgments in a recital (*Brey*, *Dano*, *Alimanovic*, *Garcia-Nieto* and *COM vs UK*)
- Recital on access to healthcare by inactive citizens



European
Commission



Brexit scenarios

- Who is affected?
 - Up to 4.5 million EU & UK citizens residing/working in the UK/EU before Brexit
- Scenario 1: DEAL - Withdrawal Agreement
 - EU law on SSC will continue to apply to persons falling within the personal scope of the WA

- Scenario 2: NO DEAL – Contingency measures
 - Regulation (EU) 2019/500 establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom from the Union (adopted on 19 March 2019)
- Personal scope:
 - EU-27 and UK nationals who exercised free movement before Brexit
- Principles covered:
 - Equality of treatment, assimilation and aggregation as regards all branches of social security covered by Article 3 of Reg. 883/2004
- Entry into application only in case of no-deal Brexit

EC Guidance note

- Proposed by the EC to EU-27
- Complements the contingency Regulation by recommending MS to continue to apply certain rules of SSC related to free movement exercised before Brexit (e.g. continue to export old-age pensions; finalisation of medical treatment ongoing on the withdrawal date; finalisation of pending claims)
- MS can decide to go further (e.g. by continuing to export to the UK other cash benefits)

European Labour Authority



Legal basis

- Regulation 2019/1149
- Decision on seat: 13 June 2019
- Publication in OJ: 11 July 2019
- Entry into force: 31 July 2019

First steps

- ELA Establishment Group
- Interim Executive Director
- Appointment of Management Board members: August 2019
- First Management Board meeting: 16/17 October 2019
- Second Management Board meeting: Early December 2019 (one day – date tbc)

Main activities

- Facilitating access to information on rights and obligations in cases of cross-border mobility for employees, employers and national administrations
- Supporting cooperation between Member States in cross-border enforcement of relevant Union law, including facilitating concerted and joint inspections
- Supporting cooperation between Member States in tackling undeclared work
- Supporting Member States authorities in resolving cross-border disputes

Impact on social security

- Social security included in the scope of ELA
- No transfer of Technical Commission, Audit Board, Conciliation Board
- For disputes related to social security, case may be referred to the Administrative Commission
- Administrative Commission may request ELA to transfer cases to it
- Cooperation Agreement to be concluded between ELA and Administrative Commission to set out work methods



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**Coffee break
(10:30-11:00)**

Posting of workers
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Deloitte.



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Revised Posted Workers Directive: in the service of fair labour mobility?

Prof. dr. Paul Minderhoud
University of Nijmegen/University of Utrecht
The Netherlands

Who is a Posted Worker?

- A "**posted worker**" is an employee who is sent by his employer to carry out a service in another EU Member State **on a temporary basis, in the context of a contract of services, an intra-group posting or a hiring out through a temporary agency**
- The legal basis for posting of work is the free movement of services provision of article 56 TFEU. The legal basis for EU mobile work is the free movement of workers provision of article 45 TFEU

Problems regarding Posting of Workers

- Specific sectors of the economy (construction, transport)
- Low wage countries to high wage countries
- Receiving countries are mainly Germany, France and Belgium
- In practice even minimum EU rules of protection are not followed, leading to abusive practices

Posted Workers Directive 96/71

- Posted workers are subject to a nucleus of mandatory rules for minimum protection of the host State
- Laval case: provisions Directive not only a floor for social protection but also a ceiling
- Host MS can only impose obligation to pay *minimum* wages
- No equal treatment required

Posting of Workers Enforcement Directive 2014/67

- Necessary because the PWD did not guarantee in practice any protection against abusive and exploitative practices. Some examples:
- Letter box companies and U turn constructions
- Bogus self-employed persons
- Pyramids of subcontractors
- False declarations of posting (A1 forms etc.)
- Repeated replacement of posted workers
- + high sums to be paid by the workers for expenditure on travel, board and lodging, bad housing, poor access to legal remedies in practice and no payment of minimum wages or of social security contributions in the home state and no monitoring of the obligatory rest and work hours.

Evaluation report Commission COM(2019)426

- Report of 25 September 2019
- Not necessary to propose amendments to the Enforcement Directive at this stage.
- But implementation by MS can be improved in some areas, such as decreasing the administrative burden
- The [European Labour Authority](#) will play a key role in fighting abuse in this field and will provide support to all actors involved

Revised Directive on Posting of Workers 2018/957

- March 2016: European Commission presented a proposal amending Directive 96/71: COM(2016)128
- Juncker speech 13 September 2017: there is a need for workers in the EU to earn the same pay for the same work in the same place
- Adopted 28 June 2018. Enter into force 30 July 2020. Special schedule for transport sector
- Croatia abstained from voting

Revised Directive on Posting of Workers 2018/957

2

- Hungary(C-620/18) and Poland(C-626/18) have challenged the legality of the Directive before the CJEU arguing that it amounts to protectionism and breaches Article 56 of the TFEU
- 30 Recitals and only 3 Articles
- Recital 16: In a truly integrated and competitive internal market, undertakings compete on the basis of factors such as productivity, efficiency, and the education and skill level of the labour force (...). In other words, they do not compete on wages

Main changes Directive 2018/957

1) Employers are obliged to pay posted workers all elements of the **remuneration** as set out by law and/or, if applicable, by a universally binding collective labour agreement of the host country.

- This includes additional allowances, such as overtime rates, statutory minimum wage or period wage in the pay scale and statutory holiday allowance.
- It does **not** include supplementary occupational retirement pension schemes.
- Uncertainty how about sick pay, maternity pay, unfair dismissal compensation and redundancy pay

Main changes Directive 2018/957

- The minimum wage guarantee is no longer enough to protect a level playing field and is replaced by a guarantee of equal remuneration. All elements of remuneration that are mandatory apply to both local and posted workers.
- These elements include:
- Thirteenth month allowances, travel expenses or compensation for work during public holidays or night work, seniority, Christmas bonus, allowance for bad weather, mobility allowance, pay supplement for special works, allowance for wear of tools, allowance for difficult work, meal vouchers or other type of vouchers, etc.
- But “equal pay” does not imply that a posted worker is entitled to an identical salary and benefits package as his local colleagues (cf. group insurance, hospitalization, company car, lunch allowances, etc.).

Main changes Directive 2018/957

2) Employers are obliged to separately reimburse travel, board and lodging expenditure incurred by posted workers where they are required to travel for professional reasons.

- Not part of remuneration. Not taken into account when comparing the amounts actually paid to the worker and the amounts due in accordance with host Member State law: they are paid or reimbursed on top of the remuneration

Main changes Directive 2018/957

3) Full application of the host Member State mandatory labour law after posting of 12 (or 18) months

- Exception made for the termination rules and supplementary occupational retirement pension schemes
- Recital 11: Where a posting exceeds 12 or, where applicable, 18 months, the additional set of terms and conditions of employment to be guaranteed by the undertaking posting workers to the territory of another Member State should also cover workers who are posted to **replace** other posted workers performing the same task at the same place, to ensure that such replacements are not used to circumvent the otherwise applicable rules

Main changes Directive 2018/957

4) Employers are obliged to apply the same conditions to posted temporary agency workers as apply to national temporary agency workers of the host country.

- Collective agreements at the level of the user undertaking (although they are not universally applicable) are also applicable to posted temporary agency workers

Concluding comments

- The free movement of services is now more firmly connected to the principle of equal treatment
- Equal treatment with local workers in respect of wages protects not only the posted workers, but also the local labour market from unfair competition
- Conflict of interest between sending MS and their nationals against receiving MS and their nationals

Concluding comments

- Danger that more enterprises will resort to carrying out the performance of the service contract in the home Member State and thereby avoid the Posting of Workers Directive
- Danger that it will just burden transnational businesses and limit the cross-border provision of services altogether
- Role European Labour Authority?



MINISTARSTVO RADA
I MIROVINSKOGA SUSTAVA

REVIDIRANA DIREKTIVA-
2018/957/EU

IZAZOVI U IMPLEMENTACIJI

EUROPSKI PRAVNI OKVIR KOJI SE PRIMJENJUJE NA UPUĆIVANJE RADNIKA

- Postoji više pravnih akata EU (uredbe, direktive, presude Europskoga suda)
- odnose se na različite aspekte upućivanja:
 - ✓ ulazak, boravak i rad na teritoriju države članice
 - ✓ područje radnih prava
 - ✓ područje socijalnoga osiguranja
 - ✓ porezna pitanja
- pravila i kriterije uređene određenim pravnim aktom EU treba razmatrati samo u kontekstu, opsegu i području na koje se akt odnosi



PODRUČJE RADNIH PRAVA

Nacionalno zakonodavstvo:

- Zakon o strancima
- Zakon o radu
- Zakon o prekograničnoj provedbi odluka o novčanoj kazni u području upućivanja radnika
- Pravilnik o postupanju prilikom opće procjene privremenosti rada upućenoga radnika i privremenosti poduzimanja ekonomskih aktivnosti poslodavca u RH
- Pravilnik o obliku i sadržaju izjave o upućivanju radnika
- Jedinstveni zakon o upućivanju radnika u RH u pripremi



PROMJENE

- 1.umjesto do sada propisanoga prava upućenoga radnika na zajamčeni iznos najniže plaće u državi domaćinu, definira se pravo na naknadu za rad
- 2.lista prava koja se jamče proširuje se s dva dodatna prava koja se odnose na:
 - ✓ kvalitetu smještaja
 - ✓ troškove unutarnje mobilnosti radnika
- 3.uvodi se pravilo o dugotrajnom upućivanju
- 4.detaljnije se adresira rad upućenih agencijskih radnika te obveze agencije za privremeno zapošljavanje

NAKNADA ZA RAD

- Novo pravilo nalaže da će se iznos naknade za rad koji treba najmanje osigurati i upućenom radniku, izračunati na temelju svih sastavnih elemenata plaće domaćega radnika koji se, na temelju zakona države domaćina ili kolektivnoga ugovora koji je proglašen opće primjenjivim, **obvezno** primjenjuju na radnika u državi domaćinu
- ne uzima se u obzir element naknade za obavljeni rad koji se obvezno ne primjenjuje na sve domaće radnike

NAKNADA ZA RAD

Znači li novi koncept da je naknada za rad upućenoga radnika jednaka plaći domaćega radnika?

- približavanje u većoj mjeri, ali ne izjednačavanje u potpunosti s plaćom koja se isplaćuje domaćem radniku
- plaća radnika domaćega poslodavca temelji se na pojedinačnom ugovoru o radu, svakom kolektivnom ugovoru koji obvezuje poslodavca te drugim aktima, dok se na naknadu za rad upućenoga radnika primjenjuje zakon ili kolektivni ugovor čija je primjena proširena

NAKNADA ZA RAD - IZNIMKA

JEDNA IZNIMKA: naknada za rad stranog agencijskog radnika

- primitak koje strani agencijski radnik primi za obavljeni rad, ne smije biti utvrđen u iznosu manjem, odnosno nepovoljnijem od plaće radnika zaposlenog kod korisnika na istim poslovima, koje bi upućeni agencijski radnik ostvario da je sklopio ugovor o radu s korisnikom

OBVEZE POSLODAVCA KOJI UPUĆUJE RADNIKA

Što to u stvari poslodavac mora osigurati upućenom radniku?

- da je iznos koji je stvarno isplaćen upućenom radniku barem jednak iznosu naknade za rad koji treba osigurati primjenom pravila države domaćina

OBVEZE POSLODAVCA KOJI UPUĆUJE RADNIKA

Kako će poslodavac znati koji iznos naknade za rad treba osigurati primjenom pravila države domaćina i koja su to pravila?

- Definicija i sastav, metoda izračuna, naknade za rad, u ovom smislu, stvar je svake države članice i socijalnih partnera
- informaciju potražiti na mrežnoj stranici koja se tiče upućivanja radnika, a koju ima svaka članica:
https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm
<http://ec.europa.eu/social/main.jsp?catId=726>

IZAZOVI

1.kako povezati nacionalni koncept plaće sa naknadom za rad na koju će imati pravo upućeni radnik prema propisima odnosno kolektivnim ugovorima čija je primjena proširena na sve radnike i poslodavce u određenoj djelatnosti ili sektoru, s obzirom da naknada nije jednaka plaći domaćega radnika

- definicija: čine je **svi obvezni sastavni dijelovi naknade** za obavljeni rad, uključujući povećanu naknadu za prekovremeni rad, na koje imaju pravo svi domaći radnici prema propisu, odnosno kolektivnom ugovoru čija je primjena na temelju posebnog propisa proširena na sve poslodavce i radnike u određenom području, grani ili djelatnosti u Republici Hrvatskoj

IZAZOVI

2. treba utvrditi koji sastavni dijelovi naknade za obavljeni rad ispunjavaju kriterij da se obvezno primjenjuju na domaćega radnika, osobito ako je njihov izvor kolektivni ugovor čija je primjena proširena, s obzirom da ih Zakon o minimalnoj plaći i Zakon o radu utvrđuju

IZAZOVI

3. utvrditi što se **neće smatrati sastavnim dijelom naknade za rad**, već pripada i isplaćuje se radniku **povrh te naknade** - djelomični odgovor je u direktivi i presudama ECJ-a, osobito C - 396/13- Sähköalojen ammattiliitto

- Postoje i troškovi koji se ne smatraju primitkom za rad, a to su svi oni iznosi koji se isplaćuju kao naknada za **stvarno nastale troškove** za vrijeme upućivanja (npr. naknada troškova putovanja, smještaja i hrane, bon za topli obrok). Ovi troškovi se isplaćuju ili nadoknađuju radniku dodatno, povrh naknade za rad, te se ne uzimaju u usporedbi je li radniku osigurana naknada na koju ima pravo prema pravilima države domaćina. U naknadu za rad ne računaju se ni naknade u naravi.

NADZOR

- osobito teško pitanje - nadzor isplate pripadajuće naknade, osobito prema kolektivnom ugovoru čija je primjena proširena
- nadležno tijelo koje obavlja inspekcijski nadzor treba nadzirati je li upućenom radniku osigurana naknada za obavljeni rad na koju radnik ima pravo prema zakonodavstvu RH

NADZOR

Prilikom utvrđivanja je li stvarno isplaćeni iznos naknade barem jednak iznosu naknade koju radniku treba osigurati prema zakonodavstvu RH, uspoređuje se bruto iznos stvarno isplaćene naknade i bruto iznos naknade za obavljeni rad na koju upućeni radnik ima pravo u RH, a ne pojedinačni sastavni dijelovi naknade za obavljeni rad

LANČANO UPUĆIVANJE

- Ukoliko je agencijski radnik prekogranično ustupljen, to se smatra upućivanjem, jer se usluga sastoji u samom ustupanju radnika
- sve češća pojava u praksi, no do sada nije bilo primjenjivih pravila, potrebno ih je uvesti
- agencija se smatra poslodavcem koji upućuje radnika, sa svim obvezama koje proizlaze iz te pozicije

SITUACIJE KOJE TREBA REGULIRATI

- a) strana agencija iz druge države ustupa radnika u HR korisniku sa sjedištem u RH
- b) korisnik sa sjedištem u RH šalje stranog agencijskog radnika dalje u treću državu u kojoj privremeno posluje
- c) domaća agencija ustupila je radnika korisniku sa sjedištem u RH, a on ga šalje u drugu državu
- d) domaća agencija uputila je radnika korisniku sa sjedištem u drugoj državi
- e) domaća agencija uputila je radnika korisniku sa sjedištem u drugoj državi, a on ga šalje u treću državu

SITUACIJE KOJE TREBA REGULIRATI

Problem: agencija kao poslodavac, mora na agencijskog radnika primijeniti najpovoljnije pravo te se u sukobu mogu naći pravila više država, važno je da se domaće agencije informiraju pravodobno o zakonodavstvu, nakon što budu obaviještene od korisnika o slanju radnika u treću državu

DUGOTRAJNO UPUĆIVANJE

1. veže se za stvarno trajanje upućivanja po istom zadatku

Prijedlog rješenja: Početak i kraj perioda upućivanja računa se od dana navedenog u izjavi o upućivanju, a u slučaju sumnje, u obzir mogu biti uzeti i datum početka i kraja upućivanja iz potvrde nadležne ustanove socijalnog osiguranja o obuhvaćenosti radnika inozemnim sustavom socijalnog osiguranja za vrijeme upućivanja, odnosno podatak o državi ili državama u kojima treba obavljati rad u inozemstvu te podatak o početku i trajanju rada u drugoj državi iz ugovora o radu ili drugoga akta kojim je zasnovan radni odnos.

DUGOTRAJNO UPUĆIVANJE

2. treba li se i hoće li se uračunavati period upućivanja i prije 30. 7. 2020.

3. što je s (ne)mogućnošću poslodavca da obavijesti o potrebi produženja na dodatnih 6 mjeseci u odnosu na radnike koji su već upućeni, možda i duže od 12 mjeseci ili blizu 12 mjeseci

Mišljenje Komisije je da se rok od 12 mjeseci računa od početka zadatka na koji je radnik upućen te da period prije 30. 7. mora biti uzet u obzir

DUGOTRAJNO UPUĆIVANJE

Prijedlog rješenja:

- Sva upućivanja do 12 mjeseci, koja su u tijeku na dan 30. 7. 2020. smatrat će se automatski produženima do 18 mjeseci, bez potrebe podnošenja obavijesti
- Obavijest o potrebi produženja vezat će se uz podnesenu izjavu o upućivanju, koja će se podnositi putem elektroničke aplikacije koja se izrađuje

DOSTUPNOST INFORMACIJE

- Izrada nove mrežne stranice o upućivanju radnika u tijeku
- izrada elektroničke aplikacije za podnošenje izjave o upućivanju, njenih izmjena te obavijesti o potrebi produženja perioda upućivanja (12 +6)
- bolja mogućnost praćenja podataka i trendova

Hvala!

The 4 key pillars of intra-EU posting in practice: information, registration, enforcement and monitoring

Frederic De Wispelaere – HIVA KU Leuven

*MoveS seminar Croatia
Zagreb, 25 October 2019*

Introduction



- It is an understatement to say that the topic of 'posting' stirs up strong emotions;
- For some stakeholders, the amended PWD goes much too far, while other stakeholders argue that the new provisions will have little or no impact in practice;
- The question is, however, whether it is really necessary to constantly pursue adjustments to the European rules applicable to posting.

Introduction

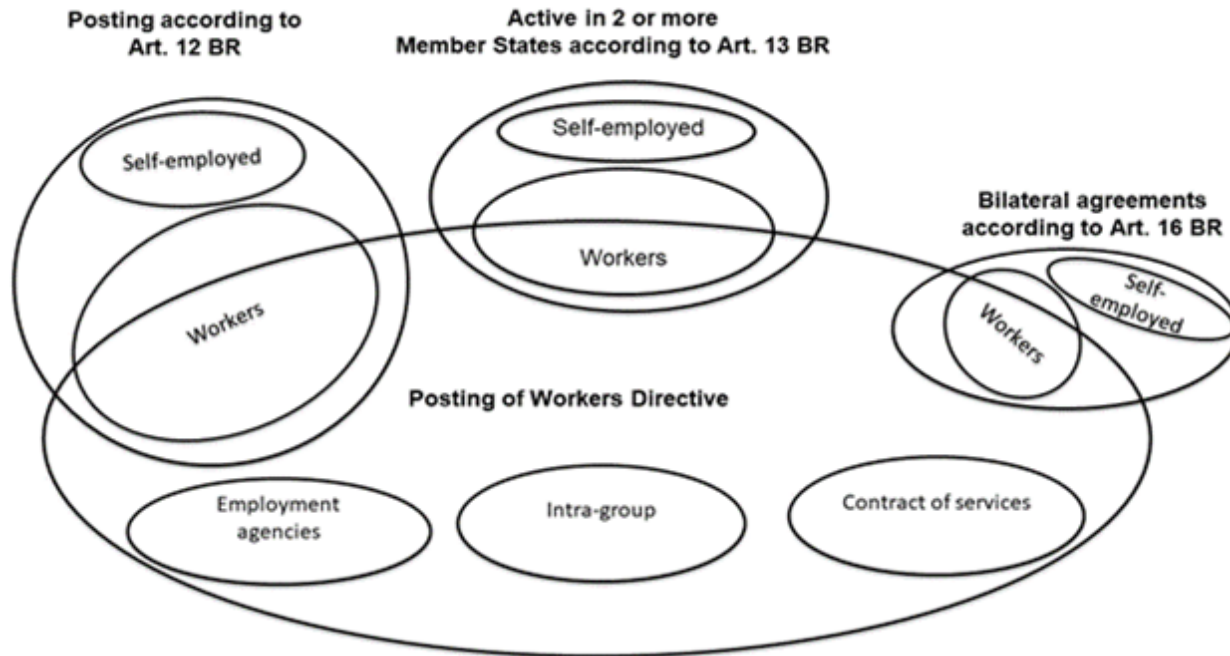


- After all, it seems like several provisions on
 - *access to information,*
 - *the registration of posted workers,*
 - *enforcement,*
 - *the exchange of information,*
 - *data collection,*
 - *and monitoring,*

which are laid down by the Posting of Workers Directive, the Coordination Regulations and the Enforcement Directive, are still underutilised.

- In favour of a pragmatic approach which first fully endorses and implements the current legislative framework applicable on intra-EU posting.

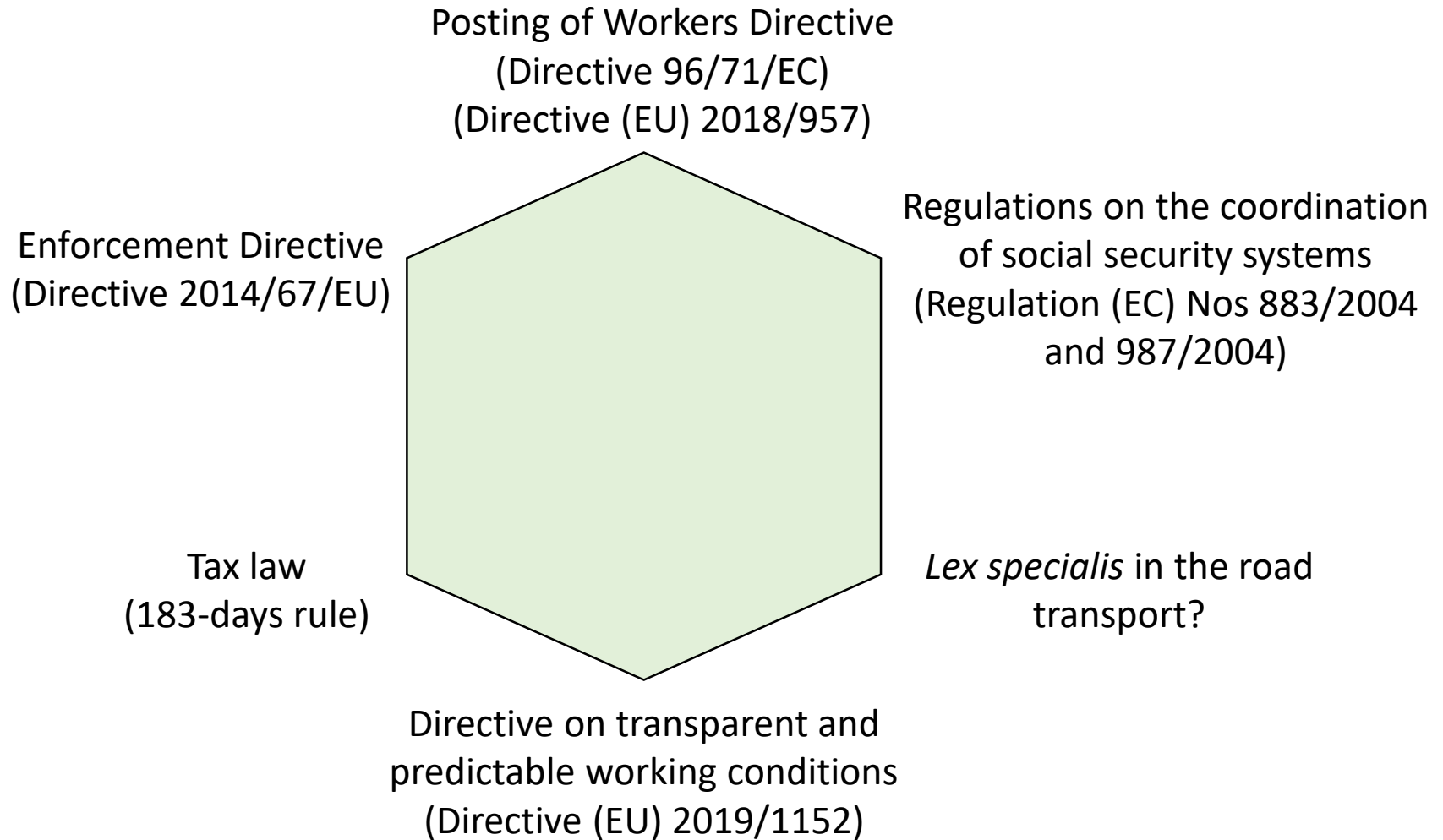
Access to information: *Posting – A confused concept*



“Everyone talks about posting, but nobody knows exactly what it means”

‘Business trip’ = posting ?

Access to information: *A broad approach*



Access to information:

The single official national website (Article 5 of the Enforcement Directive)



- The ways in which Member States are approaching this task varies greatly;
- Good practices are observed in, among others, Austria, Slovenia, Italy and Sweden. However, a number of websites are still not up to scratch;
- Several websites only contain part of the information that the posting undertaking actually needs, as no information is available on social security law and tax law, or even on the applicable collective agreements;
- Websites do not always refer to the application/declaration process of posted workers in both the Member State of origin (related to the application of the Coordination Regulations) and the host Member State (related to the application of the Posting of Workers Directive and the Enforcement Directive).

Access to information:

The single official national website (Article 5 of the Enforcement Directive)



	CROATIA
Address	Old: http://www.mrms.hr/posting/posted-workers/ New: https://mrms.gov.hr/o-ministarstvu-9/uprava-za-rad-i-zastitu-na-radu/information-for-service-providers-performing-temporary-services-in-croatia-posted-workers-and-service-users/4197
Clear, transparent, comprehensive and easily accessible	Yes, but too much information, not structured. Difficult to find what you need.
Clearly indicated terms and conditions of employment (stipulated in law or in case of Art 5 (4) in collective agreements)	No, all text is presented in one row, which makes it difficult to find information on a concrete working condition. Minimum wage stipulated only in Croatian currency, could be helpful to have it also in euros.
Applicable collective agreements (to whom, which conditions)	Yes, 1 universally applicable collective agreement in construction sector.
Languages (official language(s) and most relevant)	EN Most relevant according to A1 data (2016): SI, DE
Contact person at the liaison office indicated	Yes.

Access to information: *Good practice*



PSC
Jedinstvena
kontaktna točka
za usluge

[POINT OF SINGLE CONTACT](#)

[USER GUIDE](#)

[CONTACT](#)



[HR](#)

[EN](#)

HOW TO START A BUSINESS IN CROATIA?

Point of Single Contacts are one-stop-shops offering business information on administrative obligations for easier services market access in Croatia

[SEARCH](#)

CONTINUE TO SCROLL



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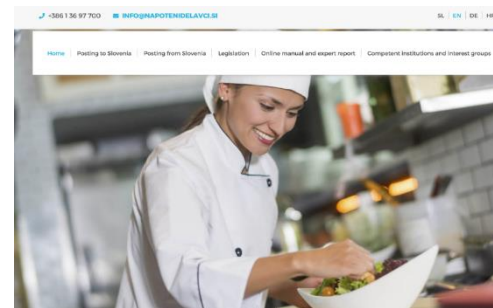
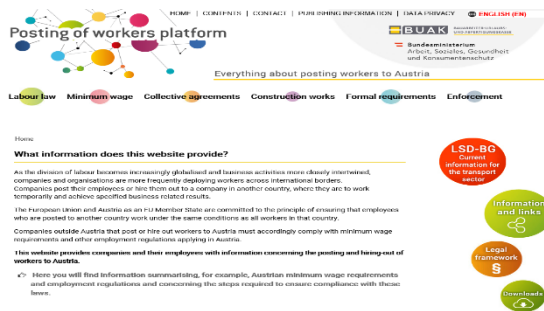


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Access to information: *Some recommendations*

- Information should be offered from a helicopter view. Inform posting undertakings and posted workers about:
 - the use of posting (situations covered) and the differences of the notion in labour law, social security law and tax law;
 - the application/registration procedures in both the sending and receiving Member State.
- Remark/proposal of the employers' organisations included in the review of the Enforcement Directive: "a template for a uniform website would be a significant improvement when it comes to the clarity and accessibility of information"
- Role of ELA?
- Take a look at some good practices:



Registration - outgoing:

Request of a Portable Document A1



- There is a great variety of practices among Member States with regard to the application procedure for a PD A1. In many Member States, an electronic procedure to apply for a PD A1 is implemented.
- Before issuing a PD A1, the competent institutions will (or at least should) check whether the posting conditions are fulfilled. To what extent these conditions are verified strongly differs among Member States. In general, four methods are used by the competent public authorities to verify whether the conditions are fulfilled:
 - 1) it is asked on the PD A1 application form (declaration from the employer and/or questions);
 - 2) the competent institution asks for relevant documents (to be attached to the application);
 - 3) it is verified by consulting other electronic databases/registers by the competent institution;
 - 4) random checks on the submitted declarations.
- Several Member States rely solely on the answer of the posting undertakings to the questions included in the application forms;
- Several Member States do not or cannot verify these conditions. For instance, it is clear that it is almost impossible to verify the 'non-replacement condition'.

Registration - outgoing:

Request of a Portable Document A1 in Croatia



- In Croatia, the competent institution for issuing the PD A1 is the Croatian Pension Insurance Institute (CPII). The competences for issuing a PD A1 are divided between regional and branch offices;
- The application forms are available at the CPII's official website and once completed, they should be **submitted to the competent regional or branch office by post or in person in paper form only**;
- The information in the application form is verified by using the information available from the Croatian Pension Insurance Institute's Database database and information from other institutions.

Registration - incoming: Prior notification tools



	Implemented a prior notification tool?	Self-employed covered?	Persons posted from countries outside of the EU-28/EFTA covered?	Type of procedure
BE	YES	YES	YES	Electronically
BG	YES	NO	YES	Post
CZ	YES	NO	YES	Mail/post
DK	YES	YES	YES	Electronically
DE	YES	NO	YES	Electronically
EE	YES	NO	NO	Mail
IE	YES	NO	NO	Mail/post
EL	YES	NO	NO	Mail/post/fax
ES	YES	NO	YES	
FR	YES	NO	YES	Electronically
HR	YES	NO	YES	Mail
IT	YES	NO	YES	Electronically
CY	YES	NO	NO	Mail/post
LV	YES	NO	NO	Mail
LT	YES	NO	YES	Mail/post/fax
LU	YES	NO	YES	Electronic
HU	YES	NO	NO	Electronic
MT	YES	NO	NO	Electronically
NL	NO			
AT	YES	NO	YES	Electronically
PL	YES	NO	YES	Post/ Electronically
PT	YES	NO		Mail
RO	YES	NO	YES (other system)	Post
SI	YES	YES		Electronically
SK	YES	NO	NO	Electronically/ mail
FI	YES	NO	YES	Electronically
SE	YES	NO	YES	Electronically
UK	NO			

Registration - incoming:

Prior notification tool of Croatia



- When providing services in Croatia, every service provider, is obliged to submit a posting declaration before the start of any service in Croatia;
- The posting declaration should be submitted to the Labour Inspectorate electronically to the following e-mail address: postingdeclaration.inspektorat@mrms.hr
- The form of the posting declaration is available at: <https://mrms.gov.hr/o-ministarstvu-9/uprava-za-rad-i-zastitu-naradu/information-for-service-providers-performing-temporary-services-in-croatia-posted-workers-and-service-users/4197>

Registration:

Some recommendations



- Introduction of user-friendly application / registration procedures;
- The principle of sincere cooperation obliges the competent institutions to carry out a proper assessment of the facts relevant to the application of the rules for determining the applicable social security legislation and, consequently, to guarantee the correctness of the information contained in the PD A1: please take this serious!;
- Practical Guide on Posting: *"Workers who are sent temporarily to work in another Member State, but do not provide services there, are not posted workers. This is the case, for example, of workers on business trips, attending conferences, meetings, fairs, following training etc. **Such workers are not covered by the Posting of Workers Directives and the administrative requirements** and control measures set out in Article 9 of Directive 2014/67/EU are therefore not applicable to them."* – Exemptions should be applied by Member States!

Enforcement



- Several infractions of the conditions determined by Article 12 of Regulation (EC) No 883/2004:
 - no direct relationship between the posted worker and the employer;
 - no substantial activities in the sending Member State, the employer only makes use of posting, inappropriate statements of the domestic activity, letterbox companies etc;
 - falsification of documents (e.g. false PDs A1 or false social security data);
 - incorrect information provided by the applicant;
 - bogus self-employment: wrong status of the person concerned;
 - circumventing the application of Article 12: false evidence that Article 13 instead of Article 12 should be applied.

	Number of PDs A1 withdrawn (as competent MS)	Total number of PDs A1 issued in 2017	% of withdrawn PDs A1 in 2017
BG	3	36,220	0.0
HU	682	82,881	0.8
NL	52	103,738	0.1
AT	5	68,956	0.0
PL	621	573,358	0.1
IS	2	293	0.7

Enforcement

Fight against letterbox companies



- Review of the Enforcement Directive was published by the Commission on 25 September 2019;
- Link between posting and the existence of letterbox companies: 'the presence or absence of substantial activities';
- A number of relevant indicators and 'red flags' can be found in the existing European legislation;
- Enforcement Directive – Art 4(2) : Elements to determine whether an undertaking genuinely performs substantial activities
 - Most of the Member States have provided for a list of elements identical to those in the Directive;
 - + Croatia: the duration and frequency of an employer's activity in the national territory, and whether it is performed occasionally or continuously.

Enforcement

Fight against letterbox companies in road freight transport



- Number of PDs A1 issued according to Art. 13 BR: a high percentage of truck drivers employed in Croatia is active in two or more Member States;
- Regulation (EC) No 1071/2009 has introduced some important requirements for all transport undertakings authorised by a Member State, helping to clamp down on the phenomenon of letterbox companies:
 - to have an effective and stable establishment;
 - to be of good repute;
 - to have appropriate financial standing;
 - and to have the requisite professional competence.
- Most Member States have implemented the requirements without additions. The most common additional requirement at the national level is for a parking space, which is specified in Austria, Bulgaria, Ireland, Slovakia and the UK.
- Lack of enforcement capability / manpower?

Monitoring by (the exchange of) data on intra-EU posting



- “The more we know about posting, the better we can discuss it.”
- The lack of accurate and detailed data on posting might hamper the possibility to get a proper picture of the phenomenon, and to assess the legal, economic and social impact of this type of intra-EU labour mobility;
- Data on posting are certainly not only necessary for scholars and policy makers. Also competent institutions in both the Member State of origin and the host Member State need data before, during and after the posting of workers.

Monitoring by (the exchange of) data on intra-EU posting: *Statistics*

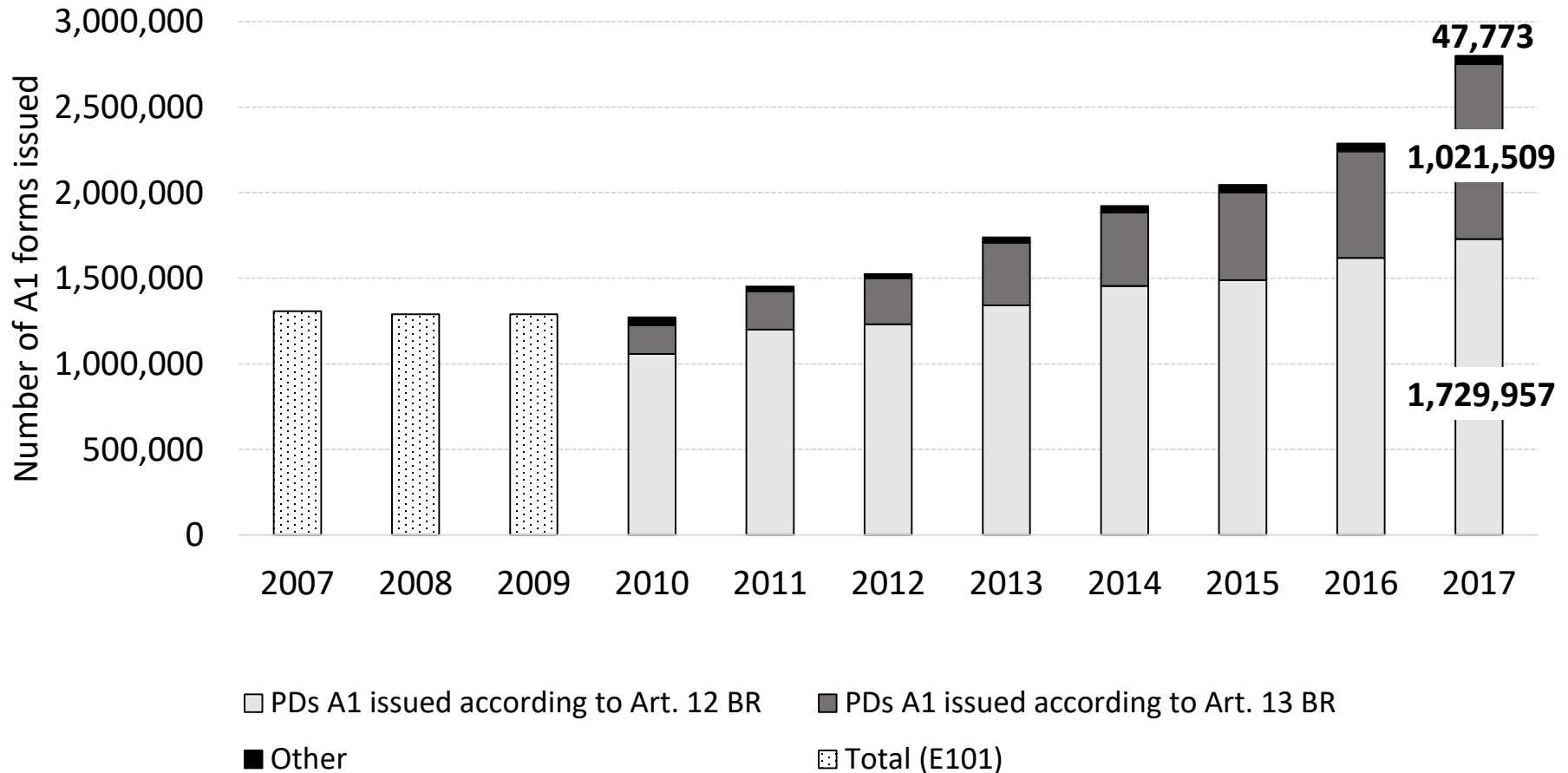


	Data from the A1 form	Data from the national prior notification tools
Legal base	Basic Regulation (EC) No 883/2004 and Implementing Regulation (EC) No 987/2009	Directive 2014/67/EU
Area	Social security	Terms and conditions of employment
Scope	Determined by Art. 12 of the Basic Regulation	Determined by Art. 3(1) of the Posting of Workers Directive + (for some MSs: + self-employed and/or + posting undertakings established outside the EU-28/EFTA)
Exempted	Persons active in two or more Member States (Art. 13 of the Basic Regulation); postings longer than two years; repetitive postings	Several categories in some/most host MSs (for instance, persons attending business meetings or participation in seminars and lectures are not always required to register) + (by several MSs: + self-employed and/or + posting undertakings established outside the EU-28/EFTA)
Enforcement	In some cases, a posting may take place without the institutions being informed of it or the PD A1 will be awarded with retroactive effect	Implementation of a 'simple declaration' system is a faculty given to Member States, not an obligation. Most Member States implemented sanctions in the event of non-registration.

Monitoring by (the exchange of) data on intra-EU posting:

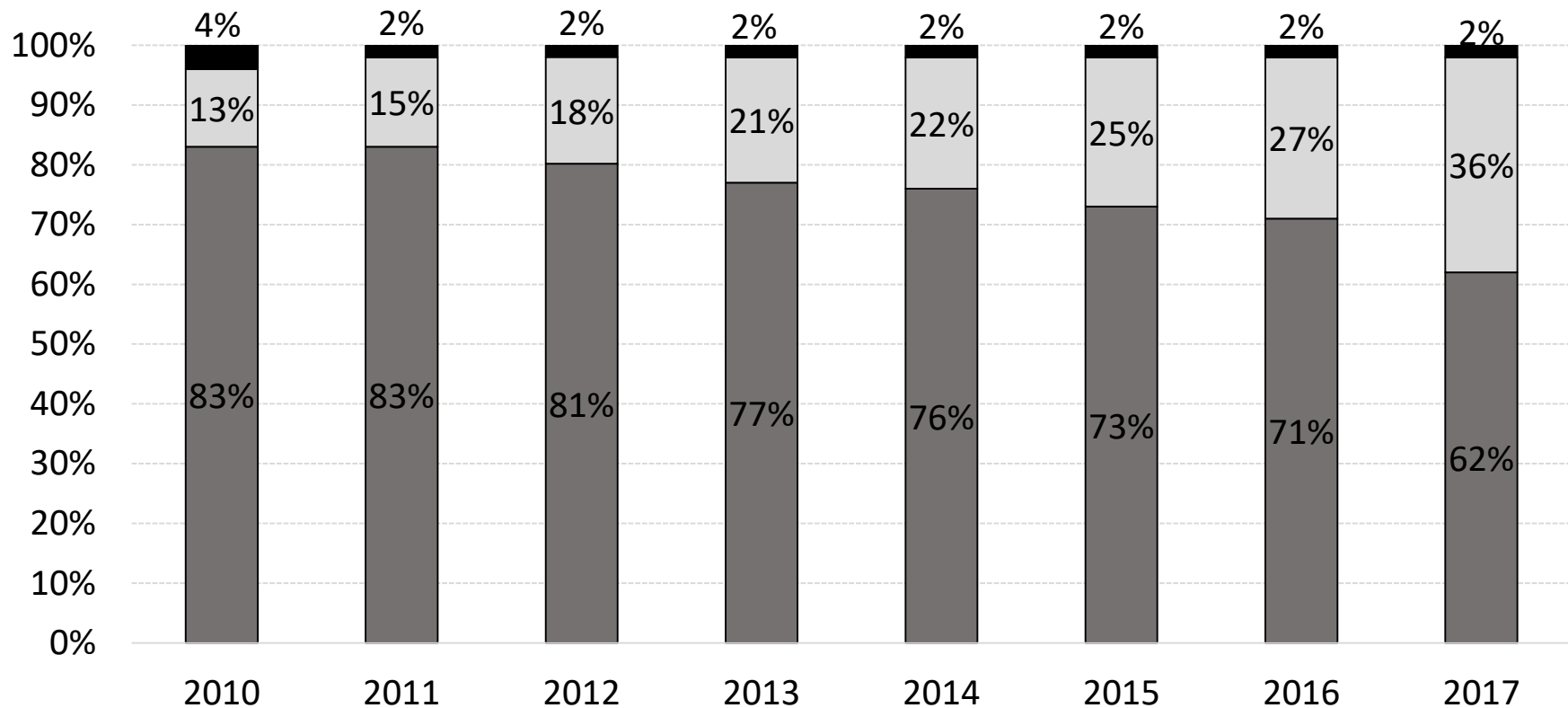


Evolution of the number of PDs A1 issued



Monitoring by (the exchange of) data on intra-EU posting:

Posting vs active in 2 or more Member States

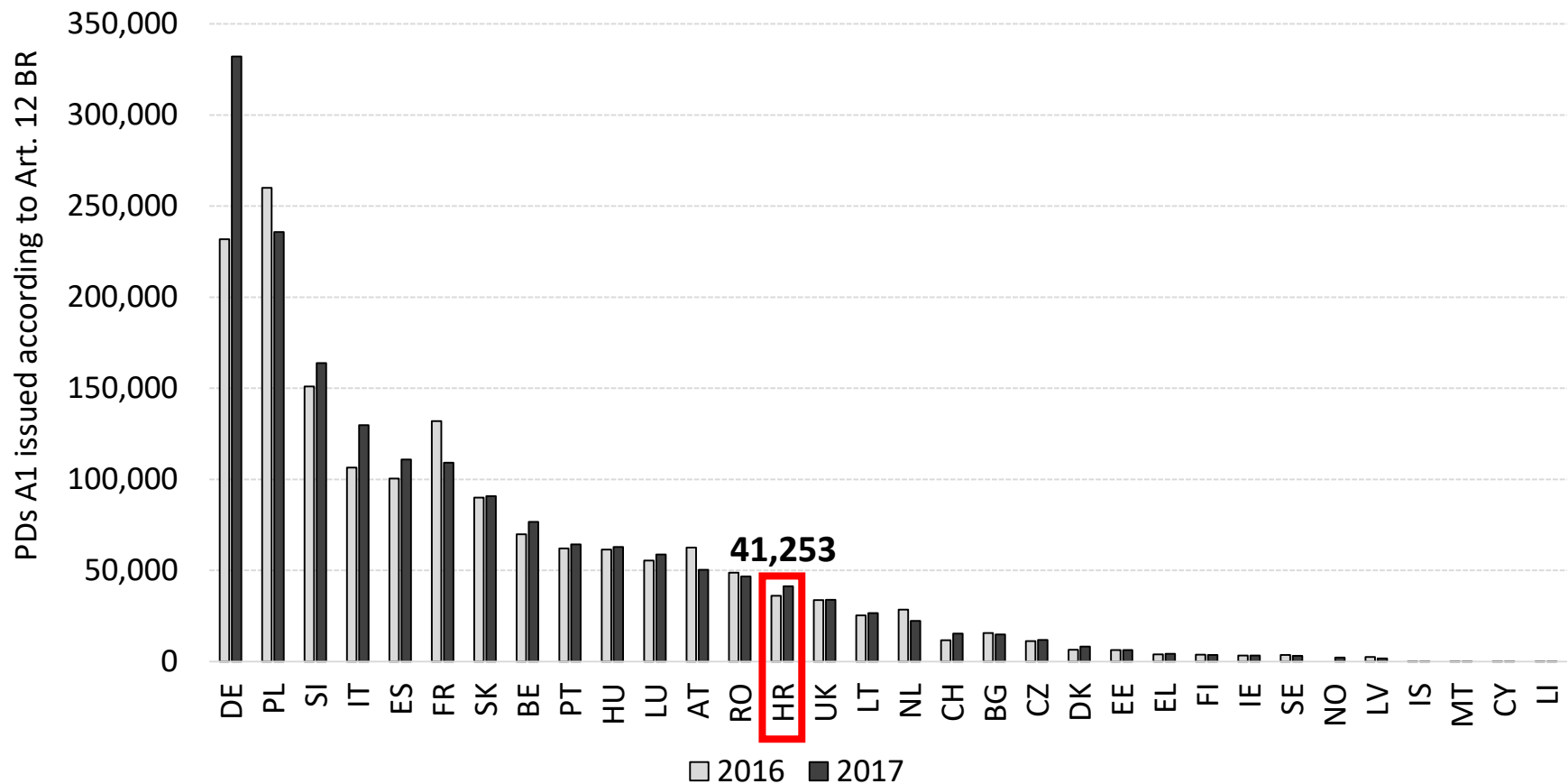


■ PDs A1 issued according to Article 12 BR □ PDs A1 issued according to Article 13 BR ■ Other

Monitoring by (the exchange of) data on intra-EU posting:



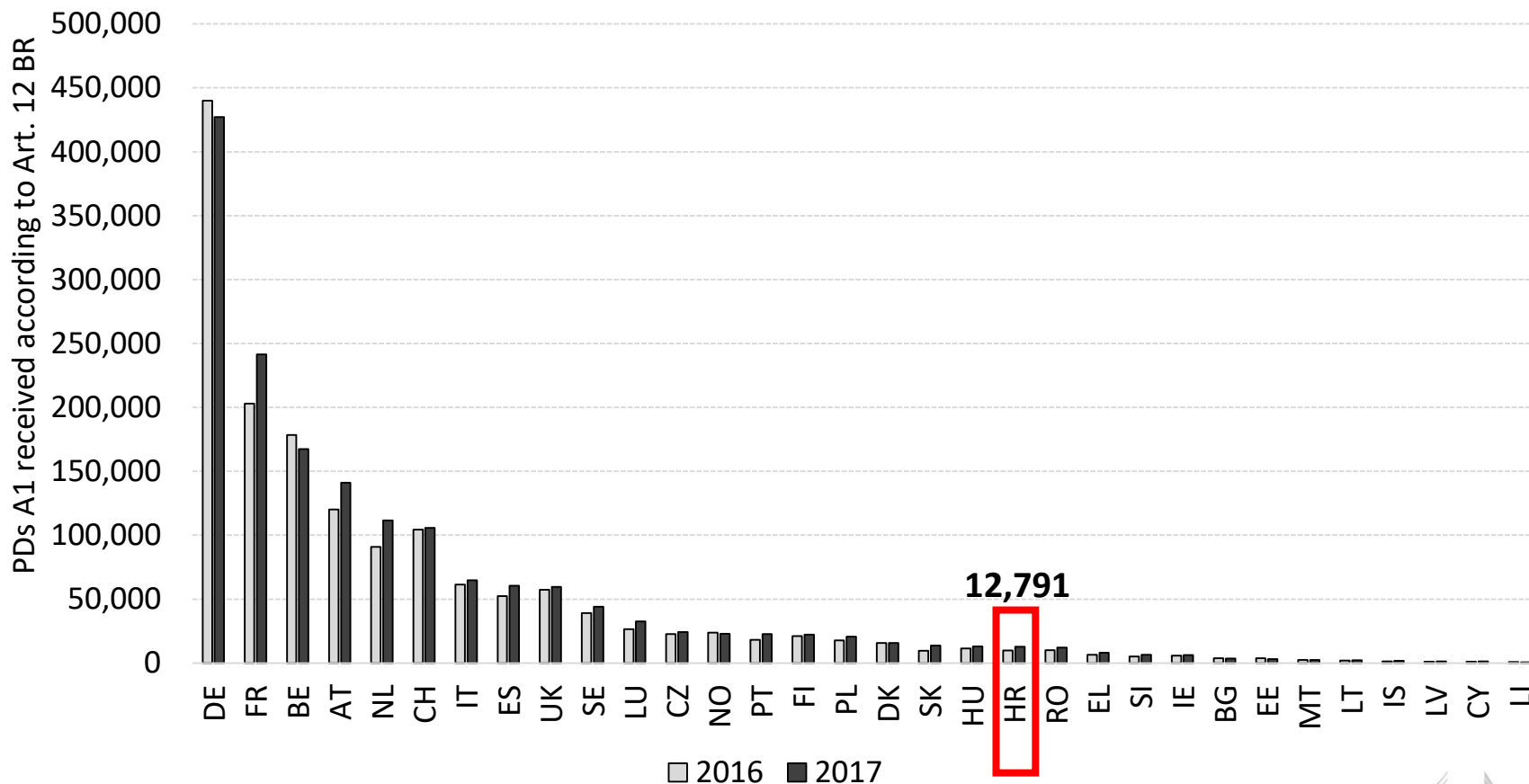
Number of PDs A1 issued according to Article 12 BR by the sending Member States, 2017



Monitoring by (the exchange of) data on intra-EU posting:



Number of PDs A1 received according to Article 12 BR by the host Member States, 2017



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Monitoring by (the exchange of) data on intra-EU posting:

Other relevant figures for Croatia

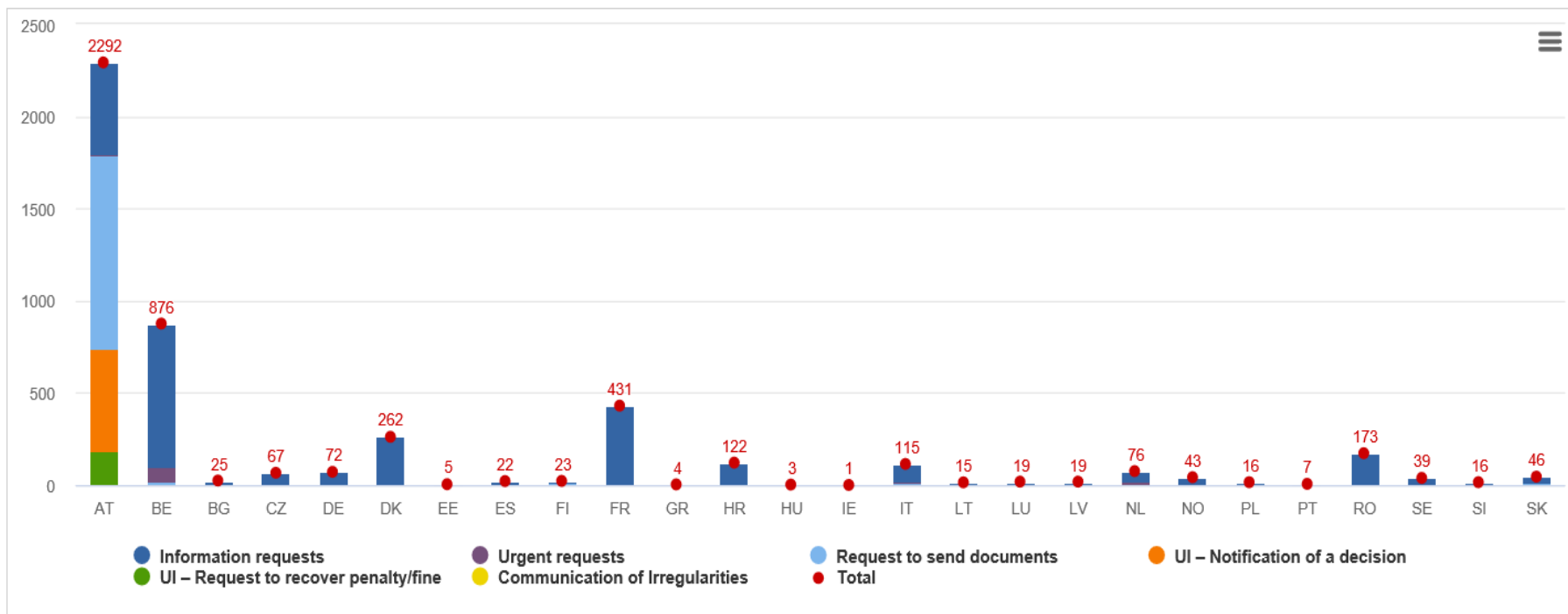


- Size of outgoing postings almost doubled compared to 2014;
- 2 out of 3 outgoing postings to Germany;
- Most of the outgoing posted workers provide services in the construction sector;
- Average duration posting: 261 days <-> EU average: 98 days;
- Until 30 June 2020:
 - Austria regulates access of Croatian workers to its labour market.
 - Free movement of services from Croatia to Austria restricted in some sectors: Croatian workers who are to be posted to work in construction or ancillary construction trades require a work permit; in some other sectors, foreign placement permits [*Entsendebewilligungen*] are sufficient.
- More than half of the incoming postings from Slovenia.

Monitoring by (the exchange of) data on intra-EU posting: Internal Market Information system (IMI)



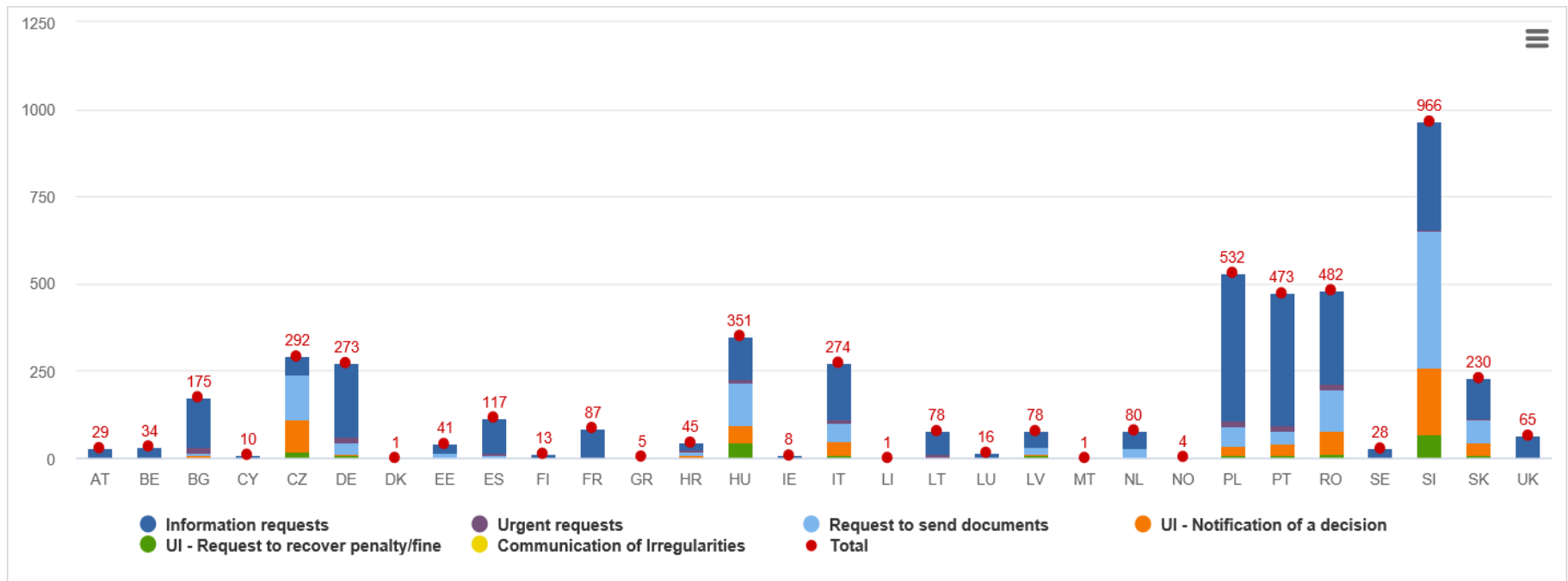
Posting information exchanges by sending Member State – 2018



Information exchanges that were not approved by coordinators and thus were not sent to the recipient Member State are excluded.

Monitoring by (the exchange of) data on intra-EU posting: Internal Market Information system (IMI)

Posting information exchanges by recipient Member State – 2018



Information exchanges that were not approved by coordinators and thus were not sent to the recipient Member State are excluded.

Conclusion



Intra-EU posting in practice: Member States can and must do better



Deloitte.



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MoveS seminar Croatia
Zagreb, 25 October 2019
Faculty of Law at the University of Zagreb

Lunch break
Restaurant Muzej
Trg Republike Hrvatske 10
(13:00-14:00)

Posting of workers
in the context of FMW and SSC
and recent changes in EU legislation

Posting and social security coordination: latest CJEU case-law and amendments to EU coordination Regulations

Dolores Carrascosa Bermejo

Prof. Dr. University Pontificia Comillas (ICADE) and
Complutense Madrid (UCM). National and Analytical
Expert (FMW and SSC) in MoveS Network. Editor in
Lefebvre

1. Posting EU Legal framework

- Coordination Regulations
- Posting Directive

2. Special rule for posting under the coordination Regulations: requirements

- EU Court of Justice case-law
- Future amendment of coordination Regulations:
 - Reinforcement and refinement of the existing rules: **no impact assessment**
 - **Provisional agreement** reached between the European Parliament, the Council and the European Commission in March 2019.

<https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf>

Posting → **temporary** mobility in the course of a professional activity

Migration → **movement** to find a job abroad

Posted workers can **disrupt the labour/business market**

Of the Member State of origin of the worker

→ **"Posting Member State"**

Less working population available ("brain drain")

Of the Member State where the worker is being posted

→ **"Host Member State"**

Posted workers **occupy job vacancies**

Posting generates **international competition between companies**

Different contributions and salaries; subcontracting ...

Social dumping?

1. Social Security → **Coordination Regulations** (1958)

Goals: Improve free movement of workers + freedom to provide services + Uniform insurance record and less administrative burden (**Manpower C-35/70; Plum C-404/98; FTS C-202/97**)

Action: Temporary application of **SS Law of posting MS**
PD A1 (Exception to *lex loci laboris* - 24 months)

Consequence: **It may cause social dumping**

2. Labour regulation → **Posting Directives** (1996)

Goals: Protect workers: **Prevent social dumping**

Action: Temporary partial application of **Labour Law of host MS**
(Among others, minimum wage, minimum holidays...)
Maximum standard Directive (**Maksimovic C-64/18**)

Consequence: It may limit freedom to provide services

PERSPECTIVES in both fields:

Increase requirements and control (Enforcement Directive transposition COM (2019) 426 final 2018 + Directive 2018).

“Low wage member states”: more salary + more SS contributions
Internal market, freedom to provide services can be affected

PERSONAL SCOPE: Physical movement of workers.

Both: **EU nationals** (also with freedom of movement restrictions)
Third country nationals in regular administrative situations
Balandin C-477/17, Regulation 1231/2010).

Regulations: **Employees** (also in business trip: not providing services) and **self-employed** workers.

Employees **posted to third countries**: previous intra-EU migration + “sufficient close link between worker and EU.

.- **Aldewereld C-60/93**: Employer establishment

.- **SF C-631/17**: Worker’s residence. Residual rule -Reg 883 Art. 13(3)(e)-

Directive: Only **employees + work in 2 MS** (Reg 883 Art. 13)

* **Provisional agreement**: no definition of the relationship with the Posting Directive

III. Special conflict-rule for posting Requirements for its application



Special conflict rule → **exception** to the general rule: *lex loci laboris* (R 883/204 Art. 12; R 987/2009 Art. 14; AC Decision n^oA2).

The posting company or the self-employed have to **ask for a PD A1 to posting Administration** (keeping the insurance + contributions under posting member State Law).

.- Preferable **in advance**. But it is possible **issued retroactively** (Alpenrind C-527/16 par. 77).

.- **Proper assessment** of the applicable legislation (AC Recommendation n^o A1 point 5)

(*) **Provisional agreement:**

- Posting information **in advance**. If there is no PDA1: evidence of having informed if there is not PD A1. (*) Exception: **business trips** defined under Reg 987 Art. 1.2.eb)
- **Obligatory assessment** (binding effect linked to documents or supporting services)

III. Special conflict-rule for posting Requirements for its application



A. Requirements regarding posted employees

A.1 Direct relationship posted worker ↔ posting employer **maintained** throughout the period of posting. AC n°A2, points 1.3 and 4:

- *Recruitment* (can be outsourced) and *Employment contract*
- *Payment of the remuneration* (can be delegate per agreement)
- *Authority to dismiss and/or impose sanctions*
- *Authority to determine the nature of the work* (Temporary Work agencies Manpower, C-35/70)
- **No double posting**

A.2 Previous attachment of the posted employee with the Social Security of the posting MS:

- The employee was **already working** for the posting company
- The employee was **recruited to be posted**: insured before **for at least a month** (eventually less). **Any kind of insurance** is valid, even mere residence if no other national law applies (Walltopia C- 451/17).

(*) Provisional agreement: 3 months of prior insurance

III. Special conflict-rule for posting Requirements for its application



A.3 Posting companies: no letterbox companies, substantial activity in the posting MS for some time before posting (Reg 987/2009 Art. 14; C-404/98 Plum; AC Decision n^oA2, point 1.5):

- *Place of registered office and administration + administrative staff*
- *Place where workers are recruited + applicable law*
- *Place where contracts with clients are concluded + applicable law*

A.4 Anticipated duration of the work \leq 24 months (AC Decision n^oA2 point 3):

- *Brief interruptions do not stop the posting period*
- *Same posting period for different undertakings in one host MS*
- *New posting period if the worker is posted to a different host MS*
- *2 months after a posting period ends the counter is reset*

(*) Provisional Agreement: Posted for maximum 24 months: for a new posting period (same worker// same Member State) → 2 months (counter will be reset). General counter reset period of 2 months?

III. Special conflict-rule for posting Requirements for its application



A.5 Replacement ban (AC Decision n^oA2, point 3):

- *Replacement before 24 months (illness) does not reset the counter.*
- *Replacement after 24 months is not allowed, **even from different companies** (C-527/16 Alpenrind).*

.- Posting companies must contact the receiving undertaking in order to find out whether the person they plan to post will be replacing some previous posted worker.

(*) Provisional Agreement: general replacement ban after 24 months (including self-employed posted workers, employees and vice-versa).

When does the replacement ban finish? Will the counter be reset after 2 months?

* **Possible replacement** before 24 months if the work was not finished

III. Special conflict-rule for posting Requirements for its application



B. Requirements for self-employed workers

(Reg 883/2004 Art. 12.2; Reg 987/2009 Art. 14.3; AC Decision n°2)

B-1. Substantial activity as self-employed in the posting MS for two months (eventually less).

(*) Provisional Agreement: at least 3 months before date of posting

B-2. Able to continue his activity in the posting MS: office, taxes, VAT number, registrations...

B-3. Similar activity in the host MS (can be an employee)

B-4. Anticipated duration of the activity \leq **24 months.**

(*) Provisional Agreement: counter reset period of 2 months

Currently a self-employed posted worker can replace any another posted worker (employed or self-employed)

(*) Provisional Agreement:

- general replacement ban after 24 months (including self-employed posted workers, employees and vice-versa).
- Replacement before 24 months if the work was not finished

- .- Van der Vecht 19/67
- .- Manpower 35/70
- .- FTS Fitzwilliam Technical services C-202/97
- .- Banks C-178/97
- .- Plum C-404/98
- .- Maaheimo C-333/00
- .- Herbosch Kiere C-2/05
- .- Van Dijk C-72/14
- .- Stefan Nikless C-474/16
- .- A-Rosa C-620/15
- .- Commission vs Belgium C 356/15
- .- Ömer Altun C-359/16
- .- Alpenrind C-527/16
- .- Walltopia C-451/17
- .- Balandin and Holiday on ice C-477/17

Thank you for your attention!

A1's probative value and duty of sincere cooperation: legal framework and CJEU case law

**Izv. prof. dr. sc. Ivana Vukorepa
University of Zagreb, Faculty of law**

Outline

1) De lege lata: legal context and relevance

2) Case law – recent developments
(in the light of fraud / abuse / error)

3) De lege ferenda

Legal context

Area	Relevant leg.	Art. / Rules		
Labour law	D 96/71	Posting Directive		
	D 2018/957	Amending Posting Directive		
	D 2014/67	Enforcement directive (Arts. 3 and 4, and 6 – 8 on admin. cooperation, 9)		
	R 1024/2012	Administrative cooperation (IMI system)		
Social security coordination	BR 883/2004	12	Applicable leg. (deviation from <i>lex loci laboris</i> , max. 24 m.)	
		13	Pursuit of activity in two or more MS	
		16	Exception by common agreement (in the interest of worker or SE)	
	IR 987/2009	5	Legal value of documents (procedure when doubt, AC D A2) Principle of sincere cooperation (Art. 4/3 TEU)	
		14	Details /clarifications regarding Art. 12 and 13 of BR	
		15	Procedures for application of Art. 12 BR	
		19	Provision of information / attestation of applicable legislation (A1)	
		76	Cooperation between institutions (interpret. and application of BR)	
	AC Decisions	A1	Dialogue and conciliation procedure (validity of documents)	
		A2	Interpretation of Art. 12 BR, and 14(1) IR	
		A3	Aggregation of uninterrupted posting periods	

Legal context: conditions /limitations (Art. 12 BR, 14 IR, AC D A2)



Employees (E)	Self-employed (SE)
Employer normally carries out his activities in the sending MS	Normally pursues self-employment activity in MS
Sent to work on employer's behalf (direct relationship)	Goes to pursue <u>similar activity</u> (nature of the activity, not designation E/SE)
Not replacing previously posted worker (prevents chain-posting for the same worker, the same undertaking and the same MS), but allowed after 2 months	- (can be problematic when bogus SE)
Anticipated duration: max. 24 months <ul style="list-style-type: none"> • Prevents permanent work, but • New posting: after min. 2 months (D A2) 	+ -
Previously subject to the legislation of the sending MS <ul style="list-style-type: none"> • 1 month rule (D A2, Art. 1/3) • for shorter p. case-by case evaluation • MS of residence based on Art. 11(3)€ of BR <ul style="list-style-type: none"> ○ C-451/17 Walltopia !!! - even if <u>not</u> insured person, <u>but only residence</u> ○ C-631/17, Inspecteur van de Belastingdienst - seafarer with residence in MS of origin, whilst working for employer establ. in MS on board a vessel flying the flag of a TC 	+ <ul style="list-style-type: none"> • 2 months rule (D A2, Art. 2) • for shorter p. case-by case evaluation

Relevance of A1 (1)

- **Statement of applicable legislation**
(Art. 19 IR)
- **Situations covered:**
 - **Posting (Art. 12. BR)**
 - Work in several countries at the same time in various or same capacities (Art. 13 BR)
 - Derogation from standard rules (e.g. Art. 16 BR), by agreement between competent institutions of MSs

Relevance of A1 (2)

- **Not constitutive condition of posting**
 - from wording of Art. 12 of BR
- **Does not create any right nor legal relationship**
- **Proof**
 - by the issuing MS that its legislation remains applicable
- **Issuance**
 - before posting (but also during or after with retroactive effect)
- **Validity until:**
 - expiry date (indicated in the form), or
 - withdrawal (declaration of invalidity) by the issuing institution
- **Binding effect if granted, but what if its validity/ accuracy disputed?**
 - Sincere cooperation between institutions
 - Case law

Case law (earlier, regarding E101 and A1)



Cases	Decision
C-2012/97 (2000) Fitzwiliam Tecnical Services	<ul style="list-style-type: none"> • Binding on the SS institutions of other MS • <u>If other MS raises doubts</u> (regarding correctness of facts or legal assessment), the <u>issuing institution must re-examine grounds</u> and <u>where appropriate withdraw</u>
C-178/97 (2000) Banks	<ul style="list-style-type: none"> • Same + May have retroactive effect (may be issued during or even after posting period expired,
C-2/05 (2006) Herbosch Kiere	<ul style="list-style-type: none"> • Binding effect on comp. institutions and courts, as long as not withdrawn or declared invalid • Courts not entitled to scrutinize its validity (regarding matters on the basis of which it was issued)
C-620/15 (2017) A-Rosa Flussschiff	<ul style="list-style-type: none"> • Binding on the SS institutions and courts, even if courts found that workers activities outside material scope of provisions relevant for the issuance of E101
C-474/16 (2017) Belu Dienstleistung	<ul style="list-style-type: none"> • Interprets Art. 19 IR, and confirms A-Rosa Flussschiff • A1 binding on SS institutions and courts, even if workers activities outside scope of Art. 12 of BR

Case law (developments in 2018)

Cases	Ruling
<p>C-359/16 (2018) Altun</p> <p><i>paras 49-53, 61</i></p>	<ul style="list-style-type: none"> • Sincere cooperation implies mutual trust & diligent investigation • Host MS courts may, in cases of fraud, disregard SS certificate • <u>Conditions:</u> <ul style="list-style-type: none"> • <u>issuing institution fails to carry out a review within a reasonable time</u> in the light of evidence brought to its atten. • Right to fair trial should be safeguarded (right to rebut), • Findings of <u>fraud</u> should be based on a <u>consistent body of evidence</u> that satisfies <u>objective (Reg. conditions)</u> and a <u>subjective factors (intention of the parties)</u>
<p>C-356/15 (2018) Belgium</p>	<ul style="list-style-type: none"> • BE legislation entitling application of BE legislation unilaterally in the case of abusive use of A1 • Contrary to Art. 11(1), 12(1) and 76(6) of BR and Art. 5 IR
<p>C-529/16 (2018) Alpenrind</p> <p><i>Paras 46, 47, 62-64, 77</i></p>	<ul style="list-style-type: none"> • Interprets Art. 5(1) BR • A1 binding effect on SS institutions and courts as long as not withdrawn or declared invalid (+ retroactive effect) • Even if matter brought before AC, that declared A1 issuance incorrect (AC decision status of opinion) • Fraud and abuse ??? - seems to stay exceptions (para. 46)

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Cases	Questions raised
<p>Joined cases C-370/17 and C-37/18 CRPNPAC Vueling Airlines</p> <ul style="list-style-type: none">- inv. Vueling Airlines- payment of pension contributions	<p>AG opinon (11 July 2019)</p> <ul style="list-style-type: none">• Article 14(1)(a) of Council Regulation (EEC) No 1408/71 must be interpreted as meaning that the <u>court of the host MS has jurisdiction to disregard an E 101 certificate when it has before it evidence establishing that that certificate was obtained or relied on fraudulently.</u> <u>Whether the dialogue between competent institutions, provided for in Article 84a(3) of Regulation No 1408/71, has taken place has no impact on that competence.</u>• EU law precludes a national court, which is bound under its domestic law by the principle that a decision adopted in criminal proceedings constitutes res judicata in civil proceedings, from drawing the appropriate conclusions from a criminal decision that is incompatible with EU law by ordering an employer to pay damages to a worker solely because that employer has been convicted in criminal proceedings in respect of the same facts.

Principle of sincere cooperation (based on legislation and case law)

- Art. 4 (3) TEU - mutual respect and assistance
- Art. 5 IR - Legal value of documents (procedure when doubt, D A2)
- Art 76 IR - cooperation between institutions

What does it mean for

• Issuing institution (sending MS):

- Proper assessment of the relevant facts & information accuracy
- Guaranteeing correctness of information
- In the case of doubt by the requesting institution:
 - Reassessment
 - Reconsider the grounds for the certificates' issuance

• Receiving (host) MS

- Bound by the A1/ E 101 (except when fraud and error?!)
- Ask for annulment, withdrawal, or declaration of invalidity
- If no agreement → Administrative commission – conciliation
- Infringement proceedings under Art. 259 TFEU

Mutual trust

De lege ferenda (1)

Proposed revision of SSC rules regarding posting

- **2016/0397 (COD)**

- Council agreed its negotiating position on 21st June 2018
- EP and the Council reached a provisional agreement in March 2019
- <https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf>

How?

- **Purpose of changes**

- ensure legal clarity and combat fraud

Period of prior affiliation with ending MS legislation

- min. 3 months (↑)

Period btw. consecutive postings:

- min. 2 months

Employer's registered office or place of business

- Clear criteria for determining its location

Enhancement of the cooperation procedure

- possibility for retroactive withdrawal or rectification

De lege ferenda (2)

Proposed revision of SSC rules regarding posting

Art. 12 BR (posting – applicable legislation)

- Introduces replacement posting - but total max. 24 months
- Changes to Art. 14 IR (periods of prior affiliation etc., for self-employed activity in the MS of establishment for 3 month)

Art. 75a BR

- obligation of competent authorities to ensure that their institutions apply provisions (even AC decisions)

Art. 76a BR - Comm may adopt impl. acts ensuring uniform application of Art. 12 and 13 BR

Art. 76b BR - examination procedure (insurance for MS of Commission's power under 76b)

Art. 1 IR - introduces definition of fraud

Art. 5 IR (validity and cooperation procedure)

- If mandatory information missing – 30 days to correct – if issuing institution fails to rectify the document, requesting institution may disregard it, as if never issued
- If doubt about validity → cooperation procedure → AC decision
- Effect of AC decision → MS (authorities and institutions) → “necessary measures to apply such decisions” (*deals with the „problem” in Alpenrind*)

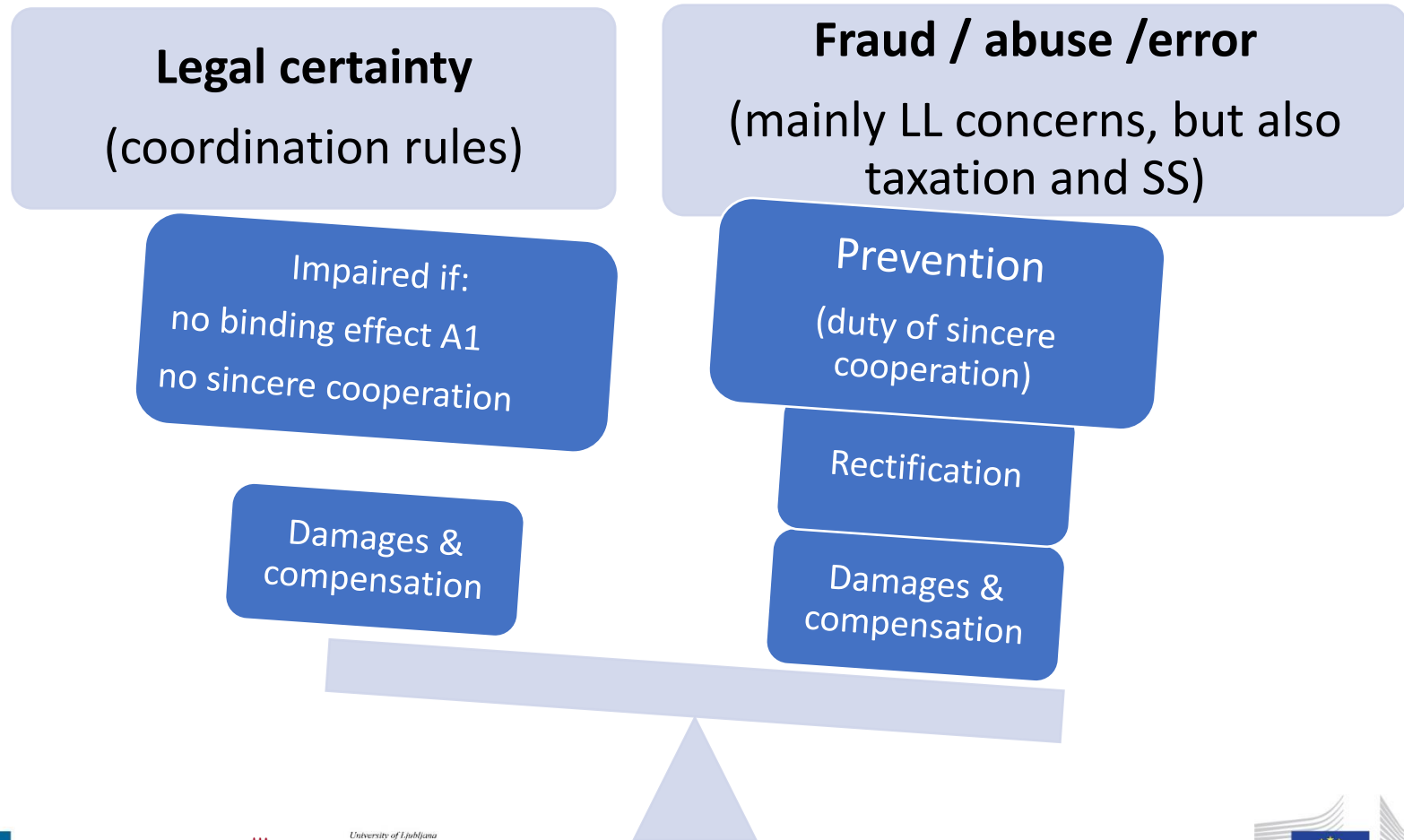
Art. 19 and 19 a

- Cooperation in case of doubts about the validity of issued documents

Conclusions (1)

Tension btw. sending and receiving states

Tensions btw. need to have legal certainty and prevent fraud and abuse



Conclusions (2)

A1 contains presumption of proper affiliation and binding effect for other MS

- Long term consistency in case law
- Purpose: Legal certainty →(? impaired recently ?)

Recent case law and revision proposal:

- Nuances the “untouchable” effect (when fraud or abuse coupled with lack of cooperation)
- Difficult balancing btw. the need of legal certainty and prevention of fraud and abuse

Future challenges:

- Codification of recent and upcoming case-law?
- MS having deficits in financing their SS?
- Administrative complications (increasing)
- Is it time for unified SS and taxation system?

Thank you for the attention!

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POSTUPAK IZDAVANJA POTVRDA A1 – DOKAZNA SNAGA A1 POTVRDE I OBVEZA SURADNJE

Dalibor Amanović

Hrvatski zavod za mirovinsko osiguranje

MoveS Seminar

Zagreb, 25. listopada 2019.

Struktura izlaganja

- Uvod
- Nadležnost za postupke izdavanja potvrda A1
- Organizacija poslovnih procesa i postupak izdavanja A1
- Načelo suradnje i razmjena podataka
- EESSI – LA_BUC
- Statistika

■ UVOD

- odredbe Glave II Uredbe 883/2004 – potpun sustav kolizijskih pravila
- **osnovno pravilo** – primjenjuje se zakonodavstvo samo jedne države članice
- **svrha potvrde A1** – osigurati poštovanje tog načela
- potvrde se izdaju u točno propisanim situacijama (članak 15. i članak 19. stavak 2. Uredbe 987/2009)
- izgled i sadržaj je također propisan i jednak za sve države članice (odluka Administrativne komisije za koordinaciju sustava socijalne sigurnosti)
- **države članice samostalno uređuju svoje sustave, organizaciju i modeliranje nacionalnih poslovnih procesa**

■ POSLOVI ODREĐIVANJA MJERODAVNOG ZAKONODAVSTVA

- **nadležnost HZMO od 01. 07. 2013.**
 - primjena svih pravila iz Glave II uredbi (Uredba 883/2004 i Uredba 987/2009) i izdavanje potvrda A1
 - zaprimanje potvrda A1 (obavijesti) iz drugih država članica
- nadležnost unutar HZMO:
 - **članak 12.** Uredbe 883/2004, pravilo za upućene radnike – **lokalno** (sve PS/PU HZMO)
 - sva ostala pravila – **centralno** (PS u Zagrebu)

GLAVNI CILJEVI KOD KREIRANJA POSLOVNIH PROCESA

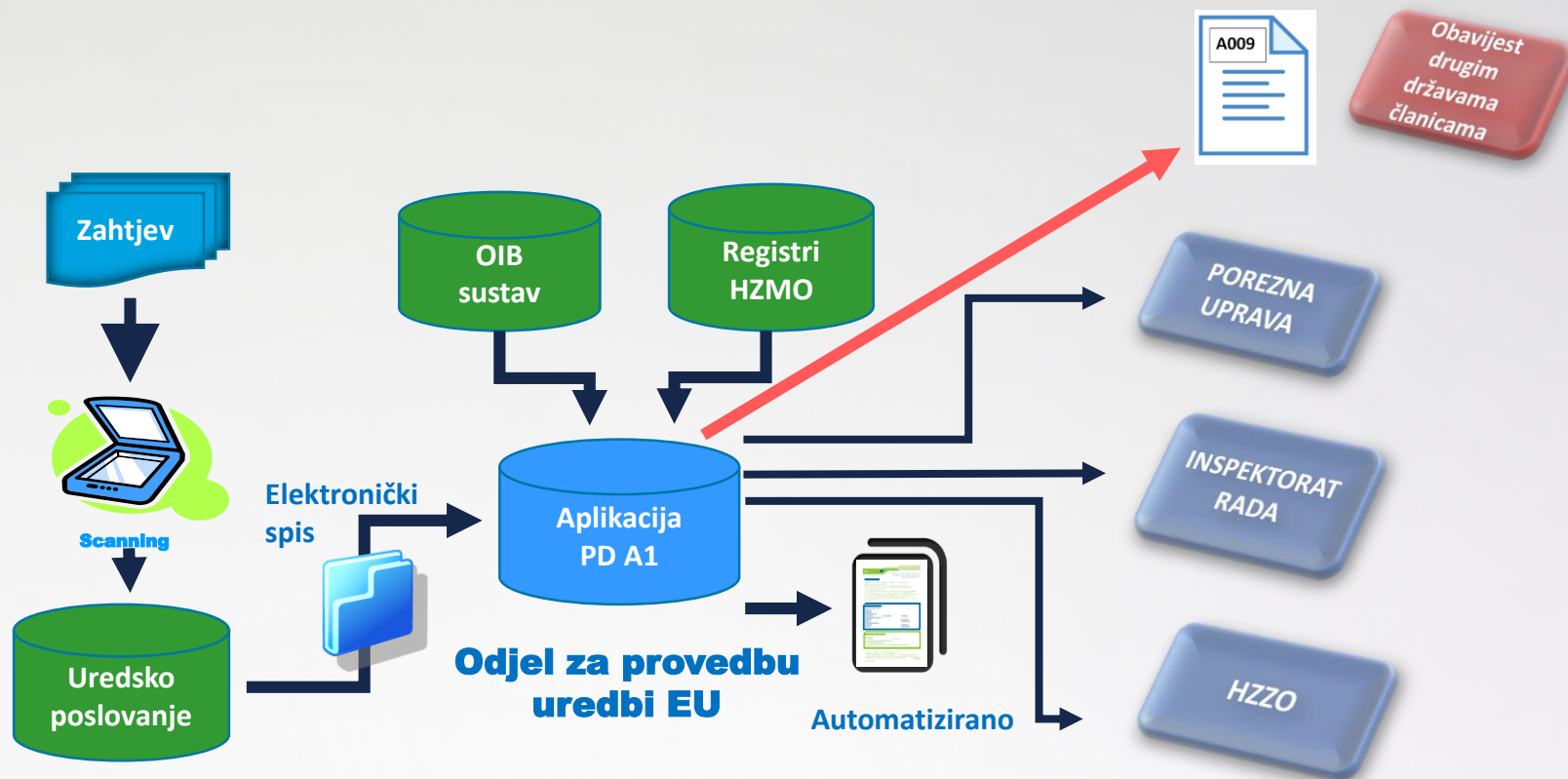
1. pravilna primjena propisanih pravila iz Glave II uredbi – informiranje javnosti, edukacija službenika

2. jedinstvena primjena propisanih pravila u svim PS/PU Zavoda – unificiran postupak, propisane tiskanice i neophodna dokumentacija

3. omogućiti brzo izdavanje PD A1, bez nepotrebnih administrativnih prepreka – prioritetni postupci, dovoljan broj službenika (potvrde A1 se u pravilu izdaju u roku od dva do tri dana)

4. osigurati pouzdane podatke koji su potrebni za utvrđivanje neophodnih činjenica – korištenje dostupnih informacija iz službenih registara (HZMO i druga ovlaštena tijela i ustanove)

TIJEK POSLOVNOG PROCESA IZDAVANJA PD A1



■ **PREPORUKA A1 I POSTUPCI IZDAVANJA PD A1**

- uspostavljeni postupci su u skladu s Preporukom A1 – preporuka AC od 18.10.2017. o izdavanju potvrde iz članka 19. stavka 2. Uredbe (EZ) br. 987/2009 Europskog parlamenta i Vijeća
- u donjem lijevom uglu potvrde dodan je ID broj dokumenta
- sve izdane potvrde se spremaju u elektroničkom obliku (također i sva dostavljena dokumentacija)
- kreirane tiskanice zahtjeva i potrebna dokumentacija su u skladu sa standardiziranim skupinama pitanja prema prilogu Preporuke A1

■ **PRAVNA SNAGA POTVRDE I NAČELO SURADNJE I RAZMJENE PODATAKA**

- prema ustaljenoj sudskoj praksi Suda EU, potvrda A1 ima obvezujući učinak za ustanove i sudove druge države članice
- ustanova koja je izdala potvrdu A1 jedina je nadležna za ocjenu njezine valjanosti – sustav podjele nadležnosti
- načelo lojalne suradnje (članka 4. stavka 3. UEU-a) obvezuje ustanovu koja je izdala potvrdu A1 na točnu ocjenu činjenica te da jamči točnost podataka iz potvrde

NAČELO SURADNJE (predmeti C-202/97 Fitzwilliam, C-2/05 Herbosch Kiere, C-620/15 A-Rosa Flussschiff, C-529/16 Alpenrind)

Država rada



Potvrda A1 obvezuje drugu državu članicu. Sud države članice domaćina nije ovlašten provjeravati valjanost potvrde A1 u odnosu na elemente na temelju kojih je izdana.

Nadležna država



Ustanova koja je izdala potvrdu A1 dužna je ponovno razmotriti osnovanost izdavanja i po potrebi je ukinuti/poništiti ako nadležna ustanova države članice domaćina izrazi sumnje u točnosti činjenica na kojima se ta potvrda temelji.

■ **POSTUPAK DIJALOGA I MIRENJA**
ODLUKA A1 AC (ČLANAK 76/883, 5. 6. 16. 60./987)

I faza

- **Dijalog između nadležnih ustanova** (obvezno, najduže šest mjeseci)

II faza

- **Dijalog između nadležnih tijela** (ako prethodno nema dogovora, najduže šest tjedana)

III faza

- **Administrativna Komisija – Conciliation Bord** (najduže šest mjeseci)

■ **OGRANIČENJA I OTVORENA PITANJA PROPISANOG POSTUPKA**

- **dugotrajan i neučinkovit postupak** (predložene su izmjene nova odluka AC A4)
- **pravna snaga odluka AC i CB**
 - dobrovoljni postupak, neobvezujuće odluke
- **treba li izdavati nove potvrde za osobe u istoj situaciji, dok postupak mirenja traje?**
 - dvojbena pravna osnova za odbijanje (blaža varijanta „tek nakon obavljenog posebno iscrpnog ispitivanja“)
- **ponišćavanje ili ukidanje?**
 - retroaktivna promjena mjerodavnog zakonodavstva (povrat doprinosa/povrat nepripadno isplaćenih davanja)

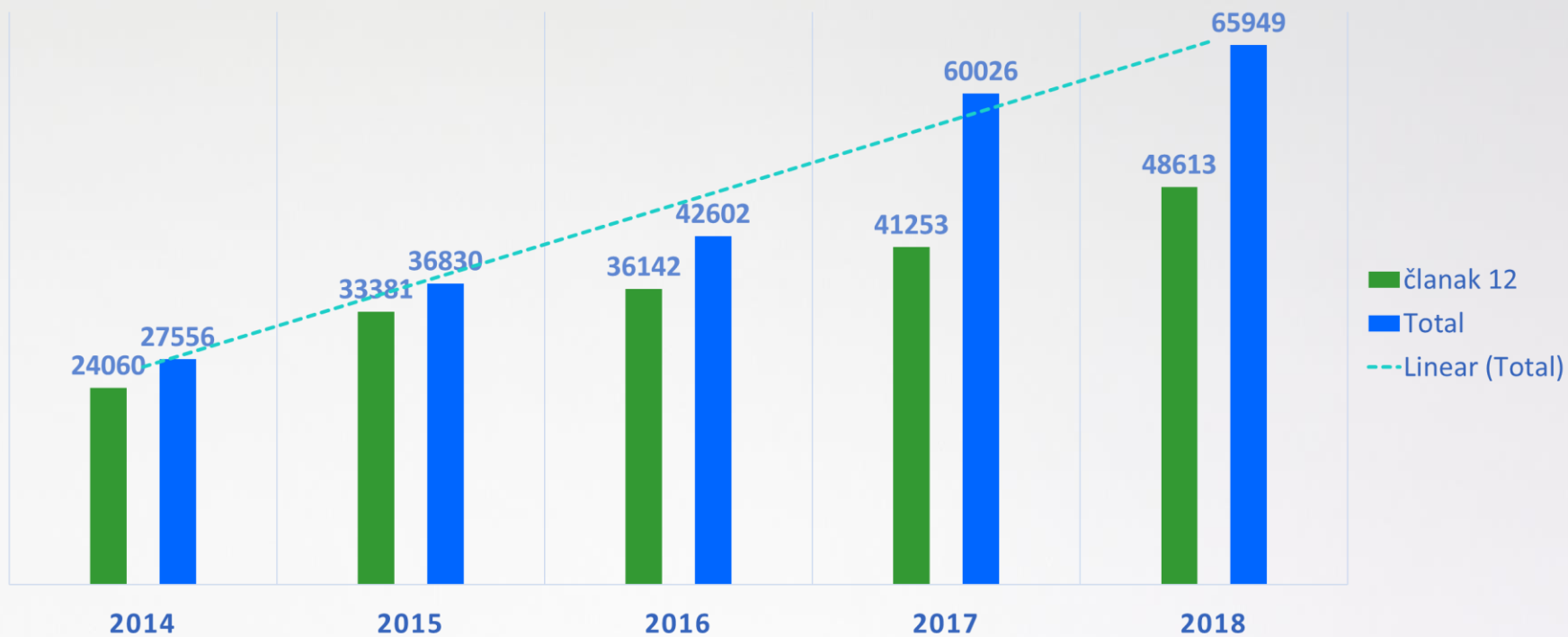
■ **NAČELO SURADNJE – HRVATSKA ISKUSTVA**

- razmjena informacija o izdanim potvrdama – obavijest drugim državama članicama, odgovori na upite i provjere, zaprimanje obavijesti iz drugih država članica
- HZMO je uključen u IMI sustav (Informacijski sustav unutarnjeg tržišta)
- postupak dijaloga i mirenja – evidentirana su dva predmeta (potvrde su izdane pogrešno te su poništene, a nezakonita situacija je legalizirana sporazumom prema članku 16. Uredbe 883/2004)
- neophodna suradnja nadležnih tijela i ustanova unutar R Hrvatske (Porezna uprava, Inspektorat rada, HZMO)

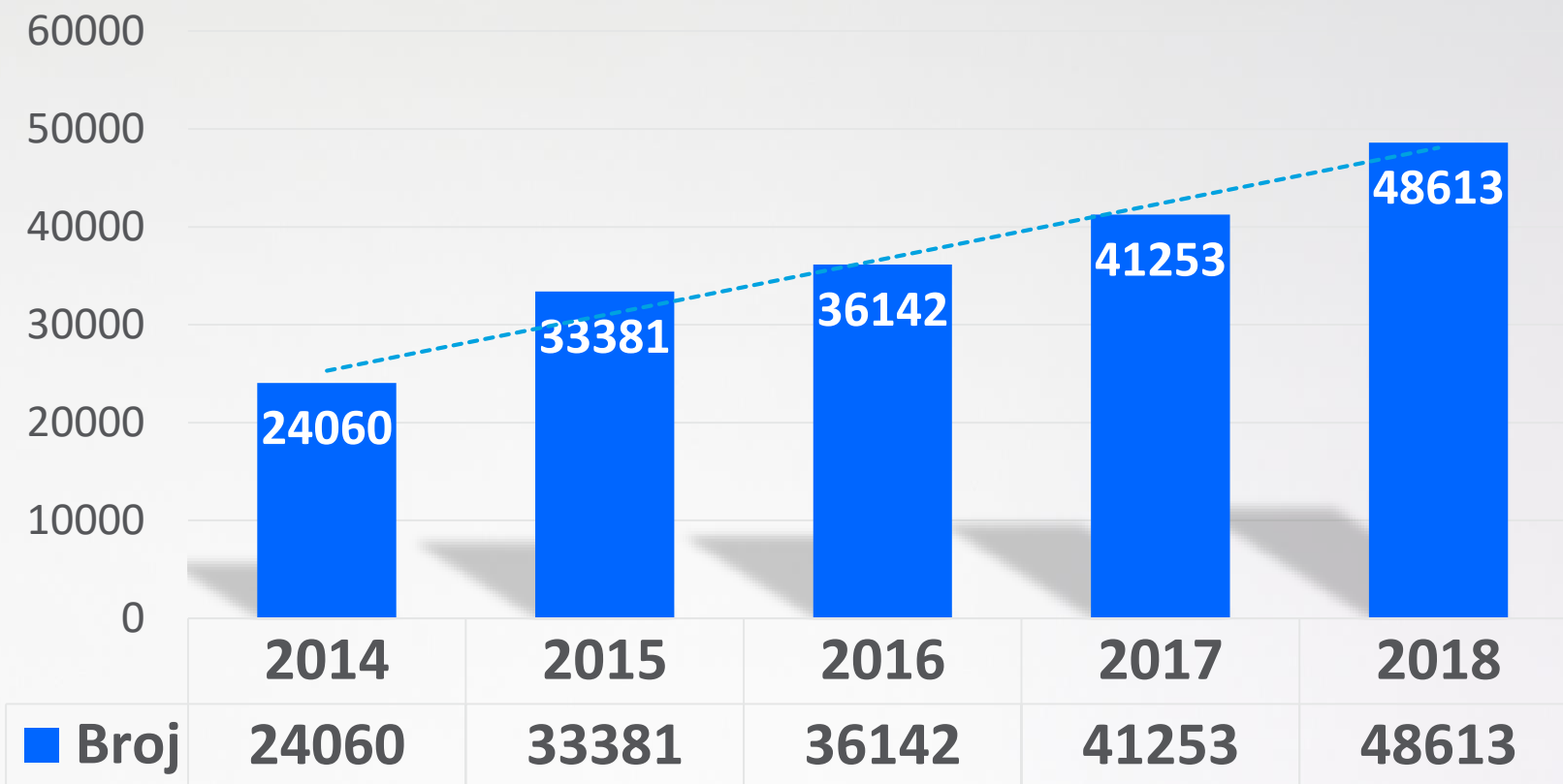
■ **POSTUPCI ODREĐIVANJA MJERODAVNOG ZAKONODAVSTVA I EESSI**

- od **01.07.2019.** HZMO je uključen u EESSI sustav:
 - **LA_BUC_04** (obavijesti o upućivanju radnika državama koje su zatražile da ih se o tome obavještava)
 - razvijena je nacionalna aplikacija – automatizirano je slanje SED A009 (trenutno Austriji, Njemačkoj, Estoniji, Nizozemskoj, Italiji, Islandu i Belgiji)
- planirano je do 31. prosinca 2019. postepeno uključiti sve ostale procese na ovom području

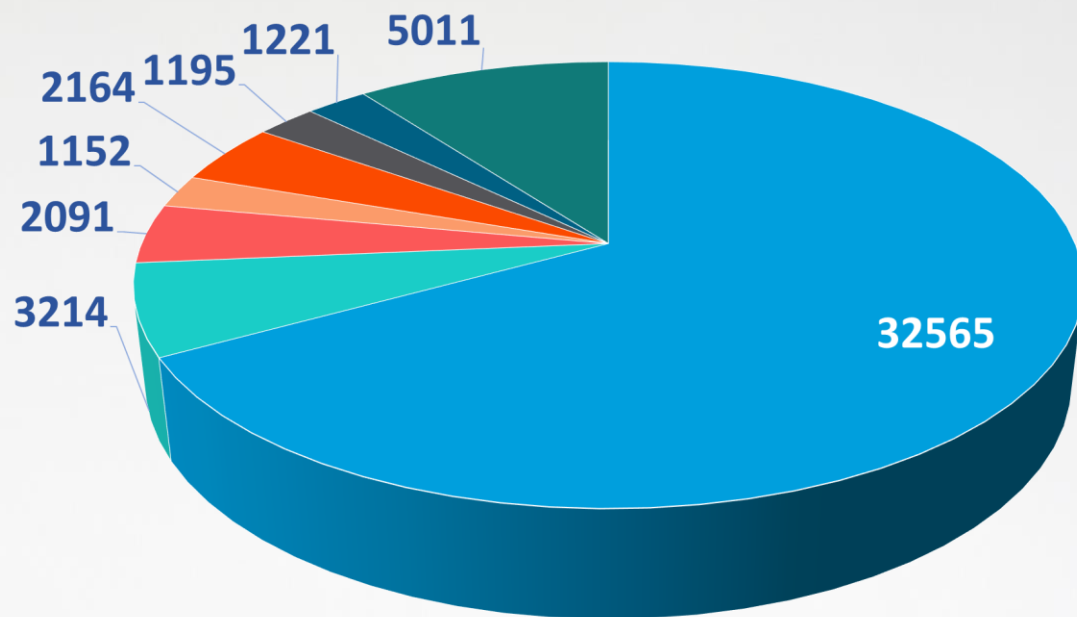
■ BROJ IZDANIH PD A1 PO GODINAMA



BROJ IZDANIH PD A1 PREMA ČLANKU 12. UREDBE 883/2004 (UPUĆENI RADNICI)



**BROJ IZDANIH PD A1 U 2018 PREMA ČLANKU 12. UREDBE 883/2004 I
POJEDINIM DRŽAVAMA**



Ukupno 48613

- Njemačka
- Slovenija
- Italija
- Austrija
- Belgija
- Francuska
- Švedska
- Ostalo (<1000)



HVALA NA PAŽNJI!