

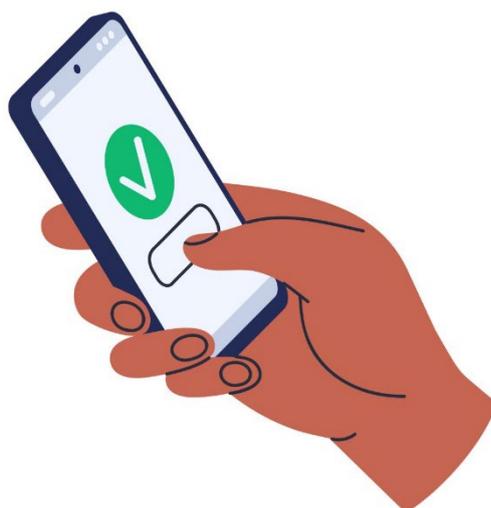
STUDY

Requested by the EMPL Committee



The European Social Security Pass (ESSPASS)

A Digital Enforcement
Tool for Labour Rights?



Policy Department for Economic, Scientific and Quality of Life Policies
Directorate-General for Internal Policies

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Abstract

This study considers the potential of the European Social Security Pass (ESSPASS) as a tool for the enforcement of labour and social security rights. It explains the challenges in social security coordination and considers whether the current conceptualisation of ESSPASS can alleviate these problems. To increase ESSPASS' effectiveness, this study recommends expanding the current scope to include documents pertaining not only social security and health care but also to labour law, notably the national declarations of posting.

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LIST OF ABBREVIATIONS

BR	Basic Regulation (883/2004)
CJEU	Court of Justice of the EU
EBSI	European Blockchain Services Infrastructure
EESI	Electronic Exchange of Social Security Information
EHIC	European Health Insurance Card
ELA	European Labour Authority
EP	European Parliament
ESSN	European Social Security Number
ESSPASS	European Social Security Pass
EU	European Union
IR	Implementing Regulation (987/200)
MS	Member State
MSs	Member States
OSH	Occupational Safety and Health
PDA1	Portable document A1
RSB	Regulatory Scrutiny Board
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Background

In March 2021, following years of discussion on solutions to better enforce EU social security coordination including an abandoned idea of a European Social Security Number (ESSN), the Commission announced that it would explore the possibility of launching a European social security pass (ESSPASS), planned for 2023.

The ESSPASS initiative features a digital wallet for smartphone use, in which social security credentials (i.e. the Portable Document "A1" (PDA1) for posted workers and European Health Insurance Card (EHIC) for cross-border health care) are stored by mobile citizens and workers, in a verifiable format that can be checked in real-time by relevant institutions. It, for now, does not concern pension or labour law entitlements for citizens and mobile workers, although these may be included in a future extension.

ESSPASS builds on the digitalisation of the relevant documents as required by the Single Digital Gateway Regulation, makes use of the Digital Wallet and e-ID proposed by the Commission, and would rely on the existing ESSI (Electronic Exchange of Social Security Information) system for exchange between social security institutions.

The current legal framework of social security coordination (Basic Regulation (BR) 883/2004 and Implementing Regulation (IR) 987/2009), is as regards mobile workers best understood by reference to its key principles: (i) a single applicable legislation, (ii) equal treatment, and (iii) the *lex loci laboris* (the state-of-employment principle). This protects mobile workers, but also prevents unfair competition; two aims that together serve the same overarching purpose of promoting social progress and the fundamental right to social security.

As a limited exception to the *lex loci laboris*, where a worker is temporarily posted (not more than 24 months) they remain affiliated to the social security system of their home State. This short posting exception presents an administrative simplification, in the interest of the worker (as well as the employer according to the Court of Justice of the EU (CJEU)). For the application of this exception, the PDA1 plays an important role. A PDA1 is required, but not in advance.

The 'posting provision' has always been politically sensitive, due to the potential for social dumping it entails. This controversy has intensified following the EU enlargements, as well as the *Laval* case law. As regards labour law, the Enforcement Directive now allows Member States (MSs) to require a declaration in advance of the posting.

The Commission has proposed a revision of the social security Regulations. One of the main negotiation points is the issue of prior notification for posted workers for social security purposes. The ESSPASS project is of high relevance here. The digitalisation of the PDA1 as anticipated within ESSPASS will reduce the administrative burden for employers, workers and social security institutions, and may make a potential requirement of a prior notification more acceptable. Furthermore, digitalisation offers opportunities for more efficient cooperation between social security institutions and may reduce fraud.

Aim

This in-depth study considers the potential of ESSPASS as a digital enforcement tool for labour and social security rights.

Key Findings

ESSPASS' added value lies mainly in the area of posted work, where it can be a game-changer. It can enhance posted workers' agency, increasing awareness and involvement of the posted worker in the applicable rights and obligations and thereby reducing fraudulent and exploitative practices. Similarly, such practices can be reduced by the secured, transparent, digitalised procedures and documentation at the heart of ESSPASS.

Such would serve not only to protect the posted worker, but all workers on the European labour market(s) more generally, by curbing competition on total labour costs through the posting of workers. Even if ESSPASS does not change the fact that there can be competition on total labour cost due to the posting exception, it can help combat the abuse of this exception. ESSPASS can furthermore help (sometimes under-resourced) labour inspectors and social security institutions in their work and reduce administrative burdens for employers. ESSPASS can thus muster broad support across the political spectrum of stakeholders and Member States.

In view of this potential, it is recommended to include also the documentation concerning (the enforcement of) posted workers labour law entitlements in ESSPASS, especially the posting declarations that MS can require in the context of the Enforcement Directive. The recently announced steps to digitalise and standardise the posting declarations by the Commission in its 2024 Work Programme, will facilitate this extension. It would be important to include the posting declarations in the conceptualisation of ESSPASS already now, in this pilot phase, to avoid unnecessary complications.

It is more complicated to include national labour cards and/or social IDs in ESSPASS. Their scope is divergent, broad (many different types of information), yet narrow (only applicable to the construction sector). Moreover, Member States may be reluctant to engage in a standardisation of these national practices. Still, it could be argued that as the construction sector is so deeply concerned by posting, and as there is an overlap between the information to be contained in ESSPASS, it would be a missed opportunity not to include it. It is recommended that this issue be further explored.

ESSPASS is still in the pilot-phase, which will be concluded in 2025, only after which the Commission will decide to put forward a (legislative) initiative to formally introduce ESSPASS. It is therefore now being explored whether the social security regulations may be amended to feature an electronic prior notification in the light of the current state of digitalisation, without explicitly integrating ESSPASS. Should this materialise, then the framework within which ESSPASS is being conceived, tested and ultimately launched will be different from initially planned.

It would still be recommended to go ahead with ESSPASS even if the digitalised PDA1s are already up and running. The mobile citizen or worker will have, in the Wallet (the possibility of) a 'one-stop-shop' for their necessary social security documents, including the EHIC, and possibly, in the future also other documentation such as pertaining to labour law entitlements for posted workers (the declaration of posting, and possibly the national social IDs and labour cards) and, in the longer term, relating other issues (e.g. tax). As such, any steps undertaken to move ahead of ESSPASS, should not come in the place of ESSPASS but instead should lead to a swifter rollout of its extension beyond its current envisaged scope.

The current conception of ESSPASS is dependent on the e-ID. This firstly raises the question of whether legally resident third country nationals, who may be posted to another Member State and to whom a PDA1 applies, will have access to the Digital Wallets. Should the e-ID Regulation leave this to be decided by the Member States, then it will be important to ensure such access in the ESSPASS legislative initiative explicitly. Secondly, the e-ID's proposed 'unique and persistent identifier' has been flagged as problematic from a data protection perspective. It remains to be seen how this will be addressed in the

context of the e-ID itself, and ESSPASS. In view of the principle of data minimisation, it is good that the current conception of ESSPASS does not feature a central repository of all the documents, but instead serves as an intermediary between the posted worker or their employer and the competent social security institutions, or between the patient and the health care provider. It is recommended that the institution (which may be the social partners in case they have a role under national law in labour or social security inspections) requesting the relevant form will not have access to any other forms stored in the person's ESSPASS application or Digital Wallet more generally. Finally, for the digitally vulnerable or those who do not possess a smartphone by choice, it is recommended that the relevant documents should be printable on paper with a verifiable QR-code.

1. CONTEXT AND STATE OF PLAY OF ESSPASS

KEY FINDINGS

In March 2021, following years of discussion on solutions to better enforce EU social security coordination including an abandoned idea of a European Social Security Number, the Commission announced that it would explore the possibility of launching a European social security pass (ESSPASS), planned for 2023.

The ESSPASS initiative features the creation of:

- a digital wallet for smartphone use;
- in which social security credentials (i.e. the PDA1 for posted workers and EHIC for cross-border health care) are stored by mobile workers and citizens;
- in a verifiable format that can be checked in real-time by relevant institutions.

It builds on the digitalisation of the relevant documents as required by the Single Digital Gateway Regulation, makes use of the Digital Wallet and e-ID proposed by the Commission, and would rely on the existing ESSI system for exchange between social security institutions.

ESSPASS, for now, does not concern pension or labour law entitlements for mobile persons, although these may be included in a future extension.

ESSPASS could make cross-border social security administration more user-friendly and person-centric, aid in the enforcement of social entitlements and help reduce fraud. As such, it may prove relevant for the pending revision of the EU social security regulations, helping to reach a solution on the issue of a prior notification of posted workers. However, the Commission will wait for the results of currently on-going pilot projects, that will run until 2025, before it will consider a (legislative) initiative to launch ESSPASS across the EU.

1.1. What is the ESSPASS initiative?

In March 2021, the European Commission announced in the European Pillar of Social Rights action plan¹ that it would start a pilot that same year to explore **the launch of a European social security pass (ESSPASS)**, planned for 2023, which would build on the initiative for a European e-ID. ESSPASS would help improve the portability of social security rights across borders through the digital verification of citizens' social security coverage and entitlements by competent actors and institutions. As the Commission notes, 'innovative solutions, notably digital ones, can facilitate the physical and virtual mobility of citizens, support the portability of social security rights and the cross-border verification of social security coverage by administrations, and address challenges in the identification of people for social security coordination purposes'². In this regard, it echoes the call on the MSs to increasingly adopt digital solutions to improve the exchange, access and processing of information across borders, to help people and businesses exercise their social security rights and duties when moving and working in the EU, while reducing the administrative burden on public administrations,

¹ 'The Commission will (...) start a pilot in 2021 to explore by 2023 launching a digital solution to facilitate the interaction between mobile citizens and national authorities, and improve the portability of social security rights across borders (European Social Security Pass), building on the initiative for a trusted and secure European e-ID (Q2 2021)'. European Commission, 2021, *The European Pillar of Social Rights Action Plan*, Luxembourg: Publications Office of the European Union, p. 30.

² Ibid.

businesses and citizens³.

In the first phase of the pilot project, which started in 2021, the Commission collaborated with the Italian INPS⁴ and several other interested MSs⁵ to test the cross-border digital verification of the validity and authenticity of the Portable Document A1 (PDA1), which indicates the social security legislation applicable to the holder and is used notably when a person is temporarily posted to work in a Member State other than the one where they are insured. In this pilot phase, ESSPASS has been conceptualised as 'a blueprint for the end-to-end digitalisation of the social security coordination procedures'⁶, 'leveraging existing EU and national digital initiatives to facilitate the interactions between mobile citizens, workers, businesses and public or private social security institutions'⁷. It focuses on; (i) digitalising the processes for the request and issuance of portable documents; (ii) improving the identification of mobile citizens and workers when performing activities or accessing public services abroad; and (iii) introducing real-time mechanisms for the cross-border verification of the social security entitlements of mobile citizens and workers⁸. Within this conception, according to the Commission, the key features of ESSPASS are⁹:

1. **A 'digital wallet'** used by mobile individuals to store social security credentials issued by trusted authorities and verifiable online across borders;
2. **Mobile individuals are in control of their own personal data;**
3. More efficient cross-border verification and **reduction of fraud.**

In the second phase of the pilot project, the scope was broadened from the PDA1 form to the European Health Insurance Card (EHIC), and its execution was brought under the two separate but inter-related umbrellas of the EU Digital Identity Wallet¹⁰ and the European Blockchain Services Infrastructure (EBSI) initiative¹¹. In this context, the Commission launched a call for tender under the Digital Europe Programme (in the framework of EBSI and the European Digital Identity framework)¹².

Currently, the Digital Credential for Europe (DC4EU) Consortium¹³ is piloting the use of the EU Digital Identity Wallet in the Social Security domain (PDA1 and EHIC). The Commission indicates that 'this Large Scale Pilot is unique its use of the European Blockchain Services Infrastructure in the context of the EU Digital Identity Wallet'¹⁴ and gives as an example of a use case for accessing social security benefits:

³ The EU 'Single Digital Gateway' Regulation, which requires that by the end of 2023, EU citizens be able to access and complete 21 key administrative procedures online and obtain the result electronically. Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012, OJ L 295, 21.11.2018, p. 1–38. See Annex 1.

⁴ *Istituto Nazionale della Previdenza Sociale*, the largest public social security institution in Italy.

⁵ Austria, Croatia, Hungary, Germany, Greece, Malta, Poland, Sweden, the Netherlands, and Slovakia, see German Social Insurance European Representation, 2021, Digitising social security: Necessary evil or overdue blessing?, p. 9, available at: https://dsv-europa.de/lib/03_Themenletter/ED_0321/Themenletter_ed_0321_EN_ba.pdf.

⁶ European Commission, 2022, *European Social Security Pass - Overview and Main Concepts*, Luxembourg: Publications Office of the European Union, p. 9.

⁷ Ibid.

⁸ Ibid.

⁹ European Commission website: <https://ec.europa.eu/social/main.jsp?catId=1545&langId=en>.

¹⁰ See European Commission website: <https://digital-strategy.ec.europa.eu/en/policies/eudi-wallet-implementation>.

¹¹ See European Commission website: <https://ec.europa.eu/digital-building-blocks/wikis/display/EBSI/QAs?option=659622446>.

¹² See European Commission website: https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/digital/wp-call/2022/call-fiche_digital-2022-deploy-02_en.pdf.

¹³ See Consortium website: <https://www.dc4eu.eu/>.

¹⁴ See European Commission website: <https://digital-strategy.ec.europa.eu/en/policies/eudi-wallet-implementation>.

Jeroen has been employed in another Member State. He uses the EU Digital Identity Wallet to access to his social security information and benefits, such as retirement and disability benefits. When his current employer again posts him across the border Jeroen uses the wallet to store documents such as the European Health Insurance Card¹⁵.

According to DC4EU, the pilot project's main objective is to test interoperability and scalability in the national domain and multiple cross-border contexts, to provide feedback to the Commission and Member States for iterative updates through specific coordination work packages, project management processes and tasks, 'allow[ing] for comprehensive wallet testing (...), and their national and cross-border functionalities in a pre-production environment and correspondent use cases'¹⁶.

Completion of this pilot project is expected in April 2025¹⁷.

At the same time, working on the technicalities of verification, the Vector Consortium is conducting the pilot project EBSI-VECTOR (EBSI enabled Verifiable credentials and Trusted Organisations Registries) with 52 partners from 20 countries¹⁸. This project is complementary to the one run by DC4EU, and aims to 'simplify some of the complex verification processes for organisations in a decentralised way' by consolidating the 'current EBSI capabilities on verifiable credentials and trusted registries and extending it with new capabilities' (including a revocation functionality)¹⁹. EBSI-VECTOR aims to reduce the gap between a pre-production implementation and a real-life production adoption²⁰. The project started on 1 June 2023, with a term of two years, with **final results expected in May 2025**²¹.

On 6 September 2023, the Commission published a **Communication on digitalisation in social security coordination**²². It announced that it will keep supporting the two consortia working on the technicalities of ESSPASS in their activities and help ensure that these activities are consistent with other EU digital initiatives, while calling on all Member States to join these two consortia²³. The Commission announced that it will follow up the pilot activities by the consortia, which are ongoing until 2025, by a decision on the next steps, which may consist in 'the opportunity to deploy an ESSPASS solution in all EU countries', and may require a 'legislative framework'²⁴. This means that while the likelihood for a formal launch of ESSPASS is increasing, **any (legislative) initiative should not be expected in the current or the next calendar year.**

1.2. What is the background of the ESSPASS initiative?

The ESSPASS initiative was launched after **several years of European-level discussions on actions, including digital solutions, to better monitor and enforce social security coordination across the EU internal market.** Especially the European Parliament (EP) has been vocal in its support for such an initiative. Almost a decade ago, in a resolution of 14 January 2014 on effective labour inspections, the EP first called on the Commission to investigate the benefits of introducing a forgery-proof European social security card or other EU-wide electronic document, on which could be stored all the data

¹⁵ Ibid.

¹⁶ See Consortium website: <https://www.dc4eu.eu/project/>.

¹⁷ See Consortium website: <https://www.dc4eu.eu/outputs/>.

¹⁸ From Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and The Netherlands.

¹⁹ See Consortium website: <https://wiki.sunet.se/display/Projekt/VECTOR>.

²⁰ See Consortium website: <https://www.izertis.com/en/-/ebsi-vector-ebsi-enabled-verifiable-credentials-trusted-organisations-registries>.

²¹ See Consortium website: <https://www.ebsi-vector.eu/>.

²² European Commission, 2013, *Communication on digitalisation in social security coordination: facilitating free movement in the Single Market*, COM(2023) 501 final.

²³ Ibid, p 10.

²⁴ Ibid.

needed to verify the bearer's employment relationship (such as details on social security status and working hours), subject to strict data protection rules²⁵. In its resolution of 19 January 2017 on a European Pillar of Social Rights, the EP pointed to the potential of accessible e-government solutions, including a European social security card (with strong data protection guarantees), which could improve EU social security coordination and individual awareness²⁶.

In 2017, the Commission announced (in its work programme for 2018) a **European Social Security Number (ESSN)** initiative to digitise the cross-border verification of social security coverage and entitlements, to address challenges in mobile citizens' identification for social security purposes, with the aim of safeguarding fair working conditions for mobile workers²⁷. In its inception impact assessment, the Commission envisaged, in a longer-term perspective, the possibility of extending the use of the ESSN to other policy areas beyond social security coordination²⁸. The Commission consulted stakeholders and citizens on the introduction of an ESSN between 27 November 2017 and 7 January 2018. Subsequently, in the beginning of 2018, a draft impact assessment report was submitted to the Regulatory Scrutiny Board (RSB). However, the RSB issued a negative opinion and asked to better address the costs and benefits of the different policy options as well as the data protection requirements, highlighting that the need to introduce an ESSN was not sufficiently justified and alternative technical solutions should be analysed²⁹.

The Commission continued to examine further the various policy and technical options, including the synergies and reusability of other digital initiatives³⁰, in the context of continued support and calls from various actors, including the EP³¹, to pursue the ESSN initiative³². The Commission's assessment however showed that the introduction of such a domain-specific European unique identifier was not a relevant or cost-effective solution to achieve the overall objective since 'creating an ESSN for every citizen would have implied not only high investments, but also complex technical requirements as well as data privacy and considerable proportionality and subsidiarity issues' and that 'to address the aspects related to cross-border identification and authentication of citizens, other initiatives could be built upon, namely the proposed EU Digital Identity (e-ID) framework³³ and the harmonised EU e-ID

²⁵ European Parliament, 2014, *Resolution of 14 January 2014 on effective labour inspections as a strategy to improve working conditions in Europe*, (2013/2112(INI)).

²⁶ EP, 2014, *Resolution of 19 January 2017 on a European Pillar of Social Rights*, (2016/2095(INI)).

²⁷ European Commission, 2017, *Communication on An agenda for a more united, stronger and more democratic Europe (Work Programme 2018)*, https://commission.europa.eu/system/files/2017-10/cwp_2018_en.pdf, p. 5.

²⁸ As noted by the EP in its Resolution of 25 November 2021 on the introduction of a European social security pass for improving the digital enforcement of social security rights and fair mobility (2021/2620(RSP)), point K.

²⁹ See exchanges between Nicolas Schmit, Member of the Commission and MEPs, 2021, Introduction of a European social security pass for improving the digital enforcement of social security rights and fair mobility (debate), [PV 22/11/2021 – 16](https://www.europarl.europa.eu/press-room/en/answer-debate-14642).

³⁰ Ibid.

³¹ In a resolution of 22 October 2020, the EP called on the Commission to put forward a proposal for a digital EU social security number (ESSN), a call that was renewed in a resolution of 17 December 2020, in which the Parliament furthermore called for a potential control mechanism such as a personal labour card, and asserted that workers and their representatives and inspectorates must have up-to-date access to information about their employers and their wage entitlements and labour and social rights. See EP, 2020, *Resolution on the employment and social policies of the euro area 2020* (2020/2079(INI)) and EP, 2020, *Resolution on a strong social Europe for Just Transitions* (2020/2084(INI)).

³² The European Trade Union Confederation considers the ESSN a valuable instrument to fight fraud and social security abuses. See ETUC, 2021, *Resolution on Fair Labour Mobility and Migration*, <https://www.etuc.org/en/document/etuc-resolution-fair-labour-mobility-and-migration>. On 12 January 2018, BusinessEurope published a note stressing the potential of the ESSN to improve the coordination of social security in the EU, while also addressing concerns related to the diversity of national social security systems, possible data protection issues (especially concerning a centralised data base of information) and additional administrative burdens. See BusinessEurope, *European Labour Authority and EU Social Security Number: BusinessEurope views*, https://www.buseurope.eu/sites/buseurope/files/media/position_papers/social/2018-01-12_be_views_onlmaandssn_final.pdf. The social partners in the construction sector have called for effective digital tools to ensure the enforcement of the applicable legislation, including a European approach to personal labour cards, see EFBWW & FIEC statement, 2021, *EU construction social partners call for digital enforcement*, <https://www.efbww.eu/news/eu-construction-social-partners-call-for-digital-enforcement/2657-a>.

³³ European Commission, 2021, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity* (COM(2021) 281 final).

wallets to be issued by the Member States³⁴. **The Commission therefore discontinued exploring the introduction of a 'number' and instead launched the ESSPASS initiative.**

The EP issued a resolution expressing its regret that the Commission had not proceeded with the ESN but welcoming the ESSPASS initiative, and called on the Commission 'to step up its ambition as regards both content and timing, launching a proper assessment in parallel with the pilot' with a view to initiating a legislative proposal 'before the end of 2022, in order to ensure the portability and traceability of workers' rights as soon as possible'³⁵. **In the resolution, the EP indicated its views on what ESSPASS should entail**, notably:

1. that it should be **mandatory** for all Member States;
2. that it must cover **all mobile EU citizens** and workers including the self-employed, as well as all **mobile third country nationals** who are covered by EU rules on intra-EU mobility;
3. that it should comprise the **PDA1 and EHIC**, with a view to being **extended** to other areas of social security coordination and EU labour law;
4. that it should enable **real-time verification** by the relevant national authorities such as labour and social security inspectorates **and social partners** (where they are carrying out or involved in labour and social security inspections) of (i) the mobile workers' **insurance status and contributions**, (ii) workers' **place of work, place of employment, employment relationship and identity**, and (iii) possibly 'other relevant information without prejudice to data protection rules and while ensuring equal treatment'; and
5. that it **must not constitute a requirement to be able to exercise one's freedom of movement**, but must aim to facilitate access to information and improve enforcement of applicable rules on social security coordination and labour mobility in cross-border situations.

1.3. How is ESSPASS linked to other EU initiatives on digitalisation?

ESSPASS is situated in a rapidly developing legal and policy context on digitalisation, as explained below. The Single Digital Gateway Regulation which requires a number of administrative procedures to be digitally available to citizens, serves as a first building block for ESSPASS as it requires MS to ensure that by the end of 2023 the PDA1 and EHIC – the main subjects of ESSPASS - can be obtained electronically (sub-section 1.3.1.). As the Single Digital Gateway Regulation provides a range of other procedures³⁶ – and their outcomes - to be accessible online as well (such as pension decisions and so-called 'declarations of posting'³⁷), it also serves as a building block for a possible future extension of ESSPASS beyond the PDA1 and EHIC. Secondly, in its current conception, ESSPASS' functioning will be anchored in the e-ID wallet (sub-section 1.3.2.). On the other hand, as an application primarily used between individual mobile workers and national social security institutions, ESSPASS serves a complementary function to EESSI, which exclusively concerns exchanges between national social security institutions (sub-section 1.3.3.). The exchanges between social security institutions are furthermore subject to the proposed Interoperable Europe Act, which aims to improve the efficiency of (cross-border) public services through enhanced interoperability (sub-section 1.3.4.). The cross-

³⁴ See exchanges between Nicolas Schmit, Member of the Commission and MEPS, 2021, Introduction of a European social security pass for improving the digital enforcement of social security rights and fair mobility (debate), [PV 22/11/2021-16](#).

³⁵ EP, 2021, *Resolution of 25 November 2021 on the introduction of a European social security pass for improving the digital enforcement of social security rights and fair mobility* ([2021/2620\(RSP\)](#)).

³⁶ See Annex 1.

³⁷ See in more detail Sections 1.4 and 2.1.2. below.

sectoral broadening of exchanges between social security institutions as would happen under this approach, would offer a potential for the broadening of the scope of ESSPASS in the future.

1.3.1. The Single Digital Gateway

Regulation (EU) 2018/1724 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services (the Single Digital Gateway Regulation)³⁸ requires a full digitalisation of the user interface of certain key procedures for cross-border users (see Annex 1 to this report for the full list), which include those concerning social security rights and obligations in the Union.

In accordance with its Article 6:

'1. Each Member State shall ensure that users can access and complete any of the procedures listed in Annex II fully online, provided that the relevant procedure has been established in the Member State concerned.'

This entails, according to Article 6(2), that the identification of users, the provision of information and supporting evidence, signature and final submission can all be carried out electronically at a distance, and that users are electronically provided with automatic acknowledgement of receipt and notification of completion of the procedure, as well as with the output of the procedure, unless it is necessary (to comply with applicable Union or national law) to deliver this output by physical means.

The procedures listed in Annex II (reproduced in the Annex 1 to this report) include, inter alia, the 'application for a European Health Insurance Card (EHIC)', the 'request for determination of applicable legislation in accordance with Title II of Regulation (EC) No 883/2004' – which results in the PDA1, as well as 'requesting information on the data related to pension from compulsory schemes' leading to a statement of personal pension data and to 'notification of business activity' which includes 'declaration of posting of workers'³⁹.

Furthermore, in accordance with Article 2:

'1. A single digital gateway ('the gateway') shall be established by the Commission and the MS in accordance with this Regulation. The gateway shall consist of a common user interface managed by the Commission ('the common user interface'), which shall be integrated into the Your Europe⁴⁰ portal and shall give access to relevant Union and national webpages.

2. The gateway shall give access to:

(a) information on rights, obligations and rules laid down in Union and national law that are applicable to users exercising or intending to exercise their rights derived from Union law in the field of the internal market in the areas listed in Annex I (...)

Annex I mentions, under the heading 'B. Work and retirement within the Union', as point 9 'social security rights and obligations in the Union including those related to getting pensions'. Point 6 under the same heading furthermore mentions 'terms and conditions of employment, including for posted workers, as stipulated by law or statutory instrument (including information on working hours, paid leave, holiday entitlements, rights and obligations regarding overtime work, health checks, termination

³⁸ OJ L 295, 21.11.2018, p. 1–38.

³⁹ European Commission, *Single Digital Gateway – Scope of Annex II procedures*, Explanatory Paper V.4, available at: https://ec.europa.eu/assets/grow/growth/toolbox/sdg-docs/V04_Explanatory%20document%20on%20scope%20of%20Annex%20II_July%202023.pdf.

⁴⁰ See https://europa.eu/youreurope/index_en.htm.

of contracts, dismissal and redundancies)⁴¹.

In essence, **by requiring that by the end of 2023, in the field of social security coordination, citizens are able to request and obtain electronically (i) the PDA1 and (ii) the EHIC, the Single Digital Gateway Regulation provides a building block for the successful roll-out of the ESSPASS**, as these are the electronic documents to be uploaded in the digital wallets and used to prove social security entitlements in another Member State. As the Commission notes in its 2023 Communication on digitalisation in social security coordination, the 'Once Only Technical system is being developed to allow national authorities to automatically exchange documents and information needed for these 21 procedures', as required by the Single Digital Gateway Regulation⁴¹. The aim is to reuse information already held in electronic format by other administrations in Europe, so that no additional burden falls on citizens and businesses⁴².

Furthermore, **the Single Digital Gateway Regulation requires the summary of pension decisions (PDP1) to be made available electronically, and as such this could be a future extension of the ESSPASS initiative. Similarly, it requires the declarations of posting, which certain MSs require to ensure the enforcement of the labour law terms and conditions for posted workers** in accordance with the Posted Workers Enforcement Directive⁴³, to be **available electronically, which opens up opportunities to expand ESSPASS beyond social security into the enforcement of general labour rights for posted workers**⁴⁴. This will be explained in more detail in Chapter 2 of this report.

1.3.2. EU e-ID

Currently⁴⁵, Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market ('the e-IDAS Regulation') ensures that people and businesses can use their own national electronic identification schemes (e-IDs) to access public services available online in other EU countries and that they have the same legal status as their traditional paper-based equivalents. In June 2021, in the context of the review of the existing e-IDAS Regulation, the European Commission issued a proposal for a new European Digital Identity Regulation⁴⁶. According to the explanatory memorandum, the evaluation of the e-IDAS Regulation revealed that it falls short of addressing new market demands, mostly due to its inherent limitations to the public sector, the limited possibilities and the complexity for online private providers to connect to the system, its insufficient availability of notified e-ID solutions in all MSs⁴⁷ and its lack of flexibility to support a variety of use cases⁴⁸. The co-legislators reached a provisional agreement on the new European Digital Identity

⁴¹ European Commission, 2013, *Communication on digitalisation in social security coordination: facilitating free movement in the Single Market*, COM(2023) 501 final, p. 5.

⁴² Ibid.

⁴³ See Sections 1.4 and 2.1.2., as well as Annex 2.

⁴⁴ See Section 2.1.2, and Chapter 3.

⁴⁵ Previously the e-Signature Directive: Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, no longer in force.

⁴⁶ European Commission, *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity*, COM/2021/281 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0281>.

⁴⁷ Ibid. The Explanatory Memorandum notes that 'since the entering into force of the e-ID part of the Regulation in September 2018, only 14 MS have notified at least one e-ID scheme. As a result, only 59% of EU residents have access to trusted and secure e-ID schemes across borders. Only 7 schemes are entirely mobile, responding to current user expectations. As not all technical nodes to ensure the connection to the e-IDAS interoperability framework are fully operational, cross-border access is limited; very few online public services accessible domestically can be reached cross-border via the e-IDAS network'.

⁴⁸ Ibid.

Regulation in November 2023⁴⁹.

Most importantly for the ESSPASS initiative, **the new Regulation will introduce so called 'European Digital Identity Wallets', 'for the purpose of ensuring that all natural and legal persons in the Union have secure, trusted and seamless access to cross-border public and private services' in which the various components of ESSPASS (PDA1, EHIC, and possibly PDP1 in the future) can be stored.** This means that the objective is that 'all natural and legal persons in the Union', and not only EU citizens, have access to this digital identity. This is of particular importance of third country nationals, who currently do not have even access to such digital identity facilities in the Member States⁵⁰. Responses to a recent ad-hoc query by the European Migration Network suggests that in 2023, of the 25 European countries that answered⁵¹ the query, only five countries (Germany, Italy, Lithuania, Poland and Georgia) have stated that they already issue digital identity documents or residence permits to third-country nationals⁵². Yet the situation is not entirely clear under the proposed text. The proposal currently refers in the preamble to 'citizens' and 'other residents'⁵³, sometimes adding 'as defined by national law'⁵⁴. The Commission has stated that 'the main novelty offered by the new rules is that all EU citizens, residents and businesses will have the right to have an EU Digital Identity Wallet which would be accepted in all Member States'⁵⁵. **If it is left to the Member States to decide which 'residents' can access the Digital Wallet, it would possibly mean that legally resident third country nationals, for whom ESSPASS could be of high salience since they may be posted to another Member State and in need of a PDA1⁵⁶, would not have digital access to it.**

The Wallet is defined as 'a product and service that allows the user to store identity data, credentials and attributes linked to his/her identity, to provide them to relying parties on request and to use them for authentication, online and offline (...) and to create qualified electronic signatures and seals'⁵⁷. The previous voluntary notification of electronic identification schemes has been turned into an obligation for Member States to notify at least one electronic identification scheme including at least one means of identification⁵⁸. Notably, under the current proposal, Member States would also be obliged to include 'a unique and persistent identifier' in the minimum set of personal identification data⁵⁹. As set out in Section 1.1, above, the Commission is currently running a number of large-scale pilot projects with a view to be able to roll out the digital identity wallets in a range of domains, including social security through ESSPASS.

⁴⁹ Council of the EU, Press Release, available at: https://www.consilium.europa.eu/en/press/press-releases/2023/11/08/european-digital-identity-council-and-parliament-reach-a-provisional-agreement-on-eid/?utm_source=dsms-auto&utm_medium=email&utm_campaign=European+digital+identity%3a+Council+and+Parliament+reach+a+provisional+agreement+on+eID.

⁵⁰ See Vassor, E., 2023, *Access to Digital identity for People on the Move in Europe*, International Organization for Migration, Geneva, available at: <https://publications.iom.int/books/access-digital-identity-people-move-europe>.

⁵¹ Responses from Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden plus Georgia, Ukraine.

⁵² European Migration Network, 2023, *Ad Hoc Query on digitalisation of identity documents and residence permits issued to third country nationals*, <https://emnbelgium.be/publication/ad-hoc-query-digitalisation-identity-documents-and-residence-permits-issued-third>.

⁵³ Paragraphs 9, 25, 26.

⁵⁴ Paragraph 4, 7.

⁵⁵ European Commission, 2023, *European Digital Identity – Questions and Answers*, available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_2664.

⁵⁶ Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ 2010L 344, p. 1). See Case C-477/17, *Balandin*, EU:C:2019:60. See further Section 2.1.2. below.

⁵⁷ Article 1(3)(i) of the Proposal, introducing Article 3(42) in the amended e-IDAS Regulation.

⁵⁸ Article 1(9) of the Proposal. See Schroers, J., 2023, *A Unique Identification Number for Every European Citizen - The Proposal for a European Digital Identity Regulation and What it Entails*, Verfassungsblog, available at: <https://verfassungsblog.de/digital-id-eu/>.

⁵⁹ Article 1(12) of the Proposal. See Schroers, J., op cit.

1.3.3. Electronic Exchange of Social Security Information (EESSI)

EESSI is an IT system that helps social security institutions across the EU to exchange information related to different branches like applicable legislation, sickness, occupational diseases and accidents at work, pensions, unemployment and family benefits more rapidly and securely⁶⁰. It became operational in 2017, gradually replacing paper-based processes which were 'time-consuming and prone to errors and a loss of data or documents'⁶¹. All communication between national institutions on social security files should take place through EESSI, which works by using structured electronic documents on the basis of commonly agreed procedures, exchanging them by routing them through EESSI to the correct destination in the right institutions in another Member State, making use of a repository of national institutions. This makes exchange of social security information across borders faster and more efficient, thus enhancing the cross-border protection of the social security rights of citizens. However, only social security institutions have access to the EESSI system, and information is not available in real-time⁶². This is what **the ESSPASS initiative intends to add, by facilitating the interactions between mobile citizens and relevant public authorities for social security purposes (such as labour inspectors or health care providers), 'making real-time verification of social security coverage and entitlements possible, including by those actors that do not have access to the EESSI system'**⁶³.

The Commission in its 2023 Communication on digitalisation in social security coordination notes that 'experience with EESSI has highlighted the complexity of digitalising cross-border processes involving thousands of social security institutions and all branches of social security' and that progress is slow 'despite the commitment, time and investment by Member States'⁶⁴. Although EESSI is now officially operational in all 32 participating countries, national implementation is still incomplete, particularly as regards the reimbursement of healthcare costs between countries. Until EESSI is fully implemented, 'alternative ways of communication need to be used outside the system for the processes in question'⁶⁵ which is disruptive as it obliges the 13 countries that have already implemented EESSI fully to maintain parallel, paper-based processes for transactions with the countries that are lagging behind in implementation. As such, the Commission notes that the 'completion of the full roll-out of EESSI is a priority'⁶⁶, to be achieved by the end of 2024 at the latest, and that it will involve the European Labour Authority (ELA) to achieve this. It is reported that ELA plans to launch a mutual learning and understanding programme for this purpose⁶⁷.

1.3.4. Interoperable Europe

Interoperability 'is what enables public sector actors to connect, cooperate and exchange data'⁶⁸ through the compatibility of work processes, regulatory frameworks and technology. The European Interoperability Framework is the current conceptual model developed by digital public sector

⁶⁰ See European Commission website: <https://ec.europa.eu/social/main.jsp?catId=1544&langId=en>.

⁶¹ Ibid.

⁶² Ibid.

⁶² Ibid.

⁶³ European Commission, 2022, *European Social Security Pass - Overview and Main Concepts*, Luxembourg: Publications Office of the European Union, available at: <https://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&newsId=10435&langId=en>, p. 5.

⁶⁴ European Commission, 2013, *Communication on digitalisation in social security coordination: facilitating free movement in the Single Market*, COM(2013) 501 final, p. 6. Currently, 13 countries are able to exchange electronically in all social security sectors and with all institutions BG, DK, EE, FR, CY, LV, HU, MT, PT, SE and IS, NO and UK. Ibid, p. 7.

⁶⁵ Ibid, p. 7.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid, p. 4.

practitioners from across Europe in 2004 and updated twice since⁶⁹. This existing policy framework of non-binding interoperability cooperation is, according to the Commission, not fit for purpose, due to its voluntary approach.

The current proposal for an 'Interoperable Europe Act'⁷⁰, on which a provisional agreement was reached in November 2023⁷¹, aims at establishing a binding and overarching framework policy approach for interoperability. It sets up a new cooperation framework on interoperability between EU Member States and EU institutions. In this framework, Member States, the Commission, the Committee of the Regions as well as the European Economic and Social Committee agree on joint priorities and work together on common interoperability solutions. Member States will be obliged to share their interoperability solutions for digital services with other public sector bodies, to perform a mandatory assessment on the impacts on cross-border interoperability in case a public sector body wants to introduce or change a digital system that (potentially) uses/exchanges data from/to another Member State, to appoint a national coordinator for public sector interoperability issues, and to monitor and report on its level of interoperability on a regular basis. The Act furthermore proposes to establish the Interoperable Europe Board which will have the mandate to agree on common reusable interoperability solutions/resources, support and innovation measures and updating of the Framework. While specific solutions have not been made binding as such (to ensure openness for technological progress), the Act will provide strong incentives to align with agreed interoperability solutions, e.g., through a mandatory interoperability assessment or a strengthened European Interoperability Framework⁷².

In its 2023 Communication⁷³, the Commission proposes to move towards a more digitally integrated social security coordination system, in which

'a more integrated data exchange between social security systems would be needed, with further interoperability – in line with the proposal for the Interoperable Europe Act –, automation, standardisation of social security data and direct access to the original source of data'⁷⁴.

(...)

Such (an) integrated approach would streamline administrative processes, reducing paperwork and manual tasks, and allowing a more efficient allocation of resources. Interoperability would enable national authorities to integrate data from multiple sources and ensure that accurate and up to date information is shared across systems.

(...)

To support a seamless experience for cross-border labour mobility – both physical and 'virtual' mobility – for people, businesses and national authorities, it is important to act

⁶⁹ See European Commission website:

<https://joinup.ec.europa.eu/collection/nifo-national-interoperability-framework-observatory/european-interoperability-framework>.

⁷⁰ European Commission, 2022, *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down measures for a high level of public sector interoperability across the Union (Interoperable Europe Act)*, COM(2022) 720 final.

⁷¹ Council of the EU, 2023, press release: https://www.consilium.europa.eu/en/press/press-releases/2023/11/13/interoperable-europe-act-council-and-parliament-strike-a-deal-for-more-efficient-digital-public-services-across-the-eu/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Interoperable+Europe+act%3a+Council+and+Parliament+strike+a+deal+for+more+efficient+digital+public+services+across+the+EU.

⁷² See European Commission website: https://ec.europa.eu/commission/presscorner/detail/en/OANDA_22_6908.

⁷³ European Commission, 2013, *Communication on digitalisation in social security coordination: facilitating free movement in the Single Market*, COM(2023) 501 final.

⁷⁴ Ibid, p. 14.

beyond the social security domain and foster cross-sectoral interoperability⁷⁵. This would require examining the various processes governing not only social security coordination but also posting of workers, cross-border healthcare and the interaction between social security coordination and labour law, taxation⁷⁶ and company law⁷⁷.

It is here that **the relevance for ESSPASS lies, as this cross-sectoral interoperability approach would potentially allow the initiative to be expanded beyond the current scope of social security.** The Commission recognises the necessity to carefully assess the needs, added value and expected impact of introducing additional interoperability, technical requirements and common standards for exchanging data, including from a data protection perspective and the risks of using algorithms or artificial intelligence, such as bias and discrimination. It will launch a study in 2024 on further developments in the longer term in digitalisation of social security coordination, and will examine the opportunity for further simplification and streamlining in the procedures governing free movement of people and workers in the EU.

1.4. How is ESSPASS linked to other initiatives on social security coordination and enforcement?

1.4.1. The Revision of EU Social Security Legislation

The current EU legal framework of social security coordination, as will be discussed in more detail in Chapter 2, consists in Regulation 883/2004 on the coordination of social security systems (which is generally called the Basic Regulation (BR))⁷⁷ and Regulation 987/2009, which lays down the procedure for implementing the Basic Regulation (the Implementing Regulation (IR))⁷⁸. **In 2016, the Commission proposed a revision of these social security regulations**⁷⁹, so as to clarify the circumstances under which Member States can limit access to social benefits claimed by economically inactive EU citizens, establish a legally sound regime for the coordination of long-term care benefits, propose a new coordination mechanism for unemployment benefits in cross-border cases, establish new provisions for the coordination of family benefits and clarify the conflict rules on applicable legislation and the link with Directive 96/71/EC on the posting of workers in the framework of the provision of services⁸⁰.

Indeed, **one of the most important issues in the still on-going political discussions on the revision of the regulations relates to the social security status of 'posted workers'**, persons employed in one Member State sent temporarily to another to provide work there in the context of their employer's services⁸¹. As further explained below, the current regulations provide for an exception to the normal rule of social security coordination whereby the worker is covered – and contributions are paid – in the Member State where the work is performed (*lex loci laboris*). By way of exception under the current rules, in light of the temporary nature of posting, posted workers remain affiliated and covered by the

⁷⁵ The Commission notes in this context that 80% of respondents to the questionnaire for the conference on digitalisation of social security coordination and labour cards believed that the EU and MS should invest more in (i) cross-border interoperability covering related policy domains and (ii) automation.

⁷⁶ The Commission is working on ways to facilitate the implementation of taxpayers' rights and to simplify tax obligations, as announced in the Tax Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy.

⁷⁷ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1–123.

⁷⁸ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1–42.

⁷⁹ European Commission, *Proposal for a Regulation 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*, COM(2016) 815 final.

⁸⁰ EPRS, 2019, *Revising the social security coordination regulations*, available at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/637915/EPRS_ATAG\(2019\)637915_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/637915/EPRS_ATAG(2019)637915_EN.pdf).

⁸¹ See in more detail Section 2.1.2.

social security system of the home (sending) Member State. This exception, and its application in practice, has been controversial. The 'home rule' approach offers a certain potential to employers to engage in a cost-cutting competition with businesses in the host Member State in cases where there is a significant difference between the social security contributions between the home and host State, and empirical evidence shows that there are cases where the exception 'is used as a smokescreen'⁸² to engage in exploitative or fraudulent practices⁸³.

Under the current rules, the employer of a posted worker shall inform the competent social security institution of the home State and the latter will inform the competent social security institution in the host State, but this does not have to be in advance of the posting. The rules provide that the employer or posted worker can request from the competent institution of the home Member State an attestation that its legislation is applicable, while Article 5 of that Regulation requires this attestation to be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the issuing Member State. As will be explained in more detail in Chapter 2, within this framework, the ensuing 'portable document A1' or 'A1 certificate' (PDA1)⁸⁴ is not a constitutive condition for the posting exception to apply, and it may be issued retroactively. It is in this context that the **negotiations on the revision of the regulations are considering the option of introducing an obligation of prior notification of the competent institution before posting a worker abroad** (as well as the introduction of deadlines for improved cooperation between the competent social security institutions in the home and host MS). This would make it easier for the host State to verify the correct application of the posting exception in practice.

The PDA1 is at the heart of the ESSPASS initiative: it is one of the two documents (alongside the EHIC) that the initiative aims to make electronically available in a digital wallet. The digitalisation of the PDA1 as foreseen by ESSPASS interacts with (the revision of) the social security regulations in important ways. In particular, **by reducing the administrative burden for employers, workers and social security institutions, the digitalisation of the PDA1 as planned under ESSPASS, and the possibility for the posted worker to carry it in an easily accessible application (such as the digital wallet), may make a potential requirement of a prior notification more acceptable to parties that have an interest in sending posted workers.**

Moreover, by providing the PDA1 to the person concerned, it **makes the posted worker more central in the process and gives them a degree of 'ownership' of their social security status**, which until now has often excluded them and has been a main source of critique of the current status quo⁸⁵. Currently there is no obligation to inform the posted worker at all about the PDA1 procedure and its outcome, which can be arranged exclusively between the employer and the competent social security institutions. As Houwerzijl notes:

'This may lead to situations where cross-border workers do not necessarily have any knowledge of which social security legislation applies to them. It is an understatement to note that this is not in line with the ultimate aims of Reg. 883 and its legal base, namely to protect workers exercising their right to free movement against any occurring

⁸² Houwerzijl, M., 2015, *A Hunters Game: How Policy Can Change to Spot and Sink Letterbox-Type Practices*, ETUC Report, p. 71.

⁸³ Ibid.

⁸⁴ See Section 2.1.2.

⁸⁵ Ibid, p. 84.

disadvantages regarding their social security rights. Before disadvantages can be discovered, a person must first have the ability to become aware of them'⁸⁶.

Furthermore, digitalisation offers opportunities for more efficient cooperation between social security institutions (through EESSI), which may increase trust and enforcement. It may also be expected that **digital PDA1's are more forgery-proof than paper versions**, further benefiting the reliability and operation of the social security coordination system. To be sure, the ESSPASS initiative is not dependent on the revision of the social security regulations, but it may be instrumental in this revision, and facilitates the very aims of the regulations - and their revision.

In its 2024 Work Programme, the Commission indicated that it 'is promoting the timely agreement and widespread implementation of a **common form of electronic format' for posted workers' declarations**⁸⁷. It concerns the declarations of posting for the purposes of the enforcement of labour law, not social security, that Member States are allowed to require in accordance with the Posted Workers Enforcement Directive, discussed further in Chapter 2 below⁸⁸. This will thus not be directly linked to the ESSPASS project, which currently only applies to the PDA1 (and EHIC), although it may provide a bridge for the future possible extension of ESSPASS into areas other than social security.

1.4.2. Social Partner pilot project on labour cards in the construction sector

Labour cards and social ID cards have been described as 'individualised worker certification tools which contain visible and safely stored electronic data that aim to attest that specific social and/or other (e.g. professional qualifications, occupational safety and health (OSH) training, social protection/security issues) requirements have been met by the worker's employer and/or the worker'⁸⁹. They are widely used across the EU especially in the construction sector,⁹⁰ and several Member States that do not have them yet, are considering introducing them in that area⁹¹.

The cards are checked during inspections on construction sites to confirm the legal status of (posted) workers and thus help in detecting undeclared work⁹². The European Commission notes that **'digitalisation efforts in social security coordination have also created renewed attention for the role played by labour cards/social ID cards in ensuring fair labour mobility'**⁹³. It considers that such cards 'remain primarily a national/regional local responsibility' but that the EU level can play a role in supporting the exchange of good practices, the examination whether interconnectivity can be established between the various cards and in 'helping to ensure that the development of cards is compatible with the internal market rules (i.e. freedom to provide services)⁹⁴. The Commission

⁸⁶ Houwerzijl, M., 2018, 'Improving cross-border social security', in: Buelen, W. (ed), *Putting an end to cross-border social security fraud and abuse*, European Federation of Building and Woodworkers (EFBWW), p. 42.

⁸⁷ European Commission, 2023, Communication on delivering today and preparing for tomorrow (2024 Work Programme), available at: https://commission.europa.eu/system/files/2023-10/COM_2023_638_1_EN.pdf, p. 4.

⁸⁸ See Section 2.1.2 below. See also Annex 2.

⁸⁹ European Federation of Building and Woodworkers, 2015, *Social Identity Cards in the European Construction Sector*, Final Report, available at: <https://www.eia.europa.eu/en/news-event/newsroom/report-digitally-accessible-and-understandable-information-promoting-cross>, p. 5.

⁹⁰ Ibid, See also Williams, C., 2022, *Comparative study of the use of social identity cards in the construction sector in various European countries*, Technical Report, available at: https://www.researchgate.net/publication/357621579_Comparative_study_of_the_use_of_social_identity_cards_in_the_construction_sector_in_various_European_countries.

⁹¹ European Labour Authority, 2023, *Construction sector: Issues in information provision, enforcement of labour mobility law, social security coordination regulations, and cooperation between MSs*, Luxembourg: Publications Office of the European Union, p. 40.

⁹² Ibid, p. 6.

⁹³ See European Commission website: <https://ec.europa.eu/social/main.jsp?langId=en&catId=1545&eventId=2065&furtherEvents=yes>.

⁹⁴ European Commission, 2023, *Conference on Digitalisation in Social Security Coordination (ESSPASS) and 'Labour Cards'*, Background Document, p. 4.

organised a high-level policy conference in March 2023 specifically to discuss 'Digitalisation in social security coordination (ESSPASS) and 'Labour Cards'⁹⁵.

In its resolution on ESSPASS, the EP has been a vocal supporter of labour cards and social ID cards, stating that it 'welcomes initiatives in several Member States to improve effective enforcement of Union law through the use of national cards or comparable instruments in the field of labour law'⁹⁶. It has stressed that these national initiatives create awareness of wage and working conditions for all workers and improve enforcement. However, they cannot facilitate an exchange of valid and accurate information including employment relationships and rights across borders, and the European Parliament has called on the Commission to ensure that the ESSPASS initiative 'affords Member States the possibility to draw on the information made available by the improved identification and verification possibilities provided by national cards or comparable instruments'⁹⁷. It has also warned that the integration of the ESSPASS in the national cards, or comparable instruments in the field of labour law, 'should not replace but be complementary to these national practices, and only provide the relevant information to the appropriate authorities'⁹⁸, adding that it must be without prejudice to the autonomy of national social partners and working conditions set out by applicable collective agreements in accordance with national law and practice. **The EP is thus cautious that the Commission's conception of ESSPASS should not curb these national enforcement practices.**

The ELA recently published a report concerning information provision, enforcement, social security coordination and cooperation between MSs in relation to posting of workers in the construction sector⁹⁹. It found that 'the most **prevalent violations and abusive practices include the establishment of letterbox companies, non-compliance with working conditions, bogus self-employment, fraudulent PDA1 usage and fraudulent posting of third country nationals**'. It noted that 'labour inspectorates can inspect and sanction these violations and abusive practices, but that they often lack sufficient financial and staff resources, and experience difficulties in identifying some factual elements in such posting contexts (e.g. place of registration of undertakings, number of contracts performed, whether or not the posted workers return to or are expected to resume working in the sending Member States) to properly carry out their inspection activities'. The report identified the provision of social ID cards to posted workers as a measure that could prevent non-compliance with the rules: '**social ID cards are a very useful preventive tool**, with some reservations on their effectiveness a) on small construction sites due to a poor cost-benefit ratio and b) in identifying underpayment practices'¹⁰⁰.

The Commission notes in its 2023 Communication¹⁰¹ that it is financially supporting a project by the EU social partners in the construction sector in 2023-25, to explore the potential for interoperability between labour and social identity cards of different countries, with the aim 'to facilitate the enforcement of labour law and working conditions, improve transparency and ensure fair labour mobility'¹⁰². It may be that in the future, such cards could become part of ESSPASS.

⁹⁵ European Federation of Building and Woodworkers, 2015, *Social Identity Cards in the European Construction Sector*, Final Report, p. 5.

⁹⁶ EP, resolution of 25 November 2021 on the introduction of a European social security pass for improving the digital enforcement of social security rights and fair mobility ([2021/2620\(RSP\)](#)).

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ European Labour Authority, 2023, *Construction sector: Issues in information provision, enforcement of labour mobility law, social security coordination regulations, and cooperation between MSs*, Luxembourg: Publications Office of the European Union.

¹⁰⁰ Ibid, p. 38.

¹⁰¹ European Commission, 2023, *Communication on digitalisation in social security coordination: facilitating free movement in the Single Market*, COM(2023) 501 final.

¹⁰² Ibid, p. 11.

2. OVERVIEW OF CURRENT CHALLENGES IN SOCIAL SECURITY COORDINATION AT EU LEVEL

KEY FINDINGS

The current legal framework of social security coordination is as regards mobile workers best understood by reference to its key principles: (i) a single applicable legislation, (ii) equal treatment, and (iii) the *lex loci laboris* (the state-of-employment principle). This protects mobile workers, but also prevents unfair competition; two aims that together serve the same overarching purpose of promoting social progress and the fundamental right to social security.

As a limited exception to the *lex loci laboris*, where a worker is temporarily posted (not more than 24 months) they remain affiliated to the social security system of their home State. The short posting exception presents an administrative simplification, in the interest of the worker (as well as the employer according to the CJEU). For the application of this exception, the PDA1 plays an important role. A PDA1 is required, but not in advance.

The 'posting provision' has always been politically sensitive, due to the potential for social dumping it entails. This controversy has intensified following the EU enlargements, as well as the Laval case law. As regards the enforcement of the application of the relevant labour law standards of the host MS, the Enforcement Directive allows MSs to require a declaration at the moment of commencement of the posting.

The Commission has proposed a revision of the social security regulations. One of the main negotiation points is the issue of prior notification for posted workers for social security purposes. The ESSPASS project is of high relevance here. The digitalisation of the PDA1 as part of the ESSPASS project would reduce the administrative burden for employers, workers and social security institutions, and could make a potential requirement of a prior notification more acceptable. Furthermore, digitalisation offers opportunities for more efficient cooperation between social security institutions and may reduce fraud.

However, ESSPASS is still in the pilot-phase, which will be concluded in 2025, only after which the Commission will decide to put forward a (legislative) initiative to formally introduce ESSPASS. It is therefore now being explored whether the regulations may be amended in the light of the current state of digitalisation without explicitly integrating ESSPASS. Should this materialise, then the framework within which ESSPASS is being conceived, tested and ultimately launched will be different than initially anticipated.

It would still be recommended to go ahead with ESSPASS even if the digitalised PDA1s are already up and running. The mobile citizen will have, in the Wallet, (the possibility of) a 'one-stop-shop' for their necessary social security documents, including the EHIC, and possibly, in the future also other documentation such as pertaining to labour law entitlements for posted workers (for instance, the declaration of posting that MSs may require of employers of posted workers to ensure the application of their labour law standards, and possibly the national social IDs and labour cards) as well as, in the longer term, relating to other issues (e.g. tax). As such, any steps undertaken to move ahead of ESSPASS, should not come in the place of ESSPASS but instead should lead to a swifter rollout of its extension beyond its current envisaged scope.

2.1. The current legal framework and its challenges

2.1.1. Primary law

a. The Constitutional context

It is worthwhile to briefly reiterate **the constitutional context within which social security law and policy are situated**. As such, these provisions do not lay down an enforceable EU right to adequate social security, but they should **inform the interpretation and application of any more specific rules that concern social security, by emphasising the fundamental importance of this issue from the perspective of the dignity and well-being of persons**.

Article 34 of the EU Charter of Fundamental Rights, entitled 'social security and social assistance', provides that 'the Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices'. It moreover stipulates that 'everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices'. More generally, Article 9 TFEU specifies that 'in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion'. In similar vein, Article 3(3) TEU refers to an internal market that 'shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress' and to a Union that 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. The (non-binding) European Pillar of Social Rights furthermore provides in principle 12 that 'regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection', and in principle 15 that 'workers and the self-employed in retirement have the right to a pension commensurate to their contributions and ensuring an adequate income'.

b. Substantive provisions and legal bases

Various provisions in the TFEU provide the EU the competence to act on social security. In general terms, the main social policy legal basis of Article 153 TFEU provides that the EU may act, including through the adoption of Directives setting minimum standards, in the field of social security and social protection of workers¹⁰³. This competence is however subject to unanimity in the Council. **Article 48 TFEU provides the possibility to use the ordinary legislative procedure to 'adopt such measures in the field of social security as are necessary to provide freedom of movement for workers'. To this end, the provision stipulates, 'they shall make arrangements to secure for employed and self-employed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.'** Finally, as a residual clause of sorts, Article 21 TFEU, which grants the right to every citizen of the Union to move and reside freely within the territory of the MSs, allows the Council to adopt measures concerning social security or social protection 'if the

¹⁰³ In accordance with Article 153(4) TFEU, the provisions adopted pursuant to this Article 'shall not affect the right of MSs to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof.

Treaties have not provided the necessary powers'.

Apart from provisions granting the EU the power to adopt legally binding acts that provide rights and obligations for individuals, the Treaties also contain a number of internal market provisions that the measures of secondary law need to comply with, and that in themselves may grant rights to workers or companies. Most relevant for the issue of cross-border social security protection are Article 45 TFEU, which lays down the right of equal treatment for mobile workers; stating that 'freedom of movement for workers shall be secured within the Union' and that such 'shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment', and – as shall become clear from the discussion of the CJEU's case law in sub-section C below - Article 56 TFEU on services ('restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended').

2.1.2. Secondary law

a. Social Security Regulations 883/04 and 987/2009

Based on (what is now) Article 48 TFEU¹⁰⁴, the EU legislator has developed a rich (and complex) social security coordination *acquis* over the past 60 years. Indeed, this issue was one of the first ever to be the subject of EEC (European Economic Community) action: Regulations 3 and 4 entered into force on 1 January 1959 and has as their main objective the protection of the social security rights of migrant workers and their families¹⁰⁵. **The current legal framework consists in Regulation 883/2004 on the coordination of social security systems - generally called the Basic Regulation (BR) - and Regulation 987/2009, the Implementing Regulation (IR).** In addition, **Regulation 1231/2010** of the EP and of the Council of 24 November 2010 **extends the BR and IR to nationals of third countries** who are not already covered by these regulations solely on the ground of their nationality provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State¹⁰⁶.

The social security regulations in principle do not harmonise social security across the EU, but coordinate the national rules and entitlements for the purposes of the free movement of persons in the Union¹⁰⁷. They apply to all EU nationals insured under national law, whether employed, self-employed, students, civil servants, pensioners or non-active persons, as well as to the members of their

¹⁰⁴ Sometimes complemented by other provisions, such as Article 352 TFEU to cover non-active workers.

¹⁰⁵ See Cornelissen, R. and De Wispelaere, F., 2019, 'Sixty years of European social security coordination: achievements, controversies and challenges', in Vanhercke, B. et al (eds.), *Social policy in the European Union 1999-2019: the long and winding road*, ETUI and OSE, available at: <https://www.etui.org/publications/books/social-policy-in-the-european-union-1999-2019-the-long-and-winding-road>.

¹⁰⁶ Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ 2010 L 344, p. 1). See Case C-477/17, *Balandin*, EU:C:2019:60. Specifically on the PDA1, see Case C-523/20, *Koppány*, EU:C:2021:160: 'Article 1 of Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, must be interpreted as meaning that nationals of third countries who reside temporarily and have a residence permit in a Member State, and who have a document stating their place of accommodation issued by the immigration authority and work in different Member States for an employer established in that Member State, may rely on the coordination rules laid down by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004, in order to determine the social security legislation to which they are subject, provided that they are legally residing and working in the territory of the Member States'.

¹⁰⁷ *Ibid.*

families and survivors, regardless of their nationality¹⁰⁸. Arguably as regards health care, the rules go beyond mere coordination and create substantive rights for mobile citizens: **a person who is insured for healthcare in one Member State and who stays temporarily in another Member State (e.g. during a city trip, family visit, holiday) is entitled to any healthcare which becomes necessary in that other MS as if he or she is insured in that other Member State, upon showing their European Health Insurance Card (EHIC) to the care provider¹⁰⁹. The cost is reimbursed to the providing Member State by the competent State at the former's tariffs¹¹⁰.**

As regards mobile workers, the current legal framework is best understood by reference to its key principles: (i) the determination of a single applicable legislation, (ii) equal treatment, and (iii) the *lex loci laboris* (the state-of-employment principle). Under (i), persons shall be subject to the legislation of a single Member State only (Article 11(1) Basic Regulation), meaning that they pay contributions and receive coverage there. As in all of free movement law generally, the cornerstone rule is non-discrimination and equal treatment in the host State. In particular, migrant workers should have the same rights as regards working conditions as national workers in the host State¹¹¹. As was confirmed by the Court of Justice of the EU, this principle not only aims to protect mobile workers against discrimination, but also seeks to prevent unfair competition between employers of national workers in a Member State and those who employ mobile workers¹¹²; **two aims that together serve the same overarching purpose of promoting social progress and the fundamental right to social security as important EU values enshrined in its constitutional settlement** (as outlined above). As a logical application of (i) and (ii), the main rule to determine the single applicable legislation is, therefore, the *lex loci laboris* (the state-of-employment principle): the place of work. As stated in Article 11(3)(a) Basic Regulation: 'a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State'.

There are some **limited exceptions to the *lex loci laboris***, which can generally be understood from the perspective of seeking the most rational coordination of social security in the interest of the person concerned¹¹³. Frontier workers have to claim unemployment benefits, and to register as job seekers, in their Member State of residence - which is based on the assumption that frontier workers enjoy the most favourable conditions for seeking new employment in their state of residence¹¹⁴. Persons to whose situation a simple application of *lex loci laboris* is not possible, because they work or are self-employed in two or more Member States – are in principle¹¹⁵ covered in the State of residence¹¹⁶. Furthermore, in two specific circumstances, a person does not become affiliated to a Member State,

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid. The Regulation also enables a person insured for healthcare in one MS to go to another MS to obtain medical treatment there, at the expense of the competent institution, provided he or she receives authorisation from that institution. If that authorisation is granted, he or she will benefit from reimbursement conditions far more favourable than those contained in the Patient Mobility Directive (Directive 2011/24/EU).

¹¹¹ Article 45 TFEU.

¹¹² Case 167/73, *Commission of the European Communities v French Republic*, EU:C:1974:35, paragraph 45. See also Verschueren, H., 2008, *Cross-border workers in the European Internal Market: Trojan horses for MSs' labour and social security law?*, The International Journal of Comparative Labour Law and Industrial Relations, Volume 24(2), pp. 167-199.

¹¹³ There is a 'general' possibility for exceptions on the basis of an agreement between two or more MSs in the interest of the persons concerned in Article 16 BR: '1. Two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons'.

¹¹⁴ See Cornelissen, R. and De Wispelaere, F., 2019, 'Sixty years of European social security coordination: achievements, controversies and challenges', in Vanhercke, B. et al (eds.), *Social policy in the European Union 1999-2019: the long and winding road*, ETUI and OSE, <https://www.etui.org/publications/books/social-policy-in-the-european-union-1999-2019-the-long-and-winding-road>, Cases 1/85, *Miethe* EU:C:1986:243 and C-444/98, *De Laat* EU:C:2001:165.

¹¹⁵ If he/she pursues a substantial part of his/her activity in that Member State.

¹¹⁶ Article 13 BR.

despite the fact that they are working there, because the highly temporary nature of the work, namely: (i) in cases where a worker is temporarily posted to another Member State in the context of their employment in the home State (Article 12(1) BR¹¹⁷), and (ii) in cases a person who normally pursues an activity as a self-employed person in a Member State goes to pursue a similar activity in another Member State (Article 12(2) BR¹¹⁸). In these circumstances, the *lex loci laboris* is not applied and the worker/self-employed person remains affiliated in their home State for the duration of the posting.

The first scenario - of temporarily posted workers - is the most sensitive. It here that the application of the exception to the *lex loci laboris* has resulted in most difficulties, as it covers the 'classic' situation where in certain sectors (such as construction) the social security exception can lead to significant competition on total labour costs by companies posting workers to Member States with higher wages and higher social security contributions.

As said, it results from Article 12(1) BR that for postings with an anticipated duration of not more than 24 months, the posted worker remains affiliated to the social security system of their normal country of employment and their employer will continue to pay contributions into that system. The idea is that in situations of short postings:

'it is usually more attractive for a worker to remain affiliated to the social security system of the country where he normally works than to interrupt this in return for acquiring only small benefits rights under the system of the host country. This is especially true if workers do not obtain any (substantial) social advantage from the switch in applicable law. The complications which a change in the applicable social security legislation may entail could in such a situation have the effect of deterring a posted worker from exercising his right to free movement of workers'¹¹⁹

The short posting exception moreover presents an administrative simplification, as it would be laborious to arrange the temporary and brief switch in applicable systems back-and-forth, which would be burdensome for the worker, the employer and the social security institutions¹²⁰. At the same time, the Court of Justice has emphasised that the posting exception to *lex loci laboris* also serves the interest of the employer of the posted worker (see further below)¹²¹. Where the social security contributions are lower in the home State, **this allows employers to compete on costs with service providers of the host Member States**, thus facilitating their freedom to provide services. Here, the rationale of non-discrimination is replaced by an objective of economic interpenetration, and departs from the objective of combatting a race to the bottom, representing a different political view on how to ensure upward social convergence in the Union, namely the assumption that this helps the development the economies of lower-cost Member States and contributes to socio-economic convergence (even if not

¹¹⁷ '1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person'.

¹¹⁸ However, 'provided that the anticipated duration of such activity does not exceed 24 months'. Although this situation is often referred to as 'posting' for the purposes of the social security legislation, it does not qualify as posting under the Posted Workers Directive and Enforcement Directive, and indeed would be more accurately described as 'self-posting' since 'posting' implies being assigned by someone else.

¹¹⁹ Houwerzijl, M., 2015, *A Hunters Game: How Policy Can Change to Spot and Sink Letterbox-Type Practices*, ETUC Report, p. 56.

¹²⁰ Case 35-70, S.A.R.L. *Manpower v Caisse primaire d'assurance maladie de Strasbourg*, EU:C:1970:120, para 10.

¹²¹ See Case C-202/97, *Fitzwilliam Executive Search Ltd tegen Bestuur van het Landelijk instituut sociale verzekeringen*, EU:C:2000:75, para 28; Case C-404/98, *Josef Plum v Allgemeine Ortskrankenkasse Rheinland, Regionaldirektion Köln*, EU:C:2000:607, para 19: 'The purpose of Article 14(1)(a) of Regulation No 1408/71 is, in particular, to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to MSs other than that in which they are established. It is aimed at overcoming obstacles likely to impede freedom of movement of workers and also at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings'.

upward convergence).

For the purposes of applying the exceptions from the *lex loci laboris*, the PDA1 (also referred to as the 'A1 certificate', previously the Form 'E 101') plays an important role¹²². Article 15 IR provides that where a person pursues his activity in a Member State other than the competent Member State, the employer should inform the competent institution of the Member State whose legislation is applicable, 'whenever possible in advance', and that that institution should without delay make information concerning the applicable legislation available to the worker and to the competent authority of the host Member State. Article 19(2) IR provides that the employer or posted worker can request from the competent institution of the home Member State an attestation that its legislation is applicable, while Article 5 of that Regulation requires that this attestation to be accepted by the institutions of the other Member States for as long as it has not been withdrawn or declared to be invalid by the issuing Member State. Within this framework, **the ensuing PDA1** is not a constitutive condition for the posting exception to apply, and it may be issued retroactively¹²³. The PDA1 form contains information on the personal details of the holder (name, nationality, birthdate/place, address in home and host states), the applicable Member State legislation, the status of the person¹²⁴, details of the employer, and the details of the issuing institution. See Annex 2 for a comparison of the PDA1 and its information with the 'declarations of posting' that will be discussed in the section below.

b. Revised Directive 2018/957 on Posted Workers and Enforcement Directive 2014/67

The situation of posted workers is a peculiar one in EU free movement law. Apart from their exceptional status under social security coordination outlined in the previous section, an exception that existed, albeit in a more limited form¹²⁵, since the original regulations on the issue), they have also become to be treated not (fully) as migrant workers¹²⁶ entitled to equal treatment as regards their working

¹²² See for a discussion of the PDA1 in great detail: De Wispelaere, 2021, F. et al, *Posting of workers, Report on A1 Portable Documents issued in 2019*, Luxembourg: Publications Office of the European Union. The previous regulation (574/72) provided for formalities in the case of posting: 'the institutions designated by the competent authority of the Member State whose legislation is to remain applicable shall issue a certificate stating that an employed person shall remain subject to that legislation up to a specific date' (Article 11 (1)). Pursuant to Administrative Commission of the Economic Communities on Social Security for Migrant Workers, 1973, *Decision No 88 adapting the model forms necessary for the application of Council Regulation (EEC) No 1408/71 and Council Regulation (EEC) No 574/72 for use in the enlarged Community*, a standardised Form E 101 'certificate of posting' was introduced. It was amended several times, most notably by Administrative Commission of the European Communities on social security for migrant workers, Decision No 181 of 13 December 2000 concerning the interpretation of Articles 14(1), 14a(1) and 14b(1) and (2) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State, to take account of the case law of the CJEU that 'the certificate (form E 101) may have retroactive effect, although it should preferably be issued in advance', and Decision No 202 of the Administrative Commission of 17 March 2005 on model forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 (E 001, E 101, E 102, E 103, E 104, E 106, E 107, E 108, E 109, E 112, E 115, E 116, E 117, E 118, E 120, E 121, E 123, E 124, E 125, E 126, E 127) (2006/203/EC) (OJ 2006 L 77, p. 1). As from 1 May 2010, the E 101 certificate became the A1 portable document, governed by the BR and IR. See Decision No A1 of the Administrative Commission of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council (OJ 2010 C 106, p. 1). See also Opinion of AG Saugmandsgaard in Case C-359/16, *Altun*, ECLI:EU:C:2017:850.

¹²³ Judgment in Case C-178/97, *Bary Banks and Others v Theatre royal de la Monnaie*, EU:C:2000:169: 'The E 101 certificate, issued in accordance with Article 11a of Regulation No 574/72, may have retroactive effect'.

¹²⁴ This can be the status of posted worker, posted self-employed, civil servant, mariner, employed working in 1+ MS, contract staff, flight crew member, or an 'exception'.

¹²⁵ As Houwerzijl notes, 'in the old BR 1408/71, the anticipated duration of the posting was 12 months (with a narrowly construed possibility to extend for another 12 months, which was seldomly used)'. Houwerzijl, M., 2015, *A Hunters Game: How Policy Can Change to Spot and Sink Letterbox-Type Practices*, ETUC Report, p. 58. The subsequent extension to 24 months in the current Regulations has been criticised for being disproportionate in relation to its original aim: Schoukens, P. and Pieters, D., 2009, *The rules within Regulation 883/2004 for determining the applicable legislation*, EJSS, pp. 106-107.

¹²⁶ However, in *Hudziński and Wawrzyniak*, the Court actually does refer to, and treat, a Polish posted worker in Germany as a 'migrant worker', and while it upholds the principle (as laid down in social security coordination Regulation 1408/71) that the home MS is competent as regards child benefits, it also considers that where the host country provides the granting of the benefit to posted workers it may not apply a rule that excludes that benefit in case of a partial overlap with the benefit provided by the home MS by application of 'the Treaty rules on the free movement of workers'. Joined Cases C-611/10 and C-612/10, EU:C:2012:339. And in *Kranemann*, the Court held 'temporary civil servants carrying out a traineeship who are posted abroad to a place of their choice' to be workers for the purposes

conditions (such as pay) under Article 48 TFEU, but instead as services provided by their employer under Article 56 TFEU¹²⁷. Even if not unproblematic from a social rights perspective, the (limited) exception of posted workers from the *lex loci laboris* for social security purposes was a deliberate legislative choice, that – as was discussed above – can be explained by an (assumed) aligned interest in this solution of all the parties concerned, first and foremost the posted worker his/herself. By contrast, the apparent carving out of posted workers from the right to equal treatment as regards working conditions and the conception of posted workers as the 'service' provided by their employer in regard of which a requirement of equal pay compared to national workers is considered a 'restriction' that has to be 'justified' and 'proportionate', is a case-law¹²⁸ invention that raises profound questions from a normative-constitutional¹²⁹, legal-technical¹³⁰, and political perspective.

Within the lines drawn by the case-law¹³¹, the EU legislator has sought to counteract the negative implications of this approach that crystallized in the controversial *Laval* case, where the Court interpreted the original Posted Workers Directive 96/71/EC (which provided that 'Member States shall (guarantee) (...) workers posted to their territory the terms and conditions of employment covering (...) minimum rates of pay' and other listed working conditions) in light of freedom to provide services rather than the free movement of workers, precluding the guarantee of full equal treatment as regards working conditions as this would restrict the freedom of the employer¹³². Firstly, the EU legislator adopted the Enforcement Directive 2014/67¹³³ and a few years later the Revised Posted Workers Directive 2018/957¹³⁴ to bring the situation of posted workers as regards labour rights as close as possible to that of equal treatment with national workers.

The Enforcement Directive provides that for the enforcement of the 'admissible' labour law protections, Member States **may adopt an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision (a 'declaration of posting'**, in (one of) the official language(s) of the host Member State, or in (an) other language(s) accepted by the host Member State, containing the relevant information necessary in order to allow factual controls at the workplace, including inter alia the identity of the service provider, the anticipated number of clearly identifiable posted workers, the anticipated duration, envisaged beginning and end date of the posting, the

of Article 45 TFEU', Case C-109/04, *Kranemann* (EU:C:2005:187). In light thereof it is all the more curious that the posted workers cannot avail themselves of the right to equal treatment provided in Article 45 TFEU, as per Case C-341/05, *Laval un Partneri* (EU:C:2007:809).

¹²⁷ See extensively on this issue: Garben, S., 2023, 'Posted workers are persons too! - Posting and the Constitutional Democratic Question of Fair Mobility in the European Union' in Nic Shuibhne, N., *Revisiting the Fundamentals of the Free Movement of Persons in EU Law*, Oxford University Press.

¹²⁸ Case C-113/89, *Rush Portuguesa*, EU:C:1990:142, Cases C-49/98 et seq, *Finalarte*, EU:C:2001:564, Case C-341/05, *Laval un Partneri*, EU:C:2007:809.

¹²⁹ See Garben, S., 2023, 'Posted workers are persons too! - Posting and the Constitutional Democratic Question of Fair Mobility in the European Union' in Nic Shuibhne, N., *Revisiting the Fundamentals of the Free Movement of Persons in EU Law*, Oxford University Press. See also the condemnation of the *Laval* doctrine by the European Committee of Social Rights and the European Court of Human Rights European Committee of Social Rights, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, No 85/2012 (3 July 2013), para. 122.

¹³⁰ Article 57 TFEU frames the services provisions as residual to those on the other freedoms: 'services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'.

¹³¹ See Davies, G., 2016, *The European Union Legislature as an Agent of the European Court of Justice*, Journal of Common Market Studies, Vol. 54(4), pp. 846-861, Lubow, A., and Schmidt, S., 2019, *A Hidden Champion? The European Court of Justice as an Agenda-setter in the Case of Posted Workers*, Public Administration, Vol 99(2), pp. 321-334.

¹³² Case C-341/05, *Laval un Partneri*, EU:C:2007:809.

¹³³ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

¹³⁴ Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ 2018 L 173/16.

address(es) of the workplace; and the nature of the services justifying the posting¹³⁵. It is explicitly stated that this shall not affect other obligations deriving from the Union legislation, including those deriving from the BR and IR. In this context, **'Member States shall ensure that the procedures and formalities relating to the posting of workers pursuant to this Article can be completed in a user-friendly way by undertakings, at a distance and by electronic means as far as possible'**¹³⁶.

The Revised Posted Workers Directive in turn has guaranteed that, on the basis of equal treatment, posted workers will be entitled to all the constituent elements of remuneration rendered mandatory in the host Member State, so that those workers should receive remuneration based on the same binding rules as are applicable to the workers employed by undertakings established in the host Member State. The revision has furthermore established that where the planned or effective duration of a posting exceeds 12 months, Member States should ensure, 'irrespective of which law applies to the employment relationship', that undertakings guarantee, on the basis of equality of treatment, workers who are posted to their territory, in addition to the terms and conditions of employment referred to in Article 3(1), *all* the applicable terms and conditions of employment¹³⁷ – and thus not only the *core* set of terms and conditions of employment that apply in the host State from the first day of the posting¹³⁸ – which are laid down in the Member State where the work is carried out. This does not cover social security, however, as this is governed by the EU social security regulations as set out above, where the posting exception means that for a period of 24 months the posted worker remains affiliated to the social security system of his normal country of employment and not the country to which he/she is posted.

Indeed, to reiterate, **the Revised Posted Workers Directive and the Enforcement Directive pertain to labour law and not to social security law which is the current subject of ESSPASS**. Still, the PDA1 is at the nexus between these two different yet related sets of EU regulation of the status of posted workers. As Van Hoek and Houwerzijl note, although the posting dispositions in the social security regulations and in the Directives specific to posting 'serve distinct purposes, in practice the A1 declaration plays an important role in identifying posted workers. Also, from the perspective of fair competition it is noted that both labour law and social security law play an important role in the total labour costs for the employer'¹³⁹. The PDA1 form concerns the applicable social security legislation but in practice is often important for the enforcement of the applicable labour law guarantees as well. The request of the PDA1 by the employer or posted worker to the competent social security institution in the home State, triggers the latter's obligation to inform without delay the relevant social security institution in the host State, and may thereby alert the latter to the fact that there is a situation of posting, which may then lead to the control of the employer's obligations under the Posted Workers Directive concerning labour law entitlements. This seems especially relevant in case where the host Member State does not make use of possibility offered by the Enforcement Directive to require a declaration of posting to be made at the latest at the commencement of the posting. Furthermore, it would seem that in several Member State, there is a certain practical confusion between the

¹³⁵ Article 9(1).

¹³⁶ Article 9(4)

¹³⁷ Article 3(1a). This however excludes the procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses and supplementary occupational retirement pension schemes.

¹³⁸ i.e.: remuneration, including overtime rates; maximum work periods and minimum rest periods; minimum paid annual leave; the conditions of hiring-out workers in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; equal treatment between men and women and other provisions on non-discrimination; the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work; allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

¹³⁹ Van Hoek, A. and Houwerzijl, M., 2011, Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, p. 76.

requirements concerning the declaration of posting in the sense of the Enforcement Directive for the purposes of labour law, and the PDA1 concerning social security¹⁴⁰. For a schematic overview of the difference between the PDA1 and declaration of posting, see Annex 2 of this report.

2.1.3. Case law

Recently, in its judgment of 14 May 2020 in *Bouygues travaux publics*¹⁴¹ the CJEU clarified the **relationship between the PDA1 and the social security regulations on the one hand, and national provisions enforcing national labour conditions within the framework of the EU posting rules**. It is worth citing the relevant passages as they are a clear (re)statement of the legal position of PDA1 under the current EU legal framework. The Court outlined the following:

According to the Court's settled case-law, the (PDA1 is) intended, like the rules of substantive law laid down in Article 14(1)(a) and (2)(b) of Regulation No 1408/71 and in Article 12(1) and Article 13(1) of Regulation No 883/2004, to facilitate freedom of movement for workers and freedom to provide services¹⁴².

Those certificates correspond to a standard form issued, in accordance, as the case may be, with Title III of Regulation No 574/72 or Title II of Regulation No 987/2009, by the institution designated by the competent authority of the Member State whose social security legislation is applicable, in order to 'attest', in accordance, inter alia, with Article 11(1)(a), Article 12a(2)(a) and (4)(a) of Regulation No 574/72 and of Article 19(2) of Regulation No 987/2009, that workers finding themselves in one of the situations referred to in certain provisions of Title II of Regulations No 1408/71 and No 987/2009 are subject to the legislation of that Member State¹⁴³.

By virtue of the principle that workers must be covered by only one social security system, those certificates thus necessarily imply that the other Member State's social security system cannot apply¹⁴⁴.

Under the principle of sincere cooperation, laid down in Article 4(3) TEU, which also entails the principle of mutual trust, in so far as (PDA1s) create a presumption that the worker concerned is properly affiliated to the social security scheme of the Member State whose competent institution has issued those certificates, those certificates are binding, in principle, on the competent institution and the courts of the Member State in which that worker is working¹⁴⁵.

Consequently, as long as those certificates are not withdrawn or declared invalid, the competent institution of a Member State in which a worker actually works must take account of the fact that that person is already subject to the social security legislation of the Member State whose competent institution has issued those certificates, and the former institution cannot therefore subject the worker in question to its own social security system¹⁴⁶.

¹⁴⁰ See for instance the situations in France and Austria as described in Case C-17/19, *Bouygues travaux publics*, EU:C:2020:379 and Case C-16/18, *Michael Dobersberger*, EU:C:2019:1110.

¹⁴¹ Case C-17/19, EU:C:2020:379.

¹⁴² See, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 35 and the case-law cited.

¹⁴³ See, to that effect, judgment of 9 September 2015, *X and van Dijk*, C-72/14 and C-197/14, EU:C:2015:564, paragraph 38.

¹⁴⁴ See, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 36 and the case-law cited.

¹⁴⁵ See, to that effect, judgments of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraphs 37 to 40, and of 6 September 2018, *Alpenrind and Others*, C-527/16, EU:C:2018:669, paragraph 47.

¹⁴⁶ See, to that effect, judgment of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 41 and the case-law cited.

According to the Court's case law, that is also the case even where it is found that the conditions under which the employee concerned carries out his activities clearly do not fall within the material scope of Title II of Regulations No 1408/71 and No 883/2004¹⁴⁷.

As correctly stated by the referring court, a court or tribunal of the host Member State may disregard (a PDA1) only where two cumulative conditions are met: (i) the institution that issued those certificates, to which there has been promptly submitted by the competent institution of that Member State a request to review the grounds for the issue of those certificates, failed to undertake such a review, in the light of the evidence transmitted to it by the latter institution, and has failed to make a decision, within a reasonable time, on that request, as appropriate, cancelling or withdrawing those certificates, and (ii) that evidence permits that court or tribunal to find, with due regard to the safeguards inherent in the right to a fair trial, that the certificates at issue were fraudulently obtained or relied on¹⁴⁸.

It follows, however, that, although (PDA1s) have binding effects, those effects are limited solely to the obligations imposed by national legislation in the area of social security which is the subject of the coordination carried out by Regulations No 1408/71 and No 883/2004¹⁴⁹.

(...) Further, it is apparent from the Court's case law that the decisive factor for the purposes of the application of those regulations is the direct and sufficiently relevant link that a particular benefit must have with the national legislation governing those branches and social security schemes¹⁵⁰.

It follows that (PDA1s), issued by the competent institution of a Member State are binding on the competent institution and the courts of the host Member State only in so far as they certify that the worker concerned is subject, in social security matters, to the legislation of the first Member State with respect to the grant of benefits directly linked to one of the branches and schemes listed in Article 4(1) and (2) of Regulation No 1408/71 and Article 3(1) of Regulation No 883/2004.

Those certificates therefore have no binding effect with regard to obligations imposed by national law in matters other than social security, within the meaning of those regulations, such as, inter alia, those relating to the employment relationship between employers and workers, in particular their employment and working conditions¹⁵¹.

In a nutshell, the position is that PDA1s, issued by the competent institution of the Member State whose legislation is applicable, and which may be issued retroactively, are to be accepted by the institutions of the host Member State, barring clear cases of fraud by the employer and non-cooperation by the social security institution in the home State. **For social security purposes, host Member States thus currently cannot require prior notification and are bound by the PDA1.** A PDA1 may be used by host State authorities to identify the posted worker also **for the purposes of labour law entitlements, however, and the PDA1 does not, in that context, bind the institutions of the host State to accept**

¹⁴⁷ See, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 61.

¹⁴⁸ Judgment of 2 April 2020, *CRPNPAC and Vueling Airlines*, C-370/17 and C-37/18, EU:C:2020:260, paragraph 78.

¹⁴⁹ See, to that effect, judgments of 4 October 1991, *De Paep*, C-196/90, EU:C:1991:381, paragraph 12, and of 9 September 2015, *X and van Dijk*, C-72/14 and C-197/14, EU:C:2015:564, paragraph 39.

¹⁵⁰ See, to that effect, judgments of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraph 23, and of 23 January 2019, *Zyla*, C-272/17, EU:C:2019:49, paragraph 30.

¹⁵¹ See, to that effect, judgment of 4 October 1991, *De Paep*, C-196/90, EU:C:1991:381, paragraph 13.

that there is a 'valid'¹⁵² posting for the purposes of labour law. In any event, as regards labour law entitlements, MSs can require a declaration from the employer to be provided no later than the moment of commencement of the posting. As explained in the previous section, in accordance with Article 9(1) of the Enforcement Directive, the Member State can require this declaration of posting to contain 'the relevant information necessary in order to allow factual controls at the workplace' including the identity of the service provider, the anticipated number of clearly identifiable posted workers, the anticipated duration, envisaged beginning and end date of the posting, the address(es) of the workplace; and the nature of the services justifying the posting¹⁵³. Potentially, there is a great degree of overlap between the information provided in the PDA1 and the declaration of posting¹⁵⁴. However, whether it is required and the exact context and format of the declaration of posting is, for now, a matter of national law and will thus vary across the Member States.

2.2. Pending revision of the legal framework

2.2.1. The posting exception

As mentioned, in 2016, the Commission proposed a revision of the current EU social security regulations¹⁵⁵, and one of the most important issues in the still on-going political discussions on the revision of the regulations relates to the social security status of posted workers. The Commission proposal sought to clarify the conflict rules on applicable legislation and the relationship between the Regulations and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, but not to fundamentally limit the 'posting exception', while the European Parliament on the other hand proposed to restrict the exception, reducing the 24 to 18 months¹⁵⁶. **The negotiations included the option of introducing an obligation of prior notification of the competent institution before posting a worker abroad**, in order to allow better monitoring and enforcement by the competent social security institution of the host Member State, as well as the introduction of deadlines for improved cooperation between the competent social security institutions in the home and host Member State.

As noted by Houwerzijl **the 'posting provision' has always been politically sensitive**¹⁵⁷. 'The exception was not meant for this purpose, but nevertheless creates possibilities to make use of differences in contribution levels between States, which may lead to so-called social dumping. The difference in social protection levels between MSs, following the 2004, 2007 and 2013 enlargements have increased the political sensitivity of the exceptions to the main rule for determining the applicable legislation even further'¹⁵⁸. In fact, 'the posting provision is more and more used as a rule than as an exception'¹⁵⁹. While host countries call for a reconsideration of the current application, monitoring, and

¹⁵² In the sense that the conditions laid down in the applicable legislation, such as the Posted Workers Directive, are respected.

¹⁵³ See also Annex 2.

¹⁵⁴ See Annex 2, the main difference is that the declaration of posting may have to provide details about all of the workers posted by the employer rather than pertaining to one individual posted worker, and may have to provide a justification for the posting.

¹⁵⁵ European Commission, Proposal for a Regulation 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, COM(2016) 815 final.

¹⁵⁶ The Committee on Employment and Social Affairs adopted the report by Guillaume BALAS (S&D, FR) 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, available at: <https://oeil.secure.europarl.europa.eu/oeil/popups/printsummary.pdf?id=1562808&l=en&t=D>.

¹⁵⁷ Houwerzijl, M., 2015, *A Hunters Game: How Policy Can Change to Spot and Sink Letterbox-Type Practices*, ETUC Report, p. 54.

¹⁵⁸ Ibid.

¹⁵⁹ Houwerzijl, M., 2018, 'Improving cross-border social security', in: Buelen, W. (ed), *Putting an end to cross-border social security fraud and abuse*, European Federation of Building and Woodworkers (EFBWW), p. 30.

enforcement of the posting provision and for strengthening the reliability of the (PDA1), sending countries do not support any changes in the rules on applicable legislation¹⁶⁰.

2.2.2. Prior notification and ESSPASS

The negotiations have indeed been arduous. After eight trilogues, a provisional agreement was reached between the Council Presidency and the EP, but was rejected at the Coreper meeting on 29 March 2019, after which trilogue meetings continued but negotiations came to a halt on 1 March 2021, inter alia because it was not possible to reach an agreement on the modalities concerning prior notification before sending a worker from one Member State to another¹⁶¹. The Portuguese Presidency tried to revive negotiations by submitting a new proposal to the EP to unblock the negotiations on prior notification, where the Council proposes two types of prior notification: one for short stays not requiring the publication of an PDA1 and another for longer stays requiring the publication of PDA1¹⁶². Subsequently, the Slovenian Presidency of the Council indicated its willingness to **find a solution which makes use of digital technologies in order to unblock the negotiations**¹⁶³. It was against this background that the EP adopted the resolution calling on the Commission to be more ambitious on digital solutions to facilitate worker mobility, and in particular on ESSPASS¹⁶⁴.

The ESSPASS project is thus of high relevance in this context. The fact that digitalisation of the PDA1 as part of ESSPASS would reduce the administrative burden for employers, workers and social security institutions, and the possibility for the posted worker to carry it in an easily accessible application (such as the digital wallet), may make a potential requirement of a prior notification more acceptable to parties that have an interest in sending posted workers. Furthermore, digitalisation offers opportunities for more efficient cooperation between social security institutions (through EESSI), which may increase trust and enforcement. It may also be expected that digital PDA1's are more forgery-proof than paper versions, further benefiting the reliability and operation of the social security coordination system. **However, as discussed above, the current ESSPASS initiative is still in the pilot phase, which will be concluded in 2025, only after which the Commission will decide to put forward a (legislative) initiative to introduce ESSPASS.** The EP has expressed its discontent with this timeline.

2.2.3. Moving ahead of ESSPASS

In this context, it is currently being considered **whether Article 15 IR may be amended in the light of the current state of digitalisation** (on the basis of the Single Digital Gateway where the PDA1 will be obtainable in electronic format in 2023, ESSI where the information can be electronically exchanged between relevant social security institutions, and via the current technological infrastructure¹⁶⁵ the trustworthiness of the exchanged documents can be verified), **without explicitly integrating ESSPASS**. The discussions are currently focused on introducing a number of additional steps to be added to the current procedures¹⁶⁶:

¹⁶⁰ Houwerzijl, M., 2015, *A Hunters Game: How Policy Can Change to Spot and Sink Letterbox-Type Practices*, ETUC Report, p. 54.

¹⁶¹ See EP, Legislative Train Schedule, available at: <https://www.europarl.europa.eu/legislative-train/spotlight-JD/file-jd-revision-of-regulation-on-social-security-labour-mobility-package>.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ EBSI, European Blockchain Services Infrastructure.

¹⁶⁶ Council of the EU, 2023, *Revision of social security coordination rules - non-paper on digitalisation opportunities in relation to prior notification and the PDA1*, presidency non-paper, WK 12874/2023 INIT.

1. **Acknowledgment of receipt** following a request for a PDA1 to be issued by the competent social security institution, in a standardised and verifiable electronic format across the EU
 - This would take place via the Your Europe Portal
2. **(Prior) notification** to the receiving Member State about the request for the PDA1
 - This would take place via ESSI
3. Issuing of the **PDA1 in a standardised and verifiable electronic format** (for instance a QR code)
4. - To be verified across the EU using European Blockchain Services Infrastructure

This could be implemented as soon as the social security regulations are revised. To secure timely and effective implementation in all Member States, the co-legislators should then empower the Commission to take legally binding decisions to determine the exact technical details (which could be by means of implementing acts referred to in the new Art 76a BR, which has already been preliminarily agreed between co-legislators)¹⁶⁷. This would also make it possible to take into account the findings of the ongoing ESSPASS piloting exercise¹⁶⁸. **From this perspective, ESSPASS would then be a later 'upgrade' to an already existing 'user journey'.**

The worker would also receive the acknowledgement by email, which can be downloaded on their smartphone or printed on paper¹⁶⁹. Similarly, once the PDA1 is ready, it will be issued to the mobile worker via email, to be printed or downloaded. Crucially, the **PDA1 may not yet have been issued when the worker is inspected by a labour inspector, in which case, the worker will provide the labour inspector with the acknowledgement of receipt as proof that they (or their employer) have requested the PDA1**¹⁷⁰. Through a dedicated verification mobile app, the labour inspector scans the QR code on the acknowledgement or PDA1. The verification mobile app automatically verifies the integrity of the information (checking that the information has not been tampered with), as well as the trustworthiness of the issuing social security institution (checking that the issuer of the document is a known social security institution competent in the legislation applicable domain)¹⁷¹.

2.2.4. Looking ahead

Should the scenario described in the previous section materialise, then the framework within which ESSPASS is being conceived, tested and ultimately launched will be different than initially expected. There would already be an existing digitalised procedure for the PDA1, as well as for the newly introduced acknowledgement of receipt, that would serve one of the major purposes of ESSPASS. The question could then be asked as to what the added value of ESSPASS would still be. Why still go ahead with ESSPASS if the digitalised PDA1 (and acknowledgement of receipt) are already up and running? If ESSPASS would eventually 'take over' the digitalised PDA1 procedure, it would be integrated rather than operate in parallel to the major digitalisation initiative of the EU (the e-ID and Wallet), thus being more 'rationalised' and presumably user-friendly. **The mobile citizen will have, in the Wallet, (the possibility of) a 'one-stop-shop' for their necessary social security documents, including the EHIC, and possibly, in the future also other documentation such as pertaining to labour law entitlements for posted workers (for instance, the declaration of posting, and**

¹⁶⁷ Ibid, p. 2.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid, p. 1.

¹⁷⁰ Ibid, p. 3.

¹⁷¹ Ibid.

possibly the national social IDs and labour cards) and, in the longer term, relating to other issues (e.g. tax).

Indeed, it should be recalled that recently, in its 2024 Work Programme, the Commission indicated that it 'is promoting the timely agreement and widespread implementation of a common form of electronic format' for posted workers' declarations¹⁷². The digitalisation and establishment of a common form is intended to simplify and facilitate the process, which is in line with the stipulation in the Enforcement Directive that 'Member States shall ensure that the procedures and formalities relating to the posting of workers pursuant to this Article can be completed in a user-friendly way by undertakings, at a distance and by electronic means as far as possible'¹⁷³. This administrative simplification would be complemented by development and provision of a multilingual and public interface through which service providers can declare posting of workers, for those Member States that choose to make use of this public interface¹⁷⁴. **It is imaginable that this standardisation and digitalisation of posting declarations could be integrated into the ESSPASS alongside the PDA1 and acknowledgement of receipt thereof, and EHIC, in the future.**

As such, any steps undertaken as described in the previous section to move ahead of ESSPASS, should not come in the place of ESSPASS but instead should lead to a swifter rollout of its extension beyond its current envisaged scope.

¹⁷² European Commission, 2023, Communication on delivering today and preparing for tomorrow (2024 Work Programme), available at https://commission.europa.eu/system/files/2023-10/COM_2023_638_1_EN.pdf, p. 4.

¹⁷³ Article 9(4).

¹⁷⁴ European Commission, 2023, Communication on delivering today and preparing for tomorrow (2024 Work Programme), available at https://commission.europa.eu/system/files/2023-10/COM_2023_638_1_EN.pdf, p. 4.

3. RECOMMENDED CONTENT AND SCOPE OF ESSPASS

KEY FINDINGS

ESSPASS is useful for potentially all mobile citizens as regards health care through the inclusion of EHIC, and as regards social security for all those economically active persons to which an exception to the *lex loci laboris* in EU social security legislation applies. However, the most pronounced added value of ESSPASS lies in the area of posted workers.

Giving posted workers digital ownership of the PDA1 enhances their agency, increasing awareness and involvement of posted workers in the applicable rights and obligations, thereby reducing fraudulent and exploitative practices. Similarly, such practices can be reduced by the secured, transparent, digitalised procedures and documentation at the heart of ESSPASS. It will be important to ensure that legally resident third country nationals have access to the digitalised PDA1s in ESSPASS either directly by including them in the e-ID Regulation, or explicit provision in the ESSPASS legislative initiative.

This would serve not only to protect the posted worker, but all workers on the European labour market(s), by curbing competition on total labour costs through the posting of workers. Even if ESSPASS does not change the fact that there can be competition on labour cost due to the posting exception, it can help combat the abuse of this exception, and thus reduce instances of falsely/undeclared work.

ESSPASS could also help (sometimes under-resourced) labour inspectors and social security institutions in their work and reduce administrative burdens for employers. ESSPASS can thus muster broad support across the political spectrum of stakeholders and MS.

In view of this potential of ESSPASS as a tool for the enforcement of worker rights, it is recommended to include also the documentation concerning (the enforcement of) posted workers labour law entitlements in ESSPASS, especially the posting declarations that MS can require under the Enforcement Directive. The recently announced steps to digitalise and standardise the posting declarations by the Commission in its 2024 Work Programme, will facilitate this extension.

There may be some objections to this extension. By extending to labour law, the name ESSPASS would no longer fit its content. Secondly, the posting declarations and their digitalisation are voluntary for the MS. Finally, it would have to be decided whether all the information in the posting declarations is appropriate to be shared with the posted worker, as currently these declarations are tailored to the employer and not the posted worker. These obstacles can be overcome, but do need careful attention, and therefore it is recommended to include the posting declarations in the conceptualization of ESSPASS already now.

It is more complicated to include national labour cards and/or social IDs in ESSPASS. Their scope is divergent, broad (many different types of information), yet narrow (only applicable to the construction sector). Moreover, MS may be reluctant to standardise these national practices. However, as the construction sector is deeply concerned by posting, and as there is an overlap between the information to be contained in ESSPASS, it could be a missed opportunity not to include it.

The current conception of ESSPASS is dependent on the e-ID, with its proposed 'unique and persistent identifier' which has been flagged as problematic from a data protection perspective. It remains to be seen how this will be addressed in the context of the e-ID itself, and ESSPASS. In view of the principle of data minimisation, it is good that the current conception of ESSPASS does not feature a central repository of all the documents, but instead serves as an intermediary between the posted worker or their employer and the competent social security institutions, or between the patient and the health care provider. It is recommended that the institution requesting the relevant form should not have access to any other forms stored in the person's ESSPASS application or Digital Wallet more generally. Finally, for the digitally vulnerable or those who do not possess a smartphone, it is recommended that the relevant documents should be printable on paper with a verifiable QR-code.

3.1. Envisaged content and scope of ESSPASS

In the Commission's current conception of ESSPASS, set out in the previous two chapters, it is to feature a digital wallet, in which the digitalised PDA1 and EHIC can be stored. It is anchored in the (pending) introduction of the e-ID. The Commission has not committed to a legislative initiative but will consider this once the pilots are concluded in 2025. Neither has the Commission at this stage explicitly committed to extend ESSPASS to pension or labour law entitlements for mobile persons or beyond.

In its resolution in ESSPASS¹⁷⁵, the EP called for a legislative initiative that would make the adoption of ESSPASS mandatory for all Member States and also called for it to cover all mobile EU citizens and workers including the self-employed, as well as all mobile third country nationals who are covered by EU rules on intra-EU mobility. It has endorsed the scope of PDA1 and EHIC, but explicitly 'with a view to being extended to other areas of social security coordination and EU labour law'. It has indicated that ESSPASS should enable real-time verification by the relevant national authorities such as labour and social security inspectorates and social partners (where they are carrying out or involved in labour and social security inspections) of the mobile workers' insurance status and contributions, as well as their place of work, place of employment, employment relationship and identity, compliant with high levels of data protection.

Against this background, this final part of the study will consider the recommended format, scope and content of ESSPASS.

3.2. What should be the scope, content and format of ESSPASS?

3.2.1. ESSPASS as a game-changer especially in the area of posted work

ESSPASS can serve several aims at the same time. It can enhance social security protection for mobile persons, through a reduction of administrative burdens and increased reliability of procedures and documentation. It can serve their (digital) self-sovereignty, as they are in control of the relevant documentation. Such benefits could be welcome in any area of cross-border public services. Perhaps most straightforwardly, applied in the area of health care, it may make cross-border provision easier for all involved – patients, health care providers and social security institutions – through the digitalisation and easy portability and verification of EHIC. Similarly, it would seem desirable to include pensions (the PDP1) in ESSPASS as soon as possible. In principle, it would be interesting to explore all the documents that are to be digitalised under the Single Digital Gateway Regulation, as listed in Annex 1, whether they could be included in a future version of ESSPASS (or the Digital Wallet more broadly). **However, the immediate and real added value of ESSPASS seems to be in relation to the rights and rules applicable to posted workers. In this complex and controversial area, it can be a game-changer.**

Firstly, ESSPASS can enhance social security protection for mobile persons, through a reduction of administrative burdens and increased reliability of procedures and documentation. It can serve their (digital) self-sovereignty, as they are in control of the relevant documentation, which especially for posted workers is significant as empirical evidence suggests that they are often not (sufficiently) informed and empowered in terms of their social security rights and the obligations that apply to their activities for their employer in a posting situation¹⁷⁶. **ESSPASS may thereby increase awareness and involvement of the posted worker and thereby reduce fraudulent and exploitative practices.**

¹⁷⁵ EP, 2021, *Resolution of 25 November 2021 on the introduction of a European social security pass for improving the digital enforcement of social security rights and fair mobility (2021/2620(RSP))*.

¹⁷⁶ Houwerzijl, M., 2018, 'Improving cross-border social security', in: Buelen, W. (ed), *Putting an end to cross-border social security fraud and abuse*, European Federation of Building and Woodworkers (EFBWW), p. 42.

Similarly, such practices can be reduced by the secured, transparent, digitalised procedures and documentation at the heart of ESSPASS.

The reduction of fraudulent and exploitative practices can moreover **serve not only to protect the posted worker, but all workers on the European labour market(s) more generally, by curbing competition on total labour costs** through the posting of workers.

It should be acknowledged that as long as there is a posting exception from the *lex loci laboris*, there will be a possibility for employers to use the differential in social security costs in one Member State (with lower social security contributions) to compete on price with employers and workers in another Member State (with higher social security contributions) through the posting of workers from the former to the latter. ESSPASS as such will not change this, and neither will the revision of the social security regulations to the extent that it will not abolish the exception. But empirical evidence has showed that beyond the (from a social protection not unproblematic) legal use of the short posting exception, the incentives that have been created by the concept of posting feed into problematic practices of exploitation and the illegal use of posting as a deliberate business model to exploit cost-differentials¹⁷⁷. **By combating at least fraudulent use of the posting exception, ESSPASS will thus serve the interest of all workers across the EU.**

ESSPASS can furthermore help (sometimes under-resourced) labour inspectors and social security institutions in their work, which may help them in performing their tasks in social security coordination more effectively and efficiently – which again may feed back into an enhanced enforcement of the social security (and other) rights and protections for workers in Europe. On top of that, **ESSPASS can reduce administrative burdens for employers** in this context, facilitating their freedom to provide services. Very often in this area, the interest of workers and employers conflict, so it is particularly attractive that digitalisation benefits all. ESSPASS can thus muster broad support across the political spectrum of stakeholders and Member States.

3.2.2. Scope: what persons should be included?

Apart from EU citizens, **it will be important to include all mobile third country nationals who are covered by EU rules on intra-EU mobility, as also the EP has emphasised.** The PDA1 applies to the people to which the limited exceptions from the *lex loci laboris* in social security apply, especially those who remain affiliated to the social security system of their home Member State instead of the Member State where they temporarily work (as workers or self-employed). This includes persons of any nationality, as Regulation 1231/2010 extends the BR and IR to nationals of third countries, provided that they are legally residing and working in the territory of the Member States¹⁷⁸. It will be important therefore that the ESSPASS application is made available to them.

A possible difficulty is that the ESSPASS depends on the e-ID and Digital Wallets. As discussed in Chapter 1, the proposed e-ID Regulation has the purpose of ensuring that all natural and legal persons in the Union have secure, trusted and seamless access to cross-border public and private services and does not only apply to EU Citizens but also 'other residents'. A key question is, however, whether it is left to Member States to determine which other residents qualify. Currently, access to national digital identity services for third country nationals is patchy¹⁷⁹. If the new rules leave it to the Member States

¹⁷⁷ Houwerzijl, M., 2015, *A Hunters Game: How Policy Can Change to Spot and Sink Letterbox-Type Practices*, ETUC Report, Buelen, W. (ed), *Putting an end to cross-border social security fraud and abuse*, European Federation of Building and Woodworkers (EFBWW).

¹⁷⁸ Case C-523/20, *Koppány*, EU:C:2021:160.

¹⁷⁹ See Vassor, E., 2023, *Access to Digital identity for People on the Move in Europe*, International Organization for Migration, Geneva, <https://publications.iom.int/books/access-digital-identity-people-move-europe>, and European Migration Network, 2023, *Ad Hoc Query*

to decide which 'residents' can access the Digital Wallet, it would possibly mean that legally resident third country nationals, for whom ESSPASS could be of high salience since they may be posted to another MS and in need of a PDA1¹⁸⁰, would not have digital access to it.

This should be avoided, by making sure that Member States are obliged to make the necessary components of the Digital Wallet available to all those persons to whom a PDA1 (as well as any other documents to be included in ESSPASS) applies. Such access will need to be ensured if not directly by including them in the e-ID Regulation, then through explicit provision in the ESSPASS legislative initiative.

3.2.3. Content: what documents should be included?

ESSPASS' current content consists in the EHIC and the PDA1. As regards the EP's request that ESSPASS should possibly be **extended to EU labour law**, it is recommended that already now the design of ESSPASS includes the declarations of posting (sub-section a, below) and that further research is commissioned to explore the feasibility and desirability of the inclusion of social IDs/labour cards for the construction sector (sub-section b, below). This should allow ESSPASS to be used as a tool to fight non-compliance with the terms and conditions of employment, including wage-setting mechanisms, in place in the host Member State.

a. Recommended extension of ESSPASS to declarations of posting

Beyond the EHIC and the PDA1, it would seem particularly **interesting to include also the documentation concerning (the enforcement of) posted workers labour law entitlements in ESSPASS**. This applies most evidently to the **posting declarations** that Member States can require in the context of the Enforcement Directive. Like the PDA1, it is an obligation that rests in the first place on the employer, as Article 9(1)(a) of the Enforcement Directive provides 'an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision'. However, this does not prevent the declaration, like the PDA1 under the current conception of ESSPASS, being made available to the posted worker him/herself as well. This would fit precisely with the objective of making the individual mobile person – the posted worker – more central, empowered and (digitally) sovereign, something that has been lacking due to the peculiar way in which this area of EU (case) law has been structured about posted workers but without their direct involvement.

The recently announced steps to digitalise and standardise the posting declarations by the Commission in its 2024 Work Programme¹⁸¹, will facilitate this extension. **The digitalisation of a common form means that it would be relatively straightforward to include this in the ESSPASS documents that people can keep in their Digital Wallets on their smartphone**. This would, of course, further simplify the cross-border administration for posted workers, as well as for employers, social security institutions and labour inspectors. It would really mean that ESSPASS becomes a one-stop-shop for the working conditions, including social security, of the posted worker.

One objection could be that by extending to labour law, the name ESSPASS would no longer fit its content – something that should not stand in the way of an otherwise sensible development that

on digitalisation of identity documents and residence permits issued to third country nationals, <https://emnbelgium.be/publication/ad-hoc-query-digitalisation-identity-documents-and-residence-permits-issued-third>.

¹⁸⁰ Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ 2010 L 344, p. 1). See Case C-477/17, *Balandin*, EU:C:2019:60. See further Section 2.1.2. below.

¹⁸¹ European Commission, 2023, Communication on delivering today and preparing for tomorrow (2024 Work Programme), https://commission.europa.eu/system/files/2023-10/COM_2023_638_1_EN.pdf, p. 4.

would increase the initiative's effectiveness and potentially make a real difference in this complex area for all the relevant parties involved. **At this early stage in the project, moreover, the name can easily be changed.**

Another obstacle might lie in the fact that, at least currently, Member States may voluntarily decide whether to participate in this upcoming initiative for digitalisation and standardisation of the posting declarations. Indeed, Member States do not have to demand posting declarations under the Enforcement Directive, they may. Yet that does not seem to be an unsurmountable obstacle. **ESSPASS could include the digitalised posting declarations for those Member States that do require them or that participate in the digitalisation initiative.**

A final complication concerns the information provided in the declaration of posting, and which would then become available to the posted worker. In accordance with Article 9(1)(a), it may include information about 'the anticipated number of clearly identifiable posted workers' and a contact person¹⁸². While nothing stands in the way of the posted worker being informed about a contact person (this instead seems to be a rather positive development), **it may not be considered necessary to provide the details of all workers posted by the employer to the posted worker concerned** (although it could be argued that such transparency may also benefit the posted worker). However, **it could be explored how to adapt that aspect of the declarations of posting for the purposes of ESSPASS specifically**, so that the posted worker receives an adjusted copy of the posting declaration that does not contain this section of information.

It is precisely **in light of these questions of compatibility and coherence**¹⁸³, **which can be overcome but do need careful attention, that it would be good to include the posting declarations in the conceptualisation of ESSPASS already now.** Although it is not impossible to them at a later stage, after the standardisation and digitalisation of declarations of posting has been completed, it would seem more efficient and effective to work on this in an integrated manner from the outset. Including this aspect of cross-border work-related administration for posting in the ESSPASS initiative by design rather than as a possible later addition, may avoid potential unnecessary inconsistencies and incoherence. It may then also be possible to change the name before the actual launch, to make clear it does not only concern social security, something along the lines of a **'EMPASS' (European Mobility Pass)**. As the Commission is not currently taking the initiative forward and is instead awaiting the results of the pilot projects, it could be advisable to add another pilot project with a view to this re-conceptualisation of an extended digital pass for mobile persons, especially posted workers (as this is there that the true added value of the initiative lies).

b. Extension of ESSPASS to national labour cards/social IDs?

The recommended extension of ESSPASS to the area of labour law entitlements of posted workers rather than only social security status, begs **the question whether also the national labour cards and/or social IDs should be included simultaneously.** To recall, labour cards and social ID cards are 'individualised worker certification tools which contain visible and safely stored electronic data that aim to attest that specific social and/or other (e.g. professional qualifications, OSH training, social protection/security issues) requirements have been met by the worker's employer and/or the

¹⁸² Under Article 9(1)(e) and (f), Member States can impose an obligation to designate a person to liaise with the competent authorities in the host MS in which the services are provided and to send out and receive documents and/or notices, if need be; and an obligation to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host MS, in accordance with national law and/or practice, during the period in which the services are provided. That person may be different from the person referred to under point (e) and does not have to be present in the host MS, but has to be available on a reasonable and justified request.

¹⁸³ See also Annex 2 for a comparison between the PDA1 and declarations of posting.

worker'¹⁸⁴. They are widely used across the EU especially in the construction sector¹⁸⁵, and several Member States that do not have them yet, are considering introducing them in that area¹⁸⁶. The cards are checked during inspections on construction sites to confirm the legal status of (posted) workers and thus help in detecting undeclared work¹⁸⁷.

It would be **less straightforward to include national labour cards and/or social IDs in the ESSPASS project**. Firstly, national practices diverge significantly and there is not, contrary to the posting declarations, a demarcated EU-level framework in which they operate. Furthermore, the information contained on these cards may be (much) more extensive than on the declarations of posting or the PDA1: it may pertain to diplomas and training as well as occupational health and safety, which complicates the picture. Moreover, the cards are widely used, but largely limited to one specific sector: construction. That suggests **their scope is both too broad (many different types of information), and too narrow (only applicable to the construction sector), to easily include in ESSPASS**. Moreover, Member States (as well as social partners) may be reluctant to engage in a standardisation of these national practices, as this may **be felt as a limitation of their autonomy and discretion in a sensitive area**.

On the other hand, the argument could be made that as **the construction sector is one of the sectors most deeply concerned by posting, and as there is an overlap between the information to be contained in ESSPASS** (personal details, information concerning employment status, attestation of social security status) and its possible extension (duration and justification of the posting, for the purposes of labour law entitlements), **it would be a missed opportunity not to include it**. Currently, the Commission is funding a social partner pilot concerning labour cards and/or social IDs in the construction sector. In this context, the Commission could **consider studying more specifically, in close cooperation with the social partners and Member States, what would be the possibility, feasibility and desirability of configuring ESSPASS in a way that could also – where Member States wish to – accommodate digitalised labour cards and/or social IDs**.

3.2.4. What should be format and function of ESSPASS?

In its resolution in ESSPASS¹⁸⁸, the EP notably called for a legislative initiative that would make the adoption of ESSPASS mandatory for all Member States. It also indicated that ESSPASS should enable real-time verification by the relevant national authorities such as labour and social security inspectorates and social partners (where they are carrying out or involved in labour and social security inspections) of the mobile workers' insurance status and contributions, as well as their place of work, place of employment, employment relationship and identity, compliant with high levels of data protection.

The Commission has not yet indicated whether and in what legal form it will take ESSPASS forward after the pilot phase. In light of what has been set out above, it is recommended to adopt ESSPASS by

¹⁸⁴ European Federation of Building and Woodworkers, 2015, *Social Identity Cards in the European Construction Sector*, Final Report, available at: <https://www.ela.europa.eu/en/news-event/newsroom/report-digitally-accessible-and-understandable-information-promoting-cross>.

¹⁸⁵ Ibid, See also Williams, C., 2022, *Comparative study of the use of social identity cards in the construction sector in various European countries*, Technical Report, available at: https://www.researchgate.net/publication/357621579_Comparative_study_of_the_use_of_social_identity_cards_in_the_construction_sector_in_various_European_countries.

¹⁸⁶ European Labour Authority, 2023, *Construction sector: Issues in information provision, enforcement of labour mobility law, social security coordination regulations, and cooperation between MSs*, Luxembourg: Publications Office of the European Union, p. 40.

¹⁸⁷ Ibid, p. 6.

¹⁸⁸ EP, resolution of 25 November 2021 on the introduction of a European social security pass for improving the digital enforcement of social security rights and fair mobility ([2021/2620\(RSP\)](#)).

means of **a binding legal measure in order to fully reach the potential of the initiative to on the one hand provide a user-friendly mobility tool for citizens and workers, and on the other hand to function as a digital enforcement tool** for social security rights (and labour rights, as recommended).

The Commission envisages that ESSPASS would enable real-time verification by the relevant national authorities of the mobile workers' insurance status, their place of work, place of employment, employment relationship and identity, through the verification of the authenticity of the PDA1. This will, as explained previously, **help combat abuse of the posting exception in social security legislation and fraudulent posting**.

However, **ESSPASS as such does not allow a verification of the actual payment of social security contributions by the employer**, as this is not covered by the PDA1. While a 'receipt or other form of confirmation of payment of social contributions for employees' is listed in Annex 2 of the Single Digital Gateway Regulation, and thus will have to be made digitally available by the Member States, the current EU social security legislation does not provide that host State institutions can require that documentation from the employers of posted workers or home State institutions.

The EP has also indicated that ESSPASS should allow verification by not only labour and social security inspectorates but also social partners - where they are carrying out or involved in labour and social security inspections, an issue that is related to another requirement specified by the EP, namely that all this should be compliant with high levels of data protection. This will be assessed in the following section.

3.3. ESSPASS and data protection

As was outlined in Chapter 1, the ESSPASS initiative sits within a broader context of evolving digital technologies and policies, with the explicit intention to harness the efficiency, reliability and user-friendliness potential that digitalisation brings to the complex field of social security coordination. In its current conception, ESSPASS would be integrated in the European Digital Identity Wallet, meaning that its verification would be connected to the EU e-ID and that it would sit alongside a wide range of digital documents. The ESSPASS itself may contain several documents for a single person, such as a PDA1 and an EHIC.

Digitalisation of identity and (sensitive) personal information inevitably raises the issue of fundamental rights in relation to data. The most relevant, in this context, are concerns about the unique identifiers used in relation to the e-ID from a perspective of human dignity, concerns of potential 'over-identification' from a perspective of the data minimisation because of the centralised storage of several types of data, and the question of inclusion of people who cannot or do not want to participate in the digitalisation of their identity, and who should be able to access the information. It would seem that **none of these concerns are an unsurmountable legal obstacle to ESSPASS, depending on how it is operationalised.**

3.3.1. Unique and persistent identifier

As mentioned above, for the e-ID Wallet, the current proposal envisages that the Wallet should 'ensure that the person identification data uniquely and persistently represent the natural or legal person associated with it', and to that end **a single and unique identifier to be used by Member States**. This identifier would for instance be used when adding electronic attestations of attributes to a Wallet. As

many have noted¹⁸⁹, including the European Data Protection Supervisor¹⁹⁰, this provision constitutes an additional category of data stored solely for the purpose of facilitating the usage of the Wallet and such an 'interference with the rights and liberties of the data subject is not necessarily trivial'¹⁹¹. Various amendments proposed by the European Parliament have focused on **removing this identifier**, as a disproportionate interference with the right of personality and human dignity, that would be considered unconstitutional in at least some Member States.

For instance, **in Germany, using a general unique identification number is prohibited**¹⁹². Persistent identifiers do exist in Germany (e.g. the Tax ID number) but these are restricted in their purpose and may not be used for anything else, begging the question 'how far the seeming requirement for a persistent unique identifier in the EDIR can conform to the German prohibition of unique personal identifiers'¹⁹³. The reason is that 'a societal order, and its underlying legal order, would not be compatible with the right to informational self-determination if citizens were no longer able to tell who knows what kind of personal information about them, at what time and on which occasion'¹⁹⁴. According to the German Constitutional Court, 'In the context of modern data processing, the free development of one's personality therefore requires that the individual be protected against the unlimited collection, storage, use and sharing of their personal data.... In this regard, the fundamental right confers upon the individual the authority to, in principle, decide themselves on the disclosure and use of their personal data'¹⁹⁵.

It has been argued that the single and unique identifier is not necessary for the e-ID Wallet to function. It remains to be seen what the final text as adopted will provide in this context, and what digital solutions can be found to nevertheless secure an effective operation of the initiative. This also affects ESSPASS. **While the digitalisation of PDA1 and EHC as such is not dependent on the Wallet, the current conception of ESSPASS as a whole is intrinsically connected, and dependent, on it. This means that the data protection issues faced by the e-ID Wallet, also indirectly apply to ESSPASS, even if ESSPASS itself does not include a unique identifier and in fact abandoned the 'European Social Security Number'**. In fact, an ESSN – although also a unique and persistent identifier - could be considered less intrusive than an e-ID that applies to all public services, as it would have been more specific and thus more contained and proportionate.

3.3.2. Data minimisation

An important principle of EU data protection law is data minimisation¹⁹⁶, i.e. **personal data must be 'adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed'**, and a data controller should limit the collection and retention of personal information to what is directly relevant and necessary to accomplish a specified purpose. This is a relevant principle

¹⁸⁹ See for instance Fratini, A., and Lo Tauro, G., 2022, *To Use or Not to Use the European Digital Identity Wallet: Data Protection issues in the ongoing legislative debate*, EU Law Analysis, available at: <https://eulawanalysis.blogspot.com/2022/08/to-use-or-not-to-use-european-digital.html>.

¹⁹⁰ Formal comments of the EDPS on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity, available at: https://edps.europa.eu/system/files/2021-07/21-07-28_formal_comments_2021-0598_d-1609_european_digital_identity_en.pdf.

¹⁹¹ Ibid.

¹⁹² Based upon the German Federal Constitutional Court's judgments, notably the Judgment of 15 December 1983 ([population Census decision](#), Hornung, G., Schnabel, C.: Data protection in Germany I: The population census decision and the right to informational self-determination. Computer Law & Security Review 25(1), 84–88 (2009).

¹⁹³ See Bilgesu Sümer, B., and Schroers, J., 2021, the new digital identity Regulation proposal and the EU data protection Regime, KU Leuven, available at: <https://www.law.kuleuven.be/citip/blog/the-new-digital-identity-regulation-proposal/>.

¹⁹⁴ Judgment of the First Senate of 15 December 1983 1 BvR 209, 269, 362, 420, 440, 484/83 para. 14.

¹⁹⁵ Ibid, para. 147.

¹⁹⁶ Article 5(1)(c) of the GDPR and Article 4(1)(c) of Regulation (EU) 2018/1725.

for the e-ID Wallets, as well as for ESSPASS itself. The very nature of the initiative is that various elements of sensitive personal data will be digitally stored, in a central place. However, it has been argued that 'currently, the personal data of every citizen is stored in private and public databases. **With the identity wallet, they will be decentralised, with individuals able to manage them on their own smartphone**'¹⁹⁷.

Crucially, **the application will not feature a central repository of all the documents**, but instead serves as an intermediary between the posted worker or their employer and the competent social security institutions, or between the patient and the health care provider. This model will serve the '**self-sovereignty**' of the person, who can themselves decide to share it when requested. '**Thanks to selective disclosure functions, the user regains control over their digital life, personal data and the dissemination of this data**'¹⁹⁸. **The institution requesting the relevant form will not have access to any other forms stored in the person's ESSPASS application or Digital Wallet more generally.**

The 'self-sovereignty' argument does beg the question **to what extent the individual should be able to opt out of the digitalisation of their identities altogether and insist on paper processing**, either for reasons of digital vulnerability or personal preference. Concretely, should the employer or posted worker requesting a PDA1 be able to insist on a paper-based process? This would not seem either warranted or realistic. The digitalised procedure will reduce administrative burdens precisely for the employer and posted worker. In case a person does not have the digital capacities to file the request, their employer can (and must) do so for them. In case the person concerned does not possess a smartphone or other device that can access the documents in the Wallet, the relevant forms can be printed out. Via the QR-code, their veracity can be checked with the competent social security institution. For that purpose the social security institution will need to have a digital version of the relevant form in their system, but this would seem to be a legitimate use of personal data in the public interest.

As to who should be able to access the information, it may be asked whether also social partners should be able to access the information in ESSPASS when they are in their national system tasked with carrying out, or involved in, labour and social security inspections. **Considering the fact that ESSPASS does not feature a central repository of information, but instead provides the mobile person themselves with the documentation, there would seem to be no problem in using ESSPASS in the same way as the current paper documentation is used. If, under national law social partners have a role in inspections, they should be able to ask the employer/posted worker for the relevant PDA1 regardless of whether it is in paper or digital format.**

3.4. Concluding recommendations

To conclude, the real added value of ESSPASS seems to lie in the area of posted work. In this complex and controversial area, it can be a game-changer.

Firstly, ESSPASS can serve the (digital) self-sovereignty of posted workers, as they are in control of the relevant documentation, which especially important, as they are often not informed of their social security rights and the obligations that apply to their employer. ESSPASS may thereby increase awareness and involvement of the posted worker and thereby reduce fraudulent and exploitative

¹⁹⁷ Thompsett, L. 2023, *IDnow: Selective disclosure in the identity wallet*, FinTech, available at: <https://fintechmagazine.com/articles/idnow-selective-disclosure-in-the-identity-wallet>.

¹⁹⁸ Ibid.

practices. Similarly, such practices can be reduced by the secured, transparent, digitalised procedures and documentation at the heart of ESSPASS. It will therefore be important that all persons for whom ESSPASS could be useful because the EHIC or PDA1 applies to them, should have access to ESSPASS. This point deserves some specific attention in the case of legally resident third country nationals, who may be posted to another Member State and to whom the PDA1 applies, but who may not be automatically entitled to an e-ID and Digital Wallet. Such access will need to be ensured if not directly by the e-ID Regulation, then through the ESSPASS legislative initiative.

The reduction of fraudulent and exploitative practices can moreover serve not only to protect the posted worker, but all workers on the European labour market(s) more generally, by curbing competition on total labour costs through the posting of workers. Even if ESSPASS does not change the fact that there can be competition on labour cost as a result of the posting exception, it can help combat the abuse of this exception. ESSPASS can furthermore help (sometimes under-resourced) labour inspectors and social security institutions in their work, and reduce administrative burdens for employers. ESSPASS can thus muster broad support across the political spectrum of stakeholders and Member States.

As such, it would seem attractive to include also the documentation concerning (the enforcement of) posted workers' labour law entitlements in ESSPASS, the posting declarations that Member States can require in the context of the Enforcement Directive. The recently announced steps to digitalise and standardise the posting declarations by the Commission in its 2024 Work Programme, will facilitate this extension. This would further simplify the cross-border administration for posted workers, as well as for employers, social security institutions and labour inspectors. It would really mean that ESSPASS becomes a one-stop-shop for the working conditions, including social security, of the posted worker.

There may be some objections to this extension. One could be that by extending to labour law, the name ESSPASS would no longer fit its content. Secondly, the posting declarations and their digitalisation are voluntary for the Member States. Finally, it would have to be decided whether all the information in the posting declarations is appropriate to be shared with the posted worker. These obstacles can be overcome, but they do need careful attention, and therefore it would be good to include the posting declarations in the conceptualisation of ESSPASS already now.

It is more complicated to include national labour cards and/or social IDs in ESSPASS. Their scope is too divergent, too broad (many different types of information), and too narrow (only applicable to the construction sector). Moreover, Member States (as well as social partners) may be reluctant to engage in standardisation of these national practices, as this may be perceived as limiting their autonomy and discretion in a sensitive area. Still, it could be argued that as the construction sector is so deeply concerned by posting, and as there is an overlap between the information to be contained in ESSPASS, it would be a missed opportunity not to include it. This is an issue that therefore deserves further study and exploration.

Finally, the perspective of data protection should be addressed. While the digitalisation of PDA1 and EHIC as such is not dependent on the Digital Wallet, the current conception of ESSPASS as a whole is intrinsically connected, and dependent, on the e-ID. This means that the data protection issues currently faced by the e-ID Wallet, also apply indirectly to ESSPASS. The main issue in that regard is the unique and persistent identifier proposed for the e-ID, which has been flagged as problematic from a data protection perspective. It remains to be seen how this will be addressed in the context of the e-ID itself, and ESSPASS.

As regards the principle of data minimisation there do not seem to be any problematic issues. With the identity wallet, data will be decentralised, with individuals able to manage the documents on their own

smartphone. Crucially, the application will not feature a central repository of all the documents, but instead serves as an intermediary between the posted worker or their employer and the competent social security institutions, or between the patient and the health care provider. The institution (which may be the social partners in cases where they have a role in labour or social security inspections under national law) requesting the relevant form will not have access to any other forms stored in the person's ESSPASS application or Digital Wallet more generally. For the digitally vulnerable or those who do not possess a smartphone, the relevant documents should be printable on paper. Via a QR-code, their veracity can be checked with the competent social security institution. The latter will need to have a digital version of the relevant form in their system for that purpose, but this would seem to be a legitimate use of personal data in the public interest.

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ANNEX 1 – LIST OF PROCEDURES TO BE OFFERED FULLY ONLINE IN ACCORDANCE WITH THE SINGLE DIGITAL GATEWAY REGULATION¹⁹⁹

Life events	Procedures	Expected output subject to an assessment of the application by the competent authority in accordance with national law, where relevant
Birth	Requesting proof of registration of birth	Proof of registration of birth or birth certificate
Residence	Requesting proof of residence	Confirmation of registration at the current address
Studying	Applying for a tertiary education study financing, such as study grants and loans from a public body or institution	Decision on the application for financing or acknowledgement of receipt
	Submitting an initial application for admission to public tertiary education institution	Confirmation of the receipt of application
	Requesting academic recognition of diplomas, certificates or other proof of studies or courses	Decision on the request for recognition
Working	Request for determination of applicable legislation in accordance with Title II of Regulation (EC) No 883/2004	Decision on applicable legislation
	Notifying changes in the personal or professional circumstances of the person receiving social security benefits, relevant for such benefits	Confirmation of receipt of notification of such changes
	Application for a European Health Insurance Card (EHIC)	European Health Insurance Card (EHIC)
	Submitting an income tax declaration	Confirmation of the receipt of the declaration
Moving	Registering a change of address	Confirmation of deregistration at the previous address and of the registration of the new address
	Registering a motor vehicle originating from or already registered in a MS, in standard procedures	Proof of registration of a motor vehicle
	Obtaining stickers for the use of the national road infrastructure: time-based charges (vignette), distance-based charges (toll), issued by a public body or institution	Receipt of toll sticker or vignette or other proof of payment
	Obtaining emission stickers issued by a public body or institution	Receipt of emission sticker or other proof of payment

¹⁹⁹ Single Digital Gateway Regulation, ANNEX II 'Procedures referred to in Article 6(1)'.

Retiring	Claiming pension and pre-retirement benefits from compulsory schemes	Confirmation of the receipt of the claim or decision regarding the claim for a pension or pre-retirement benefits
	Requesting information on the data related to pension from compulsory schemes	Statement of personal pension data
Starting, running and closing a business	Notification of business activity, permission for exercising a business activity, changes of business activity and the termination of a business activity not involving insolvency or liquidation procedures, excluding the initial registration of a business activity with the business register and excluding procedures concerning the constitution of or any subsequent filing by companies or firms within the meaning of the second paragraph of Article 54 TFEU	Confirmation of the receipt of notification or change, or of the request for permission for business activity
	Registration of an employer (a natural person) with compulsory pension and insurance schemes	Confirmation of registration or social security registration number
	Registration of employees with compulsory pension and insurance schemes	Confirmation of registration or social security registration number
	Submitting a corporate tax declaration	Confirmation of the receipt of the declaration
	Notification to the social security schemes of the end of contract with an employee, excluding procedures for the collective termination of employee contracts	Confirmation of the receipt of the notification
	Payment of social contributions for employees	Receipt or other form of confirmation of payment of social contributions for employees

ANNEX 2 – OVERVIEW OF APPLICABLE PROVISIONS TO POSTED WORKERS

Rights of posted workers	Applicable Legislation		Applicable Documentation		
	EU	National	Document	Timing	Information
Social security	BR, IR	Posting up to 24 months: Home State	PDA1	'Whenever possible in advance' of the posting	<ul style="list-style-type: none"> - Personal details of the holder (name, nationality, birthdate/place, address in home and host states) - Applicable MS legislation - Status² - Details of employer - Details of issuing institution
		Posting longer than 24 months: Host State	n/a	n/a	n/a
Terms and conditions of employment	Posting Directive, Enforcement Directive	Posting up to 12 months: Core terms and conditions of employment of Host State	Declaration of posting	At the commencement of the posting ¹	Information necessary in order to allow factual controls at the workplace, including: ³ <ul style="list-style-type: none"> - identity of service provider - number of clearly identifiable posted workers - contact/liaison persons - dates of posting - address of the workplace - nature of the services justifying posting
		Posting over 12 months: All terms and conditions of employment of Host State			

Source: Author's own elaboration.

Note 1: This depends on national law, as Member States are not obliged but merely given the option to require such a declaration. They may moreover require such a declaration but be more flexible on the timing, allowing it to be made even after the commencement of the posting. They may not require it before the commencement of the posting.

Note 2: This can be the status of posted worker, posted self-employed, civil servant, mariner, employed working in 1+ MS, contract staff, flight crew member, or an 'exception'.

Note 3: This depends on national law, as Member States are not obliged but merely given the option to require such a declaration. They may, but do not have to, require the information listed. At the same time, other information may be required to the extent that it is 'necessary in order to allow factual controls at the workplace'.

This study considers the potential of the European Social Security Pass (ESSPASS) as a tool for the enforcement of labour and social security rights. It explains the challenges in social security coordination and considers whether the current conceptualisation of ESSPASS can alleviate these problems. To increase ESSPASS' effectiveness, this study recommends expanding the current scope to include documents pertaining not only social security and health care but also to labour law, notably the national declarations of posting.

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