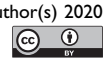

Article:
Rennuy, Nicolas orcid.org/0000-0001-5489-4386 (2020) Posting of Workers : Enforcement, Compliance, and Reform. European Journal of Social Security. pp. 212-234. ISSN 1388-2627

https://doi.org/10.1177/1388262720931658

Article

EJSS

European Journal of Social Security
2020, Vol. 22(2) 212–234



DOI: 10.1177/1388262720931658
journals.sagepub.com/home/ejs


Posting of workers: Enforcement, compliance, and reform

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Abstract

This article analyses the enforcement deficit plaguing the posting of workers. The rule subjecting posted workers to the social security system of their State of origin is enforced almost exclusively, but rather poorly, by that State. Because of its limited incentive and capacity to enforce the requirements for being posted, it often issues posting certificates without adequate verification. These rubber-stamped certificates bind the social security institutions and courts of the State of destination, thus hindering its enforcement machinery. The resulting gap in administrative enforcement enables employers to unilaterally choose the applicable social security legislation, quite possibly depriving their workers of the more generous social security protection of the State of destination while gaining an unfair competitive advantage over undertakings based there. Helpful though they may be, pending reforms of Regulation 883/2004 and Regulation 987/2009 are held back by an incomplete problem definition. Building on rationalist and managerial theories, I argue that the effectiveness of administrative enforcement depends on whether each posting requirement can be monitored by a State that is both willing and capable of doing so. The existing and envisaged allocation of administrative enforcement powers suffers from a misalignment between incentives, capacities and competences to monitor, which can be addressed by heightening incentives, by enhancing capacities, and by transferring competences to the State of destination.

Keywords

Posted workers, migrant work, undeclared work, administrative enforcement, practical implementation, compliance, EU administrative law, reform of EU social security law, social security coordination.

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1. Introduction

Workers are generally subject to the social security laws of the State in which they work.[1] Consequently, States apply their laws territorially, migrant workers are treated in the same way as local workers, and employers cannot escape the social security contributions of the place where their workers are active. Posting is an exception to all of this. In certain circumstances, workers and self-employed persons can temporarily work on the territory of one State – the State of destination – while remaining exclusively subject to the social security law of their State of origin. Without the posting rule, employers would have to register their workers with the social security system of the State in which they perform short stints of work.[2] In this way, this rule aims

> to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to Member States other than that in which they are established. It is aimed ... at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings.[3]

Much depends on the enforcement of the posting rule. This determines: (i) whether States can apply their laws on their own territories and levy contributions from people who are active there; (ii) which social security system workers and self-employed persons are subject to; and (iii) the contribution rates and thus the competitive position of employers and self-employed persons.

The enforcement of the posting rule is almost entirely in the hands of the State of origin. It issues a Portable Document A1 (previously the E 101 certificate and hereinafter 'the certificate'), which attests to the applicability of its social security legislation and the inapplicability of the social security legislation of the State of destination. Crucially, certificates are binding on the social security institutions (hereinafter 'institutions') and courts of the State of destination. The certificate is at the heart of the enforcement of the posting rule, and therefore affects the interests of States, workers, self-employed persons and employers.

The problem is that all too often the State of origin grants certificates on request from the employer or self-employed person without much verification of the requirements for posting – rubber-stamping rather than investigating. This gap in enforcement creates propitious conditions for non-compliance: it enables employers and self-employed persons to provide services in a Member State without paying contributions there and without complying with the posting requirements. As a result, certificates that may well be dubious bind the social security institutions and courts of the State of destination. This is all the more problematic as posting is a significant and growing phenomenon—in 2018, 1.8 million certificates were issued to an estimated 1 million people, up from about 1 million certificates in 2010.[4] Posting is also asymmetric, varying widely between sectors and countries, with only 8 per cent of certificates covering postings to EU-13 Member States.[5] These figures are conservative, given that many workers and self-employed persons are posted without a certificate.

1. Art. 11(3)(a) Reg 883/2004.
2. Case 35/70 *SARL Manpower v Caisse primaire d'assurance maladie de Strasbourg* [1970] ECR 1251, para 11.
3. Case C-202/97 *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen* [2000] ECR I–883, para 28.
4. De Wispelaere, De Smedt and Pacolet (2020: 23–35).
5. *ibid*.

What, then, can be done to address the enforcement and compliance deficits? In line with the 'enforcement turn' taking place in the free movement of persons, where the emphasis is put on the enforcement rather than the creation of rights,[6] the EU legislature has foregrounded the fight against fraud and error in a reform package that is under negotiation.[7] In March 2019, an agreement reached in trilogue[8] (hereinafter 'the Draft Regulation') was defeated in the Council, after which the Parliament refrained from voting. The trilogues resumed in the autumn, but only one issue that is relevant for this article is seemingly being renegotiated.[9] All but one of the amendments discussed in this article are therefore likely to be final, at least if the package is adopted.

Although those reforms should contribute to narrowing the enforcement and compliance gaps, they only partially engage with the root of the problem, which is that the State of origin lacks the capacity and incentive to monitor compliance with the posting rule assiduously. I infer that some of its administrative enforcement powers should be transferred to the State of destination.

The posting rule connects with several wider debates. It delimits a patch of home State regulation in a field, EU social security law, which is dominated by host State regulation. Those modes of regulation, alongside the mutual recognition of the certificate, constitute core themes of EU internal market law. The reasons for the enforcement gap – the preserve of compliance studies – include a lack of cooperation in the composite administration and difficulties in access to judicial review, which may call for reconsideration of the Member States' institutional and procedural autonomy to implement EU law – *topoi* of EU administrative law. My methodological goal is to embed the analysis of the enforcement of the posting rule, especially in EU administrative law – 'the set of rules governing the administration of the European Union and national administrations when they are acting within the scope of application of EU law'.[10]

Much as EU social security law is part of EU administrative law, it is hardly ever framed as such.[11] Cutting this umbilical link hurts here, as the issue at hand—the allocation of enforcement powers to a plurality of administrative and judicial authorities—is eminently administrative. What EU social security law scholars would phrase as an issue of fraud and error afflicting the posting rule arising from the binding effect of the A1 certificate, their EU administrative law colleagues would frame as an enforcement and compliance gap arising from the recognition of a transnational administrative decision.

6. E.g. Directive 2014/54 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L128/8; Directive 2014/67 on the enforcement of Directive 96/71 [2014] OJ L159/11; Regulation 2019/1149 establishing a European Labour Authority [2019] OJ L186/21. Directive 2018/957 amending Directive 96/71 [2018] OJ L173/16 only partly bucks that trend.
7. E.g. proposed Recital 25 Reg 987/2009 (inserted by Art. 2(3) General Secretariat of the Council, 'Proposal for a Regulation amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 – Analysis of the final compromise text with a view to agreement' 7698/19 Add 1 Rev 1, hereinafter 'the Draft Regulation'). While 'facilitating the exercise of citizens' rights', according to the Commission the amendments to the social security Regulations do 'not envisage granting new rights to EU citizens' (European Commission, 'Impact Assessment: Initiative to partially revise Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and its implementing Regulation (EC) No 987/2009' SWD (2016) 460 final/2, Part 1/6, 10).
8. Negotiations in trilogues involve representatives of the European Parliament, the Council and the Commission.
9. Letter from the Dutch Ministry of Social Affairs and Employment (4 November 2019), available at www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2019Z21072&did=2019D43928, see below, section 5.3.
10. Eliantonio (2016: 532).
11. The main example that springs to mind is Henrik Wenander's article couching the Regulations' administrative machinery in the language of networks. See Wenander (2013).

In sections 2 and 3, I set out what the posting conditions are and how their enforcement is organised. Section 4 describes deficiencies in the enforcement of the posting rule by regulators and in the compliance with that rule by regulatees. Section 5 reviews the Draft Regulation's attempt to tackle these deficiencies. In section 6, I formulate a crisper problem definition and make some suggestions for administrative enforcement.

2. The certificate as an inter-administrative tie

Five cumulative requirements need to be fulfilled for an *employed* person to be posted, and therefore to remain subject to the social security legislation of the State of origin despite working abroad.[12] First, the anticipated duration of the work must not exceed two years. Second, to protect that limit against circumvention, workers can only be posted if they do not replace another posted worker. Third, a posted worker must have been subject to the legislation of the Member State of origin prior to being posted. Fourth, he or she must be bound by 'a direct link' to the posting undertaking throughout the period of posting.[13] The former must be an employee of the latter and remain under its authority.[14] Finally, the employer must 'normally carr[y] out its activities' in the Member State of origin.[15] To be posted, *self-employed* persons must perform an activity lasting no longer than two years in the State of destination, which is 'similar' to the activity they 'normally' pursue in the State of origin.[16]

The certificate is central to the enforcement of these posting conditions. By issuing it, the institution of the State of origin does no more than declare that its social security legislation remains applicable to an employed or self-employed person while he or she is posted abroad.[17] In *Fitzwilliam*, the CJEU ruled that the certificate 'is binding on the competent institution of the Member State to which those workers are posted.'[18] Unless and until it is withdrawn or declared invalid, the certificate prevents that institution from subjecting workers to its legislation.[19] The social security institutions of both States are linked by what Luca De Lucia calls an 'inter-administrative tie': 'the host administration cannot (unilaterally) question the validity or appropriateness of the measure of other States', which deploys its effects in the State of destination.[20] The certificate also binds the courts of the State of destination.[21] That applies 'even if it were established that the conditions under which the workers concerned carry out their activities clearly do not fall within the material scope of the provision on the basis of which the A1 certificate was

12. Art. 12(1) Reg 883/2004. The Draft Regulation would introduce waiting periods before and between postings (proposed Art. 14(1)–(1a) Reg 987/2009 (amended by Art. 2(8) Draft Regulation)).
13. E.g *Fitzwilliam* (note 3 above: para 24).
14. Art. 12(1) Reg 883/2004.
15. *ibid*.
16. Art. 12(2) Reg 883/2004. The Draft Regulation would ban replacement (proposed Art. 12(2) Reg 883/2004 (replaced by Art. 1(13) Draft Regulation)).
17. Case C-178/97 *Barry Banks and Others v Theatre royal de la Monnaie* [2000] ECR I–2005, para 53.
18. *Fitzwilliam* (note 3 above: para 53).
19. *ibid*, para 55, now codified in Art. 5 Reg 987/2009.
20. De Lucia (2016: 100).
21. Case C-2/05 *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV* [2006] ECR I–1079; Case C-527/16 *Salzburger Gebietskrankenkasse and Bundesminister für Arbeit, Soziales und Konsumentenschutz v Alpenrind GmbH and Others* [2018] 9 WLUK 53, paras 38–47.

issued'.[22] However, the courts of the State of destination can sometimes disregard certificates that were obtained or relied upon fraudulently.[23]

There are good reasons for this concentration of administrative powers in the State of origin. It serves the principle of exclusivity, which requires that, unless otherwise provided, people are subject to the social security legislation of only one Member State at any given time.[24] By issuing a certificate, a Member State can prevent all other Member States from applying their legislation. Certificate holders exercise their free movement rights secure in the knowledge that only the stated legislation applies and that they owe only one set of social security contributions. In this way, the certificate brings legal certainty and facilitates the exercise of the freedom to provide services.[25]

The problem with the certificate is its unreliability. The less the Member State of origin verifies compliance with the posting conditions before and after issuing certificates, the more problematic is their binding effect. The inter-administrative tie rests on a number of assumptions. If the certificate is to be accurate, the Member State of origin must be sufficiently willing to and capable of monitoring compliance with the conditions for being posted. Where it lacks such capacity, the Member State of destination must be willing to take over monitoring and the Member State of origin must accept its findings. The administrative enforcement of the posting rule presupposes intense administrative cooperation and information exchange. Moreover, it requires effective judicial review of the certificate.

Most of these assumptions prove problematic in practice. The State of origin often lacks incentives to monitor and sometimes lacks capacity to do so (section 6). As a result, it often issues certificates without much by way of verification (section 4). Duties of cooperation do not necessarily translate into cooperation on the ground (sections 3 and 5.4). Judicial review of certificates is far from guaranteed. The courts of the State of origin can invalidate certificates but may be hard to access for posted workers and the social security institutions of the State of destination. These actors cannot challenge erroneous certificates in the courts of the State of destination.[26] They may be able to lodge proceedings in these courts where the non-compliance was due, not to an unintentional error, but to intentional fraud.[27] However, the CJEU only allows the courts of the State of destination to disregard certificates on the grounds of fraud under strict conditions. In the recent *CRPNPAC and Vueling Airlines* ruling, the Grand Chamber held that these courts can only disregard fraudulent certificates where the social security institution of the State of destination has promptly requested its counterpart in the State of origin to review the certificates in the light of its concrete evidence of fraud; and the latter has failed to do so within a reasonable time.[28] In sum, access to judicial review is often denied in the State of destination and difficult in the State of origin.

22. Case C-356/15 *Commission v Belgium* [2018] OJ C319/2, para 93.
23. Case C-359/16 *Criminal proceedings against Ömer Altun and others* [2018] 2 CMLR 35.
24. Art. 11(1) Reg 883/2004.
25. E.g. *Fitzwilliam* (note 3 above: paras 48, 52, 54).
26. *Herbosch Kiere* (note 21 above).
27. *Altun and others* (note 23 above).
28. Joined Cases C-370/17 and C-37/18 *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v Vueling Airlines SA and Vueling Airlines SA v Jean-Luc Poignant* [2020] (CJEU 2 April 2020).

3. The administrative network

The certificate calls for a set of powers, duties, and procedures to ensure that it accurately reflects reality. This framework has been developed over the years by the CJEU, the EU legislator and the Administrative Commission for the Coordination of Social Security Systems (hereinafter 'Administrative Commission'); it would be finetuned further by the Draft Regulation. It is best seen as an administrative network—a somewhat amorphous term for 'a pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the "domestic" from the "international" sphere'[29]—that seeks to facilitate enforcement.[30] The network has a horizontal dimension inasmuch as it concerns the relationships between Member States, and a vertical dimension inasmuch as it involves the European Commission, the Administrative Commission, and the European Labour Authority.

3.1. Monitoring when issuing the certificate

The social security institution of the State of origin is bound, by virtue of the principle of sincere cooperation, 'to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable in the matter of social security and, consequently, to guarantee the correctness of the information contained in an E 101 certificate.'[31]

If the proper assessment is required in every case, the CJEU sets too high a bar. Such verification would be unfeasible given finite resources;[32] undesirable given the need to issue certificates promptly, ideally before the start of the posting;[33] and unnecessary given that risk assessments would allocate resources more efficiently.[34] Whatever the ideal standard of monitoring, current practice often falls far short: many Member States seem to not carry out *any* assessment of the relevant facts, let alone a proper one (section 4).

3.2. Cooperation, dialogue, and conciliation

In discharging its obligations, the social security institution of the State of origin can rely on the general duty of mutual information and cooperation laid down in Article 76 Regulation 883/2004, which calls on Member States to 'lend one another their good offices'. The institution of the State of destination and the service recipient *must* share any doubts they may have as to the validity of the certificate or the accuracy of the facts on which it is based with the institution of the State of origin.[35] Upon request from the latter institution, the institution of the place of stay or residence *shall* make the necessary verifications.[36]

29. Slaughter (2004: 14); see also Craig (2011: 82).
30. Wenander (note 10 above: 68–69).
31. E.g *Fitzwilliam* (note 3 above: para 51); Case C-620/15 *A-Rosa Flussschiff v Urssaf* [2017] 4 WLUK 505, para 39; *Altun and others* (note 23 above: para 37). For good measure, the CJEU added that 'any institution of a Member State must carry out a diligent examination of the application of its own social security system' (*Altun and others* (note 23 above: para 42)).
32. Pöltl and Spiegel (2014: 199).
33. *Banks* (note 17: para 53).
34. See Art. 10 Reg 2019/1149.
35. Art. 5(2) Reg 987/2009; *A-Rosa Flussschiff* (note 31 above: para 50).
36. Art. 5(3) Reg 987/2009. The Draft Regulation would extend this duty to 'any institution concerned' (proposed Art. 5(3) Reg 987/2009 (amended by Art. 2(7) Draft Regulation)).

A dialogue and conciliation procedure is foreseen in cases of doubts about the validity or accuracy of the certificate. Upon receipt of a request from the institution of the State of destination to clarify or withdraw the certificate, the institution of the State of origin '*shall* reconsider the grounds for issuing the document and, if necessary, withdraw it.'[37] Where the dialogue procedure fails to bring resolution, the conciliation procedure may be launched: the issue *may* be referred to the Administrative Commission, which shall seek to reconcile viewpoints within six months.[38] If it fails to do so, the State of destination *may* bring infringement proceedings against the State of origin under Article 259 TFEU, 'without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs'.[39]

The dialogue and conciliation procedure has practical and legal limitations. The social security institution of the State of origin may well be unwilling to perform an onerous exercise that may reveal that it did not initially discharge its duties.[40] The Administrative Commission has handed down very few single-case decisions,[41] which are not binding.[42] Only the CJEU can bind the social security institutions of both States, but it would be fanciful to expect Member States to launch infringement proceedings against one another for certificates.[43] The effectiveness of the dialogue and conciliation procedure thus seems limited.[44] While in theory it incentivises enforcement, it remains to be seen to what extent the effect is perceptible.

4. The law in action

This section moves from the 'law in the books' to the 'law in action' and finds a gap between them. The law in action breaks down into two interrelated issues: the enforcement by regulators and the compliance by regulatees. The goal is for the regulatees—posted workers, their employers, and posted self-employed persons—to comply with EU law, and in particular the conditions for being posted. This is an issue of *compliance*—'the conformity of behaviour with a prescribed rule or objective'.[45] 'Within the European administrative context, *enforcement* is generally to be understood as encompassing any means of achieving compliance with obligations imposed by EU law.'[46] I focus on administrative enforcement, which includes 'the establishment of administrative agencies, the setting up of necessary tools and instruments, monitoring and inspecting by regulators'.[47] Taken together, enforcement by regulators and compliance by regulatees constitute the *practical implementation* of the posting rule.[48] For EU law in general, 'the practical

37. Art. 5(2) Reg 987/2009 (emphasis added); *Fitzwilliam* (note 3 above: para 56); *Altun and others* (note 23 above: para 43). I disregard the optional second stage of the dialogue procedure because of its minor practical importance.
38. Art. 5(4) Reg 987/2009; *Fitzwilliam* (note 3 above: para 57).
39. E.g. *Fitzwilliam* (note 3 above: para 58); *Alpenrind* (note 21 above: para 61).
40. E.g. Pöltl and Spiegel (note 32 above: 200).
41. Lorré (2018: 159).
42. *Alpenrind* (note 21 above). The addition to Art. 5(4) Reg 987/2009 envisaged by Art. 2(7) Draft Regulation would not change this state of affairs (c.f. Art. 89(3) Reg 987/2009; *Alpenrind* (note 21 above: paras 62–63)).
43. Verschueren (2008: 193).
44. E.g. De Pauw and Verschueren (2019: 207); Jorens and Lhernould (2014: 39–40); Lorré (note 41 above: 158–159). For a more positive assessment, see Pöltl and Spiegel (note 32 above: 201).
45. Batory (2016: 688).
46. Hofmann, Rowe and Türk (2011: 690, emphasis added), who prefer a narrower definition.
47. Versluis (2007: 53).
48. *ibid*.

implementation (the ''law in action'') remains to a large extent a ''black box''. There is relatively little insight into how European legislation is applied in practice, that is, how regulators enforce it and how the regulated comply with it.'[49] The same holds for the practical implementation of the posting rule, though some publications give a glimpse into the box.

A recent Eurofound report—far from a state-of-the-art implementation study—contains indications that the *enforcement* of the posting conditions is deficient.[50] Its questionnaire asked national correspondents whether and how the institution of the State of origin verifies three posting conditions—the existence of a genuine activity in the State of origin, the existence of an employment relationship, and the prohibition on replacement—before issuing a certificate. Depending on the condition, two to eight Member States cross-check the information provided in the request with databases and registers; two to four Member States ask the employer to provide supporting evidence; and two Member States perform random checks. Strikingly, nine to thirteen Member States do not verify whether those posting conditions are satisfied. In sum, whether or not the other Member States perform the requisite 'proper assessment of the facts',[51] about half the Member States for which information is available seemingly do not perform *any* assessment of the facts when issuing a certificate, though they may monitor afterwards. While they suffer from methodological limitations, Eurofound's findings broadly accord with statements made by inspectors and civil servants to the effect that the State of origin regularly fails to perform any, or at least a proper, assessment of the facts, and instead delivers unchecked, incorrect or incomplete A1 forms.[52]

While there is little by way of empirical fieldwork on the issue of *compliance* with the posting conditions, it is thought to be problematic.[53] There are reasons to support this assumption. Non-compliance is likely to follow from the combination of (i) the low risk of detection owing to the enforcement deficit; (ii) the low likelihood of litigation due to the obstacles to judicial review; (iii) the lack of information as to the posting conditions;[54] and (iv) the significant incentive for employers and self-employed persons to rely on posting rather than other conflict rules, as it reduces their administrative burden and, quite possibly, their contribution costs.[55]

While compliance deficits are intrinsically problematic, as the law cannot achieve its regulatory goals if it remains dead letter, it is worth spelling out why that is the case for the posting rule in particular. Non-compliance enables regulatees—in practice employers and self-employed persons rather than workers—to choose the applicable legislation, thus opting out of and into mandatory social security schemes and depriving the competent State of contributions. Where workers are

49. *ibid* 50–51; in the same vein, see e.g. Mastenbroek (2005: 1114–1115); Schmälter (2019: 1–2).
50. Biletta, Cabrita and Gerstenberger (2020: 16–17). See also Jorens and Lhernould (note 44 above: 21); Jorens *et al* (2020: 71–74).
51. *Fitzwilliam* (note 3 above: para 51).
52. E.g De Pauw (2009: 412, 438–439); Heirman *et al* (2014: 144, 152); Lorré (note 41 above: 158); Pöltl and Spiegel (note 32 above: 199–200). For sources collating input from civil servants, see Jorens and Lhernould (note 44 above: 40); Van Overmeiren (2008: 78–80).
53. E.g. *Altun and others* (note 23 above), Opinion of AG Saugmandsgaard Øe, footnote 42; Heirman *et al* (note 52 above: 144); Lorré (note 41 above: 158); Steinmeyer (2015: 172); Van Overmeiren (note 52 above: 78).
54. See Jorens and De Wispelaere (2019: 116–118).
55. While, in theory, enforcement is not necessarily a precondition for compliance, in practice poor enforcement tends to result in poor compliance when regulatees have incentives not to comply (e.g. Hartlapp (2014: 806, 822)).

migrant workers under Article 45 TFEU,[56] erroneous certificates block their access to the social security schemes of their State of work, emptying the status of migrant worker of much of its meaning. Finally, widespread non-compliance, if confirmed, would undermine the mutual trust upon which the certificate rests.[57]

5. The Draft Regulation and beyond

Strong arguments accordingly militate against lax enforcement and patchy compliance. In the remainder of this article, I evaluate and formulate proposals to narrow the enforcement and compliance gaps. Two questions recur. First, to what extent would a particular measure enhance enforcement? Seeing as this is an empirical question about the effectiveness of future reforms on the ground, answers are bound to remain tentative. Why do Member States comply with EU law and how can compliance be improved? Rationalist theorists answer that States are 'rational actors that weigh the costs and benefits of alternative behavioural choices when making compliance decisions in cooperative situations. Both the sources of, and solutions to, non-compliance stem from the incentive structure. States choose to defect when confronted with an incentive structure in which the benefits of shirking exceed the costs of detection. Compliance problems are therefore best remedied by increasing the likelihood and costs of detection through monitoring and the threat of sanctions'.[58]

The competing but complementary managerial theory considers a lack of state capacity and rule ambiguity to be major sources of non-compliance.[59] It offers capacity-building and rule clarification as solutions.

A second question is whether a gain in enforcement jeopardises competing goals, interests and principles. Particularly important, given the EU institutions' commitment to that objective, is whether a measure preserves exclusivity in practice. No proposal discussed in this article would give more than one State the power to levy social security contributions – in theory, the principle of exclusivity is therefore intact. But could measures create double burdens in practice, because a State wrongly claims to be competent to levy contributions?

This section outlines almost all relevant reforms the EU institutions recently effected and envisaged in the Draft Regulation.[60] As they insufficiently engage with the root of the problem, I argue that there is a need to reallocate administrative responsibilities (section 6).

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56. In principle, posted workers are not migrant workers for the purpose of Article 45 TFEU (Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I–7831).
57. *Altun and others* (note 23 above: para 40).
58. Tallberg (2002: 611). Important though they are, I will not discuss sanctions for breach of the posting conditions, because they are mostly left to national practice, about which little is known (Jorens and Lhernould (note 44 above: 40), and because penalties presuppose detection, which is rare (Jorens *et al* (note 50 above: 69–74)). See further proposed Art. 19a(2) Reg 987/2009 (inserted by Art. 11a.new Draft Regulation).
59. E.g. Börzel *et al* (2010); Tallberg (note 58 above: 613–614).
60. I ignore measures relating to the retroactivity of the withdrawal or rectification of certificates (note 58 above) and to the recovery of contributions or benefits that were unduly paid or provided. The fate of incomplete certificates is mentioned below, (note 100).

5.1. Standardising procedures

As the law stands, Member States are free to design the procedures for the issue and reconsideration of certificates; their practices vary widely.[61] The Draft Regulation would grant the Commission powers to adopt implementing acts to 'establish standard procedures [including where appropriate, time limits] for . . . the issuance, the format and the contents of a portable document certifying the social security legislation which applies to the holder, . . . the elements to be verified before the document can be issued, withdrawn or rectified, . . . [and] the withdrawal or rectification of the document by the issuing institution (. . .)'.[62]

Those powers, which would be exercised in accordance with a comitology procedure,[63] would bring greater uniformity. Especially if it goes beyond merely pouring the content of existing decisions and recommendations of the Administrative Commission into a new, legally binding, mould, partial harmonisation of (the procedure for) the certificate could benefit enforcement by lifting rule ambiguity; by raising the threshold Member States must reach; and by weakening the incentive for employers and self-employed persons to request certificates in the State whose enforcement is laxest.

5.2. Launching a new agency

Another vector for rather unpredictable but potentially sweeping change is the European Labour Authority – a new agency, whose Management Board first convened in October 2019 and which should be fully operational by mid-2021.[64] Its mandate is supportive rather than coercive: with a view to enhancing the enforcement of the social security Regulations among others, it is meant to smooth cooperation and information exchange between Member States, support them with capacity building, mediate between them, and share good practices. With the agreement of the States involved, the European Labour Authority will be able to coordinate and support joint inspections, where the authorities of more than one State carry out an inspection in one State.[65] It should also improve the information available to private actors, thus addressing one reason why they may not comply with the posting conditions.

The European Labour Authority could, in rationalist terms, make States' defection more costly. While it cannot adopt measures against recalcitrant Member States, it has some leverage. For instance, its semi-annual reports for the European Commission on unresolved requests between Member States could eventually lead to infringement proceedings.[66] The European Labour Authority could also strengthen the capacity of States to enforce EU law in line with managerial precepts. Its considerable manpower and supportive mandate should ease transnational enforcement.

61. See Jorens and Lhernould (note 44 above).
62. Proposed Art. 76a Reg 883/2004 (inserted by Art. 1(25) Draft Regulation).
63. The Commission and the committee assisting it shall act under the examination procedure detailed in Art. 5 Reg 182/2011 (Proposed Art. 76b Reg 883/2004 (inserted by Art. 1(25a.new) Draft Regulation)).
64. Reg 2019/1149.
65. Art. 8 and Art. 9 Reg 2019/1149.
66. Art. 7(1)(e) Reg 2019/1149; Van Nuffel (2019: 242).

5.3. Requiring prior notification

The awareness of both States is crucial for enforcement. In order to enforce the labour rights of posted workers, Directive 2014/67 enables the State of destination to require service providers to declare that they post workers to its territory at or before the start of the posting.[67] Such prior notification could facilitate the enforcement of the rules on posting in social security law.

Is there and should there be a duty of prior notification to the State of origin in social security law? Until 2010, there was no obligation to request a certificate. This was inferred from the CJEU's statement that E 101 certificates can be awarded retrospectively.[68] Regulation 987/2009 introduced a notification duty: the employer or the posted self-employed person 'shall inform' the social security institution of the State of origin of the posting, 'whenever possible in advance', whereupon it will consider issuing the certificate.[69] The remedy for this – often neglected – obligation to request a certificate is not the requalification of the case as falling outside the posting rule. Requesting a certificate is not a condition of being posted.[70] Rather, remedies and penalties must be sought at the national level. A few Member States have introduced specific penalties for workers and/or employers who are active on their territory without certificates,[71] some of which risk falling foul of EU law because they are excessive under the *Greek Maize* criteria or the freedom to provide services.[72]

The Draft Regulation would require the employer or the posted self-employed person to inform the institution of the State of origin 'in advance' of the posting, except for business trips.[73] This duty of prior notification would put a heavy weight on the – rather vague – definition of business trips. A business trip is 'a temporary working activity of short duration organised at short notice, or another temporary activity related to the business interests of the employer and not including the provision of services or the delivery of goods, such as attending internal and external business meetings, attending conferences and seminars, negotiating business deals, exploring business opportunities, or attending and receiving training'.[74]

The fate of this obligation of prior notification remains highly uncertain, as it is the only part of the Draft Regulation relating to posting that is currently being renegotiated.[75] Two issues are moot. First, how would this duty relate to primary law? Service providers' obligation to notify both States could be framed as a double burden that hinders the free movement of services.[76] Second, would a

67. Art. 9(1)(a) Dir 2014/67.
68. *Banks* (note 17 above: paras 52–57).
69. Art. 15(1) and Art. 19(2) Reg 987/2009.
70. *Alpenrind* (note 21 above: paras 70–72).
71. Biletta, Cabrita and Gerstenberger (note 50 above: 31–34).
72. See Case 68/88 *Commission v Hellenic Republic (Greek Maize)* [1989] ECR 2965 and, by analogy, Joined Cases C-64/18, C-140/18, C-146/18 and C-148/18 *Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei* [2019] OJ C383/17. See further Sørensen (2015, 823-830).
73. Proposed Art. 15(1) Reg 987/2009 (amended by Art. 2(9) Draft Regulation).
74. Proposed Art. 1(2)(eb) Reg 987/2009 (inserted by Art. 2(4) Draft Regulation).
75. Letter from the Dutch Ministry of Social Affairs and Employment (note 9 above).
76. Jorens and De Wispelaere (note 54 above: 125). The notification duties could be merged by the single social security number being discussed in political circles (see, e.g. Employment and Social Affairs Committee, 'Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004' PE 612.058v03-00, Amendment 103).

harder duty of prior notification foster enforcement and compliance? On the one hand, each request for a certificate draws the State of origin's attention to a situation it could investigate. When it issues a certificate, the institution of that State 'shall without delay' inform its counterpart in the State of destination,[77] enabling further enforcement activity. On the other hand, each awarded certificate hinders enforcement by the State of destination. While it can monitor, it risks doing so in vain if its evidence of non-compliance is ignored by the State of origin. Moreover, a certificate prevents the courts of the State of destination from enforcing the posting rule (except in cases of fraud). In conclusion, a stricter duty to request a certificate in advance both furthers and thwarts enforcement.

5.4. Facilitating information flows

While enforcement depends on information sharing, information does not always circulate freely.[78] The Draft Regulation facilitates data exchange, whether in individual cases or as an exercise in data matching, so as to 'enable a Member State to compare data held by its competent institutions against that held by another Member State in order to identify errors or inconsistencies that require further investigation.'[79] Data flows will be eased further by EESSI—a platform for the electronic exchange of social security information that is being rolled out. Increased data exchange would assist States in detecting non-compliance and in targeting their investigatory resources efficiently. It would be welcome both from a managerial and rationalist perspective: information exchange strengthens States' capacity to comply while reducing the costs involved.

The Draft Regulation sets a general deadline for the exchange of information: social security institutions would have to reply to one another's queries concerning the applicable legislation within 35 working days.[80] It also makes adjustments to the dialogue and conciliation procedure. When requested to reconsider the grounds for the issue of a certificate, the institution of the State of origin would have to reach a decision within 30 working days.[81] It would also be obliged to forward all available evidence within 30 working days of the request if it maintains the certificate, and within ten days in cases of motivated urgency – this could be awkward if little to no evidence was collected. Should its doubts persist despite having received this evidence, the institution of the State of destination may make a second, evidenced, request for clarification, rectification or withdrawal in accordance with the above procedure and timeframes. If put into practice, stricter duties would facilitate enforcement. But it is not obvious that a lack of administrative cooperation on the ground is best solved by an inflation of cooperation duties on paper. Given the heavy burden they place on institutions and the fact that breaches are unlikely to entail adverse consequences other than pressure from peers or the European Labour Authority,[82] these increased cooperation duties may not translate into much of an increase in cooperation, though they may gently tilt the balance towards the State of destination.

77. Art. 15(1) Reg 987/2009.
78. E.g. Giubboni *et al* (2017: 61). For an overview of forms of information exchange, see Schneider (2014).
79. Recital 13 Draft Regulation; proposed Recital 25 Reg 987/2009 (inserted by Art. 2(3) Draft Regulation); proposed Art. 2(2a) Reg 987/2009 (inserted by Art. 2(5)(a) Draft Regulation).
80. Proposed Art. 20(3) Reg 987/2009 (inserted by Art. 2(11b.new) Draft Regulation).
81. Proposed Art. 19a Reg 987/2009 (inserted by Art. 2(11a.new) Draft Regulation).
82. They are not accompanied by specific remedies, and it is hard to envision breaches being brought to court. Cf Art. 6(5) Dir 2014/67 and Art. 4(2) Dir 96/71, as amended by Dir 2018/957.

5.5. The enforcement network in context

By way of answering the questions with which this section opened, none of these reforms threaten exclusivity in practice, while all should contribute to administrative enforcement. The reforms should be contextualised. Has the EU legislature exhausted its arsenal of enforcement tools? If so, whatever enforcement gap remains should be attributed to the unavoidable difficulties in enforcing the posting rule: posting is intrinsically hard to monitor, because it is both temporary and spread over the territory of two Member States.[83] This section compares the enforcement of the posting rule with the enforcement of similar rules, thereby locating posting in the broader context of EU internal market law.

First, the subject of this article can be juxtaposed with the EU's efforts to enhance enforcement of, and compliance with, harmonisation measures based on the country of origin principle, recently reviewed by Sørensen.[84] Such secondary legislation harmonises standards while introducing a strict separation of tasks – one State enforces, while the other recognises. More specifically, the State of origin authorises regulatees who comply with the harmonised standard to carry out their activities in the State of destination, which must recognise authorisations and may neither attempt to enforce the harmonised standard itself nor add supplementary conditions. The similarities with social security posting are clear: in both cases the State of origin has the main competence to enforce EU rules and to grant authorisations that bind the State of destination but fails to monitor sufficiently closely. The main difference is that the object of enforcement in social security law is not a harmonised standard but, rather, EU conflict rules that enable one State to apply its domestic law. It is striking that most of the stratagems the EU has deployed to foster the practical implementation of such harmonisation are also being applied to the posting rule.[85] Sørensen's study ends on a familiar note: despite the array of measures, 'the host Member State has only very few options when the home Member State fails to supervise the observance of the conditions . . . , and when the home Member State fails to either suspend or withdraw an authorization.'[86]

When compared to country-of-origin harmonisation, at least on paper, the enforcement of the posting rule will be advanced once the Draft Regulation is adopted. That is not to say, however, that the EU institutions could not go further. Comparison with the labour law Directives on posting shows how the enforcement network in social security law could, and possibly should, be developed. In section 6, I make additional suggestions.

The framework on the labour law applicable to posted workers is well known. They are protected at least by the mandatory provisions of labour law of the State of origin.[87] By virtue of Directive 96/71, posted workers and their employers are not subject to all the labour law of the State of destination, but rather to a core set of terms and conditions of employment, at least for the first 12 or 18 months.[88] The labour rights of posted workers are thus based on a mix of home State regulation and host State regulation, whereas their social security rights are anchored solely to home State regulation. Beyond this major difference, there are many similarities between labour law and social security law. In labour law, there are concerns that posting leads to social dumping,

83. See Hartlapp (note 55 above: 811).
84. Sørensen (2019).
85. *ibid* 388–402.
86. *ibid* 400.
87. Art. 8 and Recital 36 Regulation 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.
88. Dir 96/71, as amended by Dir 2018/957.

deprives posted workers of the full protection of the State of destination, enables employers to reap an unfair competitive advantage, and suffers from widespread error, abuse and fraud.[89]

Worries about the practical implementation of labour law to posted workers have led to a flurry of legislative activity in recent years.[90] As amended, Article 5 Directive 96/71 places responsibility for the enforcement of the obligations of that Directive squarely on the State of origin *and* the State of destination, instructing each to take appropriate measures in cases of non-compliance.[91] The State of destination must lay down 'effective, proportionate and dissuasive' penalties for breaches of the core of its labour law.[92] It is responsible for 'the inspection of [its core] terms and conditions of employment [. . .] in cooperation, where necessary, with [the authorities] of the Member State of establishment.'[93] That State 'shall continue to monitor, control and take the necessary supervisory or enforcement measures, in accordance with its national law, practice and administrative procedures, with respect to workers posted to another Member State.'[94] The States must share information on request, if need be by obtaining it from service providers.[95] Persistent failure to do so can prompt the Commission to take appropriate measures.[96] Member States must mobilise their enforcement machinery: they 'shall ensure that appropriate and effective checks and monitoring mechanisms provided in accordance with national law and practice are put in place and that the authorities designated under national law carry out effective and adequate inspections on their territory'.[97] Some of these measures could be transplanted to social security law, modified where appropriate to reflect the differences with labour law. The comparison should not be misread as a plea for unthinkingly importing rules from one context to another, glossing over their differences – enforcement measures must be tailored to the root causes of the problems in specific policy areas.[98]

Wielding the tools of the labour law Directives, Member States may detect non-compliance with the posting rule in social security law. However, a number of provisions confine the processes, powers, and duties to the enforcement of labour law. For instance, the information shared by and with the competent authorities in the context of Directive 2014/67 'shall be used only in respect of the matter(s) for which it was requested.'[99]

5.6. Pinpointing the problem

The enacted and envisaged reforms cannot be faulted for being too timid – the European Labour Authority could transform transnational enforcement practices while the duty of prior notification,

89. E.g. Verschueren (2015).
90. Dir 2014/67; Dir 2018/957.
91. Some such measures are listed in Art. 9 Dir 2014/67.
92. Art. 5 Dir 96/71, as amended by Dir 2018/957.
93. Art. 7(1) Dir 2014/67.
94. Art. 7(2) Dir 2014/67.
95. Art. 6(2) and (4) Dir 2014/67. The competent authority or body of the State of destination also has a duty to request information from other authorities or bodies (Art. 4(2) Dir 96/71, as amended by Dir 2018/957).
96. Art. 6(5) Dir 2014/67. The same applies to persistent delays in transfers of information to the State of destination (Art. 4(2) Dir 96/71, as amended by Dir 2018/957).
97. Art. 10(1) Dir 2014/67; see also Art. 6(2) Dir 2014/67.
98. Sørensen (note 84 above: 384, 387).
99. Art. 6(8) Dir 2014/67. Data protection law can also preclude the transfer of data between administrative bodies (Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L119/1; Case C-201/14 *Smaranda Bara and Others v Casa Naţională de Asigurări de Sănătate and Others* [2016] 1 CMLR 41).

if introduced, would prioritise enforcement over the free movement of services. What is missing is not so much ambition as careful problem definition. The root of the problem is that the certificate poorly captures reality (largely due to the shortcomings of the enforcement machinery of the State of origin) and carries great legal weight (disabling the enforcement machinery of the State of destination).

A first strategy to improve enforcement could be to limit the binding effect: the inaccuracy of certificates is less problematic if they can be disregarded. The Draft Regulation would reduce the legal strength of incomplete certificates, which is currently unclear,[100] but otherwise leave the binding effect intact. Easier access to judicial review should enhance enforcement, but space precludes further analysis of the extent to which this is feasible and desirable.

The second way to narrow the gap in the practical implementation of the posting rule would be to reduce the inaccuracy of the certificate: the more it mirrors reality, the less problematic its binding effect. While the EU institutions seek to tackle the inaccuracy, they do not address its fundamental causes. In particular, they seem, by and large, blind to the incentives and capacities of social security institutions.[101] The likelihood that a given condition would be monitored depends in no small part on there being at least one Member State with a strong incentive and the capacity to monitor. The State of origin has almost exclusive decision-making powers but lacks full capacity and a strong incentive to monitor. A failure to monitor is unlikely to be punished, given the difficulties in challenging certificates in court. Section 6 now sets out how aligning decision-making powers, incentives and capacities would lead to better administrative enforcement, and, ultimately, greater compliance. The focus on incentives and capacities accords with rationalist and managerial views.

6. Towards a new division of administrative competences?

The EU institutions have failed to ask the fundamental question of what should guide the allocation of enforcement powers between social security institutions. I would propose three factors. First, what is the stake of the Member State to which the social security institution belongs? The more the interests of a Member State are liable to be affected by non-compliance with the posting rule, the stronger its claim on an enforcement role, other things being equal. In the case of posting, both States are affected if their laws are wrongfully disapplied. Two further factors seem relevant: incentives and capacities to monitor. Administrative enforcement, and therefore compliance, depend on whether each condition for posting is, or at least can be, monitored by a State that is both committed to and capable of doing so. I shall argue that enforcement tasks should be shared between the two Member States, in line with their incentives and capacities to monitor.

100. The Draft Regulation provides that, where some compulsory sections of a certificate are left blank, the institution of the State of destination shall without delay inform its counterpart in the State of origin, which shall rectify it as soon as possible or confirm that the conditions are not satisfied; if the lacunae are not filled within 30 working days, the institution of the State of destination can ignore the certificate (proposed Art. 5(1a) Reg 987/2009 (inserted by Art. 2(7) Draft Regulation)). This is a welcome addition: incomplete certificates should not be binding since they do not attest to compliance with all posting conditions.

101. A major exception is the establishment of the European Labour Authority.

6.1. Incentives to monitor: A rough cost–benefit analysis

Why and to what extent Member States practically implement EU law is the subject of much discussion.[102] What interests us here is whether, in matters of posting, Member States have less of an incentive to comply than usual. That seems to be the case for the Member State of origin. While bearing the principal responsibility for monitoring, it lacks a strong incentive to do this. By contrast, the State of destination, which has little responsibility to monitor, has a strong incentive to do so. This mismatch goes some way towards explaining the compliance gap and suggests how it could be narrowed.

Administrative enforcement is resource intensive. A State's willingness to monitor depends on what it stands to gain from such an investment. These returns in turn depend partly on whether a person moves from a Member State with more generous benefits, heavier contribution rates and higher wage levels than the State of destination ('high-to-low movement') or vice versa ('low-to-high movement').[103] What interests do States have in enforcing the posting rule zealously, or on the contrary, in allowing people to be wrongly categorised as posted?

Regardless of the type of movement, the State of origin has reasons *not* to enforce the posting rule. Issuing certificates even when the conditions are not fulfilled would support its service sector by creating economic opportunities for local businesses and workers, whose employability could depend on holding a certificate. The State of origin even has a financial interest in maintaining such workers' subjection to its social security system, provided that, as is likely, they contribute more to the welfare budget than they draw in benefits. In low-to-high movements, the anti-enforcement incentives are even more pronounced, as posted workers earn at least the remuneration imposed by the State of destination,[104] which exceeds that set by the State of origin. This higher wage not only benefits them but also the public purse, by raising the basis for income taxes and social security contributions.[105] The State of origin's main incentives to enforce meticulously are the risk of labour shortages[106] and the consequences that always attach to breaches of EU rules, except that the likelihood of successful litigation is considerably lower than normal because of the difficulties in accessing courts. On the whole, then, the State of origin has an unusually weak incentive to monitor. This may partially explain certificates being rubber-stamped.

The position of the State of destination is very different. Regardless of the type of movement, it has an interest in the enforcement of the posting rule. Workers who are wrongly posted do not contribute to its social security system – a loss that is particularly significant when the posted worker's salary is above average. Especially in low-to-high movements, the erroneous labelling of workers as being posted engenders unfair competition that can be significant considering the differential in social security contribution rates[107] and the share of social security contributions in the price of services. Such wage cost competition negatively impacts competitors established in the State of destination. If it is widespread, it could detrimentally affect workers who are active in that State by generating a job displacement effect and putting downward pressure on wages and

102. For a literature review, see, e.g. Mastenbroek (note 49 above).
103. For the sake of simplicity, I ignore other movements.
104. Art. 3(1)(c) Directive 96/71 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, as amended by Directive 2018/957.
105. De Wispelaere and Pacolet (2015: 5–6).
106. See, e.g. European Commission (note 7 above: 8).
107. See De Wispelaere and Pacolet (note 105 above: 11).

social protection.[108] This is not to say that the State of destination has nothing to gain from relaxing enforcement. Enforcement is costly. Posting, even unlawful, can contribute to meeting labour market needs. Especially in low-to-high movements, it can benefit consumers and service recipients who are established in the State of destination by lowering prices.[109] Overall, however, the State of destination has strong incentives to monitor, even more so in low-to-high and medium-to-high movements, which account for about half the certificates issued for posting.[110]

This sketch of the incentive structure suggests that the State of destination has much more of an interest in monitoring than the State of origin. In other words, the State with the greatest decision-making powers has the weakest incentive to monitor and vice versa. The mismatch between incentives and powers would support an argument to tweak the former (by encouraging the State of origin to monitor) or to reallocate the latter (by upgrading the enforcement role of the State of destination). Before considering such solutions, a further variable must be introduced: the fact-finding capacity of Member States.

6.2. Capacities to monitor

The certificate attests to matters that, because of issues of time and place, the Member State of origin cannot know. The conditions for posting necessitate continuous compliance and therefore continuous monitoring. For instance, workers and employers should maintain a direct link 'during the period of posting'.[111] As the certificate ought to demonstrate compliance not only at the time of issue, but also afterwards, inevitably it is usually issued on the basis of anticipated facts.[112] Predictions being less accurate than observations, the certificate's reliability suffers.

The need for enforcement begins, rather than ends, with the issue of the certificate. Yet, neither the Regulation, whether in its current or reformed form, nor the case law pays much attention to the follow-up of certificates. As it stands, the institution of the State of origin must 'carry out a proper assessment of the facts'[113] when issuing the certificate, after which it must reconsider the grounds for issuing the certificate on request. An obligation on that institution to spontaneously monitor the certificate during the period of posting could probably be read into judicial snippets,[114] but it deserves to be articulated explicitly, as it is no less important than the initial assessment of the facts, which is largely based on prediction. Such a general duty to 'continue to monitor' exists in labour law.[115]

108. *ibid* 7–9 (suggesting that current numbers are too low to have a significant impact on labour markets, except perhaps in certain sectors); Verschueren (note 43 above: 198).
109. E.g. Hunger (2000: 192–194, 200).
110. This figure is based on wages rather than contribution and benefit levels (De Wispelaere and Pacolet (2019: 27)).
111. *Herbosch Kiere* (note 21 above: para 19).
112. Case C-115/11 *Format Urządzenia i Montaże Przemysłowe sp. z o. o. v Zakład Ubezpieczeń Społecznych* [2012] OJ C366/11, para 43. This paragraph and the next ignore certificates issued after the posting came to an end.
113. *Fitzwilliam* (note 3 above: para 51).
114. A thorough follow-up could form part of the 'proper assessment of the facts' (*ibid*) or 'diligent examination' (*Altun and others* (note 23 above: para 42)) expected from the institution of the State of origin.
115. Art. 7(2) Dir 2014/67. While admittedly onerous, the State of origin and/or the State of destination could be encouraged or even required to verify compliance with the posting rule at some predetermined point(s). Reg 1408/71, which preceded Reg 883/2004, offered such an opportunity. Art. 14(1) and Art. 14a(1) Reg 1408/71 limited posting to activities which were anticipated not to exceed 12 months. Should the activity last longer due to unforeseeable circumstances, if requested the competent authority of the State of destination could consent to an extension of at most

There are, however, requirements for posting that the Member State of origin is incapable of monitoring, whether before the issue of the certificate or afterwards. The reason is that its fact-finding capacity is limited to its territory, while the evidence would be found in the Member State of destination. Under public international law, the enforcement jurisdiction of a State is strictly territorial.[116] It cannot carry out inspections abroad, except with the permission of the State in question, and even then, often with considerable difficulty. If those conditions for which the evidence is largely found in the State of destination are to be monitored more than exceptionally, its enforcement machinery has to be called on.

Admittedly, the current rules do not prohibit that State from monitoring. The State of origin, however, regularly refuses to withdraw certificates in the face of evidence of non-compliance presented by the State of destination.[117] If there is a high risk that its requests will fall on deaf ears, for the State of destination to spontaneously monitor would be to incur certain costs for uncertain benefits. There is thus an argument, developed below, for giving that State decision-making powers regarding those conditions which it is best placed to monitor.

6.3. Aligning administrative competences to capacities and incentives

The problem, therefore, is that the State of origin has insufficient incentives to monitor the posting rule, while its capacity to do so is constrained by two major limitations – place and time. Effective administrative enforcement presupposes that, for each posting condition, one State has the necessary incentives, capacity and decision-making powers. How can this be achieved? Incentives resist easy reform.[118] Capacities are not malleable either, since sending inspectors abroad, even if facilitated by the European Labour Authority, is bound to remain logistically challenging and rare. Reform should thus focus on reallocating powers rather than incentives or capacities.

If powers are to reflect incentives, then the State of destination should acquire new tasks. If powers are to reflect capacities, then monitoring responsibilities should be allocated on the basis of where the evidence is located. One option would be to determine, for each condition, where most of the evidence is to be found. A subtler, more granular, alternative would be to reallocate, not the competence to monitor a particular condition, but rather the competence to check individual indicators or pieces of evidence. For instance, it is unclear which Member State is generally best placed to monitor the condition that the posting undertaking and the posted worker remain bound by 'a direct link' throughout the period of posting – the CJEU says that the assessment ought to be based on 'all the circumstances of the worker's employment',[119] but these do not neatly fit within one State. Evidence that the service recipient has become the posted worker's employer, thus severing his or her direct link with the posting undertaking, would probably be found in and by the State of destination, while other indicators may be best ascertained by the State of origin.[120] At any

12 months. This rule made the State of destination aware of postings while giving it decision-making powers that it could (but did not have to) use to verify compliance. See also Art. 3(1a) Dir 96/71, as amended by Dir 2018/957.

116. *Case of the SS 'Lotus'* PCIJ Rep Series A No 10, 18–19.

117. E.g. Pöltl and Spiegel (note 32 above: 200).

118. Except that the State of origin would be more inclined to monitor if its certificates were more susceptible to judicial review.

119. *Fitzwilliam* (note 3 above: para 24).

120. For a non-exhaustive and non-binding list of indicators, see European Commission, 'Practical Guide on the Applicable Legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland' [2013] <https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en> accessed 9 April 2020, 9–10.

rate, most of the enforcement activity would still have to occur in the State of origin, as that is where most of the evidence is located. Involving the State of destination in enforcement would bring the certificate in line with a decisional model in EU administrative law – 'the national administrative act with transnational effects subordinated to control'.[121]

The State of destination could essentially be given three roles. Most modestly, it could be tasked with monitoring, on its own motion,[122] those conditions or indicators that are best verified on its territory, without any role in the issuing or withdrawing of the certificate. The contribution of this solution to effective enforcement is limited, first, by the risk that the State of origin ignores evidence of non-compliance and maintains the certificate; and, second, by the fact that the prospect of mobilising resources free of charge[123] and in vain would surely dampen the State of destination's enthusiasm for monitoring.

A more effective alternative would be to allow each State to independently pull the brake: the State of origin would remain exclusively competent to issue the certificate, but it would be withdrawn where the State of destination produces compelling evidence of non-compliance.

The most far-reaching option would be to give the State of destination a role not only in the withdrawal but also in the issuing of the certificate, thus turning it into a joint decision – 'a national authorisation which is the result of a composite procedure in which all the State administrations involved . . . participate with a co-decisional role.'[124] This would be overly cumbersome for certificates requested prior to the start of the posting, as the only condition that the State of destination needs to check is the ban on replacement, which is intrinsically very difficult to monitor.[125] For certificates requested after the start of the posting, a co-decisional role would be more meaningful, as the State of destination would oversee all the posting conditions or indicators that are best verified on its territory.

Whatever the details, a new division of enforcement tasks along these lines would do justice to the stake both States have in the correct enforcement of EU social security law and their own social security law, as well as their complementary capacities. It should also better enforcement because the risk that the new duties of the State of destination remain dead letter is lessened by its incentive to monitor, especially in low-to-high movements. Shared administrative enforcement would not be unprecedented: both the State of origin and the State of destination are tasked with the enforcement of the labour rights of posted workers.[126]

In conclusion, if powers, capacities and incentives are to be aligned, then the capacities of the State of origin could be improved, e.g. through the European Labour Authority, or its incentives could be heightened, e.g. by easing access to judicial review. Most amenable to adjustment, however, are decision-making powers: while the State of origin should keep powers regarding those conditions or indicators that it is best placed to monitor, other powers belong to the State of destination, which has complementary capacity and strong incentives to monitor.

121. De Lucia (note 20 above: 106–107).
122. Regarding verification upon request, see Art. 5(3) Reg 987/2009.
123. Art. 76(2) Reg 883/2004.
124. De Lucia (note 20 above: 96).
125. See, e.g. Jorens (2009: 75–77).
126. Art. 5 Dir 96/71, as amended by Dir 2018/957.

7. Conclusion

The enforcement deficit and the compliance deficit are intertwined: lax enforcement by regulators enables non-compliance by regulatees to go undetected. These deficits bear a complicated relationship to the certificate. As it stands, the certificate cuts both ways: it fosters enforcement by flagging up a situation to the State of origin and hinders it by disincentivising and incapacitating the State of destination.

The EU legislature is going to great lengths to address the enforcement deficit. It constructed an administrative network to foster enforcement, which the European Labour Authority and (if adopted) the Draft Regulation will consolidate further. Yet, the problem definition that implicitly underpins the reforms is sloppy, as it does not engage with the reasons why States fail to comply with EU law. Administrative enforcement depends on each posting condition being monitored by a Member State which has the incentive and the capacity to do so. After all, the rationalist school teaches that States disobey when they feel it is in their interest to do so, while the managerial school considers non-compliance to be the consequence of a lack of capacity. In Tallberg's words:

> 'In the EU, the primary sources of rule violations are incentives for defection associated with national adjustment to EU rules, and legislative and administrative capacity limitations in the member states.'[127]

The State of origin, which has almost exclusive decision-making powers and strong duties to monitor, lacks a strong incentive to do so; the State of destination, which has limited powers and duties, has strong incentives to monitor. The capacities of both States are limited, yet complementary: legally and practically, their enforcement jurisdiction is largely confined to their territory, while evidence could be found abroad. The concentration of decision-making powers in the State lacking sufficient incentives and capacities is a mismatch that (partly) explains poor enforcement. The way forward is to align decision-making powers, incentives and capacities.

There is some room for expanding capacities, but it is too early to speculate as to whether, for instance, the European Labour Authority will live up to expectations. That agency could gently modify the incentive structure, as could greater exposure of certificates to judicial review. Decision-making powers lend themselves to reform. While the argument from incentives tells us that the State of destination should acquire some new decision-making powers, the argument from capacities tells us which. That State should be given the power to terminate certificates where it demonstrates a breach of a condition or indicator it is best placed to monitor. Enlisting the State of destination should help to overcome the spatial challenge stemming from territorially bounded fact-finding capacities and territorially unbounded evidence. The certificate's accuracy also suffers from the temporal challenge, as the need for ongoing monitoring is curiously overlooked. This, again, is a task to be shared by both Member States.

The difficulties that inhere in cross-border administrative enforcement are compounded by the temporary nature of posting. These unavoidable constraints on the enforcement of the posting rule should lead to realistic expectations, but not fatalistic resignation.

127. Tallberg (note 58 above: 610).

Acknowledgements

The author is very grateful to Frederic De Wispelaere for discussions, comments and sources. The usual disclaimer applies.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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