SENSE PROJECT – BELGIAN POSITION PAPER

Labour and Social Security Law in Transnational European Road Transport from the Perspective of Belgium

By: Dorien Willemen, Mohamed Lamkoref, Irem Güzel and Lucas Van Geel, University of Antwerp. Last updated in March 2019

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1 INTRODUCTION

1.1 SENSE PROJECT

This position paper is written in light of the SENSE project. SENSE is a project funded by the European Commission to research on the topic of European transport legislation. This project aims to contribute to resolve problems in the field of EU transnational road transport by contributing to the understanding of the legal setting at the national, EU and comparative level.[1]

1.2 OBJECTIVES OF THE POSITION PAPER

The purpose of this position paper is to provide a better understanding of the position of the Belgian official institutions and stakeholders regarding transnational road transport from the perspective of labour and social security law, within the EU. This will be achieved through scrutiny of the situation from a legal (chapter 2), social (chapter 3) and political (chapter 4) perspective. More specifically, it will try to define the current situation, offer insight into the underlying reasons for this situation, detect occurring problems and offer potential solutions. Lastly, a conclusion indicating potential ways forward is presented (chapter 5).

1.3 METHODOLOGY

In light of the objectives of this research, we were compelled to employ empirical research methods. Since we are interested in an in-depth understanding of a situation in a well-defined, particular space and time, we opted for qualitative empirical research. To gather our data, we conducted several semi-structured interviews with a selection of key stakeholders.

These semi-structured interviews comprised of 16 open-ended questions[2], which aim to introduce the different topics. These topics were chosen in such a way that they would enable us to fully reflect the Belgian position regarding transnational road transport in the EU from the perspective of labour and social security law, including legal, political and social discussions.

Questions were formulated in such a way that they would not influence the answers of the respondents. During the interviews, which lasted on average about one and a half hours, the respondents were given the liberty to digress or elaborate on certain topics. If it was deemed that the position or opinion of a respondent was unclear, targeted follow-up questions were asked.

[1] European Union, Project Sense, available at: http://www.project-sense.eu/ (last accessed: 24 December 2018).
[2] See Annex I for an overview of the questions.

The participants of the interviews were carefully selected to ensure representation of all different types of actors involved in Belgium. Four different types of actors were identified: governmental agencies, trade unions, employers' organisations and transport companies. Below, we will describe the different actors that participated in our research.

Governmental agencies

Cabinet of Mr. De Backer: (*Kabinet de Heer Philippe De Backer)* Belgian minister competent for, amongst others, social fraud.

Office of the Labour Prosecutor (*arbeidsauditoraat*) of Ghent: specialised section of the public prosecutor's office, competent with the enforcement of labour and social security laws.

Belgian Federal Public Service of Employment, Labour and Social Dialogue: ('SPF ELS') (*Federale overheidsdienst Werkgelegenheid, arbeid en sociaal overleg: 'FOD WASO'*): Public Service at the federal level, competent to ensure the balance between employees and employers in their employment relationship. To achieve this, they have the mandate to conduct inspections, negotiations and impose administrative fines.

Trade unions

ACV-Transcom: Trade federation that promotes the interests of employees in, amongst others, the transport sector. It is connected with ACV, a trade union that was founded upon Christian morals, while remaining open for people with other beliefs.

BTB–ABVV *(Belgische Transportbond)*; Trade federation that promotes the interests of employees in, amongst others, the transport sector. It is connected with ABVV, the federal socialist trade union.

Employers' organisations

Transport en Logistiek Vlaanderen: Association that represents over 1,500 Flemish companies in transport and logistics, both self-employed, family-owned and large companies.

Febetra: Promotes the interests of the Belgian sector of transport of goods by road.

Transport companies

Informal interviews with two transport companies were held to fully understand their position as a stakeholder in the debate. However, these companies wished to remain anonymous. In order to guarantee the transparency and reliability of our research, the decision was taken to not directly include their answers in our position paper. Nonetheless, their input was used to get a better understanding of the subject matter and to confront the other stakeholders during their interview.

2 LEGAL PERSPECTIVE

In chapter two, the Belgian position regarding EU road transport will be scrutinised from a legal perspective. It will consecutively address: The EU legislative framework in practice (chapter 2.1), enforcement of labour and social security law (chapter 2.2), inspection of labour and social security standards (chapter 2.3) and particularities of Belgian case law (chapter 2.4).

2.1 EU LAW RELATED TO CROSS-BORDER ROAD TRANSPORT

2.1.1 LABOUR LAW IN PRACTICE

2.1.1.1 LEGAL CONTEXT

IMPLEMENTATION - The European Union provisions relevant for cross-border road transport are the fundamental freedoms, the rules of private international law (PIL), social security coordination rules and the rules on posting of workers. Contrary to the freedoms, PIL and social security coordination rules which can be found in the Treaty and in Regulations, the Posting of Workers Directive (PWD)[3] and the Posting of Workers Enforcement Directive (PWED)[4] were adopted through Directives. Consequently, the nature of this instrument allows the Member States (MS) to choose the means to achieve the goals of the Directive.

OVERVIEW - Firstly, this chapter will discuss the issues with regard to the posting of workers in Belgium, followed by an analysis of the legal instruments implementing EU law relating to those issues. In this, the primary focus will be on the implementation of PWD and the PWED. Additionally, other relevant legal measures will be briefly mentioned as well. The rules with regard to social security will be discussed in the next title of this chapter.

2.1.1.2 ISSUES REGARDING POSTING OF WORKERS

LETTERBOX COMPANIES - One of the most prominent issues are letterbox companies posting workers to Belgium. Indeed, the high wages and labour standards in Belgium brought a substantial number of companies to set up letterbox companies in low-wage Eastern-European MS from which they post their workers to Belgium. As these practices became apparent and were widely condemned, the mere letterbox companies nowadays transformed into more complex corporate structures. Furthermore, there are currently greater efforts to create the impression of a genuine establishment. While at first this tactic was

[3] 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, *OJ L* 1997, 18, p. 1-6.
[4] 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'), *OJ L* 2014, 159, p. 11–31.

primarily adopted by undertakings that were initially situated in Western MS, it has subsequently been used by undertakings from other states too. As a result, this practice has spread throughout the EU, creating a climate of fierce competition by which many small Belgian companies feel pressured to adopt similar tactics in order to maintain their competitive position.

BOGUS SELF-EMPLOYMENT - Another issue is bogus self-employment. In these cases, it is argued that a posted worker in the meaning of the PWD has self-employed status while in reality there is an employment relationship between the posted workers and an employer. This was for example the case in a judgement of the Court of Appeal of Ghent.[5] The judgement considered Slovakian construction workers who claimed they were self-employed, whereas the facts of the case clearly demonstrated the existence of an employment relationship. In these cases, Belgian labour law allows for the requalification of the self-employed status to an employment agreement.

CABOTAGE - A last point worth mentioning are issues raised with regard to cabotage. Cabotage is the transport of goods between two locations both situated in one MS, operated by a transport company of another MS. Under current EU law, cabotage is a service provided in another MS, thus a form of posting of workers. Consequently, the posted worker carrying out internal road haulage exclusively in Belgium will still remain subject to the labour law of the home state, with the exception of the applicable of hard-core obligations of the host state. Furthermore, the social security law of its home state will remain applicable in its entirety as well. The liberalisation of cabotage has on its part led to abusive practices as well.

SOCIAL DUMPING - The issues discussed above are all raised under the umbrella of social dumping. Social dumping is in the first place a political concept, with minor legal value. However, in the political and social sphere, it is widely used to name a broad spectrum of issues. Undeniably, it is a rather difficult exercise to give a legal definition to the concept. This has been confirmed by the interviews with the stakeholders as well. For example, the Office of the Labour Prosecutor correctly pointed out the fact that the term is impracticable for carrying out their task. Likewise, the employer's organisation Transport en Logistiek Vlaanderen stated that the main problem with social dumping is particularly the fact that there is no uniform interpretation of the term. An inductive analysis of the interviews demonstrates that social dumping is a term which is easily used to name practices which are to be condemned. For example, trade union ABVV stated that social dumping, 'such as very low wages', is destroying the transport sector.

Indeed, the long-time dangers of social dumping cannot be disregarded. Unfair competition, a race-to-the-bottom and undermining fundamental social standards are named as consequences of the discussed abusive practices. In what follows, the key legislative initiatives in order to combat these practices will be analysed.

[5] Court of Appeal Ghent, 19 October 2017, *Nieuw Juridisch Weekblad* 2017, 801.

2.1.1.3 BELGIAN POSTING OF WORKERS ACT

IMPLEMENTATION - The PWD was implemented in the Belgian legal order through the Belgian Posting Act of 5 March 2002 (hereinafter: BPWA)[6], amended by the Law[7] of 11 December 2016 implementing the PWED. The BPWA sets out the scope of the law, substantive and administrative 'hard-core' obligations and furthermore contains enforcement rules.

SCOPE - Firstly, Article 2 sets out the scope of the BPWA by defining who a posted worker is. A posted worker is a worker who performs labour of a temporary character and habitually works on the territory of one or more countries other than Belgium or has been recruited in another country than Belgium. Noticeably, the scope of the BPWA is broader than the PWD. Contrary to the PWD, the material scope of the BPWA is not limited to the context of transnational provision of services, nor does it require a services contract or a habitual place of work in another MS. The broad scope makes it clear that cabotage falls under the scope of the BPWA as well.

HARD-CORE OBLIGATIONS - Furthermore, the BPWA lays down the hard-core obligations of the parties in cases of posting. According to article 5, the employer engaging a posted worker in Belgium has to comply with Belgian labour law, the rules on remuneration and the employment conditions expressed in Belgian legislative provisions, administrative legislation and collective agreements which are subject to penal law. Furthermore, additional grounds to comply with can be adopted by Royal Decree, as far as it concerns public policy. Important to note here is that the BPWA clearly goes beyond the Directive in the sense that all legal provisions subject to penal law are considered to be public policy provisions within the meaning of the PWD. This is all the more so if one considers that the majority of the Belgian labour and social security law is subject to penal law. Thus, it is clear from the BPWA that the Belgian legislator intended to submit the posted worker and his employer to far-reaching obligations, presumably with the purpose of ensuring a level-playing field in Belgium. Since cabotage falls under the scope of BPWA, these obligations have to be complied with in cases of cabotage as well.

LIMOSA - Moreover, an important obligation in the cases of posting to Belgium is the LIMOSA declaration. Every employer employing a person working in Belgium who is not subject to the Belgian social security system has to fill in this mandatory declaration. This LIMOSA declaration contains of the identification details of the employee, the undertaking posting the worker, the service recipient in Belgium and the place of employment. The LIMOSA declaration has essentially been introduced to fight fraud and unfair competition by providing the authorities with information for more effective monitoring and controls with regard to employment relationships which are not subject to Belgian law. However, workers

[6] Belgian Posting Act, 5 March 2002, *Belgian Official Journal*, 13 March 2002, 10.638.
[7] *Belgian Official Journal*, 20 December 2016, 87.449.

in the international transport sector are exempt from the Limosa declaration, with the exception of cabotage. One of the reasons named as a justification for this exemption is the particular difficulties in this sector with providing the authorities with pertinent information, such as for example the place of employment. Nonetheless, one might argue that technically speaking the employer's do have sufficient information with regard to the routes and data of tachographs at their disposal, and consequently Belgium could -or should, according to for example the FPS ELS - submit employers in the international transport sector to the LIMOSA declaration as well.

However, the context of the free movement of services in which the posting of workers takes place necessarily has to be considered in these particular assertions. It can be argued that far-reaching obstacles to this freedom, such as the obligation to provide authorities with extensive information, for example tachograph data or driving routes, may be considered as an impediment of the free movement provisions. This has been confirmed by the CJEU case-law as well, more particularly that "formalities implied by the declaration requirement (…) impede the supply of services on the territory of the kingdom of Belgium by self-employed service providers established in another Member State. That obligation thus constitutes an obstacle to the freedom to provide services."[8] Consequently, a MS will have to justify the measure according to the rule of reason. In this regard, the CJEU has acknowledged that the objective of "combating fraud, particularly social security fraud, and preventing abuse, in particular detecting 'bogus self-employed persons' and combating undeclared work, can form part not only of the objective of the financial balance of social security systems, but also of the objectives of preventing unfair competition and social dumping and protecting workers, including self-employed service providers."[9] Furthermore, the particular measures at stake have to be justified according to the proportionality-test. In a number of judgements of the CJEU on the compatibility of the LIMOSA declaration with the EU law, Belgium has failed this proportionality-test and the law had to be amended consequently.

To conclude, in the light of the free movement provisions and the case-law of the CJEU, the demands of authorities competent with the enforcement of labour law to submit the employer's in the international transport sector than it is the case at the moment may not easily be satisfied.

[8] CJEU 19 December 2012? Case C-577/10, Commission v. Belgium, ECLI:EU:C:2012:814 par. 40.
[9] *Ibid,* par. 45.

2.1.1.4 IMPLEMENTATION OF THE PWED

IMPLEMENTATION - The PWED was implemented in the Belgian legal order by the Law of 11 December 2016. This law amended the BPWA discussed above. Corresponding to the objectives set out in the PWED, these amendments aimed to enhance the enforcement of the minimum protection offered by the BPWA.

CRITERIA GENUINE POSTING – Belgium has transposed the criteria for the identification of a genuine posting and the prevention of abuse and circumvention of article 4 PWED into article 2 of the Law of 11 December 2016. In doing so, the Belgian legislator kept the assessment of a genuine posting based on two main criteria as mentioned in the PWED, namely whether a posted worker *temporarily* carries out his or her work in a Member State other than the one in which he or she normally works and the determination whether an undertaking genuinely performs *substantial activities*, other than purely internal management and/or administrative activities. Those two main criteria are further divided into a non-exhaustive list of factual elements which can be considered in the analysis of genuine posting. In this regard, it is noteworthy that Belgium has strictly followed the criteria set out by the PWED. Similarly to the PWED, the Law of 11 December 2016 does not explicitly attach particular consequences to the case in which one concludes that there is no genuine posting. Nevertheless, since these criteria are laid down in article 2 of the BWPA which sets out the scope of the law, it can be concluded that the legislative framework with regard to posting will not be applicable at all thus the Rome I Regulation will govern the employment relationship, with all consequences that will entail in terms of applicable law to the employment agreement.

ADMINISTRATIVE OBLIGATIONS – The first amendment to the BWPA worth mentioning is article 7/1, which contains of the administrative obligations of the employers. In sum, the employers have to provide the Belgian authorities of a copy of their employment agreement, information about the foreign currency of the remuneration, the working times and the proof of payments of the wages. Furthermore, the employer posting workers to Belgium has to communicate a liaison person to the Belgian Labour Inspectorate. This liaison person has to deliver and receive documents or notifications regarding the employment of posted of workers in Belgium. The enhanced obligations of the employers will presumably ensure better surveillance by the Belgian authorities of the situation of posted workers.

SUBCONTRACTING LIABILITY – Another measure introduced by the Law of 11 December 2016 is subcontracting liability. This measure is based on Article 12 of the PWED, which provides for a discretionary power of MS to adopt rules with regard to subcontracting liability. Contrary to this, establishing a subcontracting liability for the construction sector in particular is mandatory. In the implementation of the PWED Belgium restricted itself to the mandatory provisions, thus the scope of the subcontracting liability is limited to the construction sector.

CROSS-BORDER ENFORCEMENT OF FINANCIAL AND ADMINISTRATIVE SANCTIONS – Lastly, the Law of 11 December 2016 provides for measures with regard to the enforcement of financial and administrative sanctions. These measures are essentially based on articles 6 and 7 of the PWED considered with the enhancement of administrative cooperation between MS. These provisions were implemented by allowing the Belgian authorities to request from other MS the notification of administrative fines imposed by Belgium for non-compliance with Belgian law, to the concerned service providers established in their territory. Moreover, the authorities can request the recovery of the administrative fines by other MS. Conversely, the Belgian authorities will take notice of the requests by other MS as well.

2.1.1.5 OTHER RELEVANT LEGAL MEASURES

Besides the BPWA, the legislator took additional measures in further legislation to fight the above-mentioned fraudulent practices. In what follows, the most noteworthy measures will be discussed.

BOGUS SELF-EMPLOYMENT - The measures to fight bogus self-employment have been adopted outside of the scope of the BPWA. Under Belgian labour law, a self-employment agreement can be re-qualified as an employment contract if there is in fact an employment relationship. To this end, the legislator has adopted indicia that demonstrate this employment relationship. When more than half of these indicia are fulfilled, a rebuttable presumption of an employment contract will be established.[10]

FRAUD - Fraus corrumpit omnia is a general principle of Belgian law and is applicable in the context of labour and social security law as well. Moreover, this principle is codified in the Belgian social penal code.[11] As a consequence, a foreign company engaging in fraudulent practices can be regarded subject to the integral Belgian labour law and even Belgian social security law.

CABOTAGE - Besides the BPWA, cabotage is subject to the Law of 15 July 2013. This law restricts the cabotage activities in its material scope. Namely, maximum three cabotage operations are allowed, which have to follow up international transport activities. Furthermore, cabotage has to take place within 7 days after unloading the last goods.

[10] Article 337/2 of the Programme Law (I) of 27 December 2006.
[11] Articles 230 – 236 Belgian Social Penal Code.

2.1.2 SOCIAL SECURITY LAW IN PRACTICE

A1 certificates are statements that dictate the applicable legislation regarding social security and are issued by the competent social security institution.[12] In the following chapter, the perception regarding A1 certificates in Belgium will be discussed.

OVERVIEW - It became clear that burdensome difficulties are encountered by various Belgian stakeholders, particularly state actors, regarding A1 certificates. Notably, it was argued that there is a discrepancy between the ease at which an A1 certificate is obtained, the legal consequences that ensue and the difficulties Belgian stakeholders encounter in order to get a foreign A1 certificate withdrawn.

2.1.2.1 GRANTING OF AN A1 CERTIFICATE

DIVERSITY OF COMPETENT INSTITUTIONS - There is no uniformity within the EU as to which national institution should be competent to grant A1 certificates. As a result, different institutions are competent amongst the MS. For example, where governmental agencies are competent in Belgium, (private) health insurance institutions have this task in Austria. It is argued, amongst others by the Office of the Labour Prosecutor, that this leads to discrepancies in how and when these certificates are granted. What is more, the criticism was given that certain foreign institutions will issue these certificates almost automatically. In summary, Belgian actors believe that in many cases, it is far too easy to obtain a certificate.

DUAL PURPOSE - Interesting to notice is that the system of A1 certificates is being used for two purposes. On the one hand, by private individuals acting in good faith who are asking for a certificate from their national institution while on the other hand, the same system is used by governmental agencies to revoke certificates issued by a competent authority from another MS from persons that may have tried to abuse the system, as pointed out by the Office of the Labour Prosecutor. Thus, in the latter instance, the same system has to be used to combat fraudulent abuse of the system by persons, both natural as well as legal, that have intentionally done so.

Where the principle of good faith is present in the first, the principle of bad faith could be found in the latter. In this instance, the system was critiqued to be too rudimentary and not adjusted to face the challenges it encounters.

[12] European Union, "Useful forms for social security rights", available at: https://europa.eu/youreurope/citizens/work/social-security-forms/index_en.htm (last accessed: 21 December 2018).

2.1.2.2 LEGAL CONSEQUENCES

UNILATERAL DECLARATION - An A1 certificate has profound consequences, it is a *de jure* unilateral declaration of a MS that its social security law is applicable. Since the coordination of European social security law is founded upon the principle that simultaneous application of multiple legislative systems is to be avoided, difficulties ensue once it has been established that the A1 certificate might not be justified. Furthermore, withdrawing or declaring invalid such a certificate is only possible for the authority that issued the certificate in the sending MS.[13]

2.1.2.3 CHALLENGING AN A1 CERTIFICATE

Belgium has tried to take measures to deal with the difficulties that ensue when trying to attain the withdrawal of a foreign awarded certificate. It did so because it was of the opinion that the current system was inadequate to deal with such cases, especially in instances of fraud or abuse. Thus, Belgium took unilateral measures to define what it saw as abuse. Furthermore, Belgium also stated that its social security legislation was to be applicable from the day that the abuse occurred. Accordingly, the European Court of Justice ruled that these measures were in violation of European legislation, specifically the duty for a member state to not take unilateral action to declare its social security law applicable when an A1 certificate has already been awarded.[14] This occurrence confirms that Belgium is not satisfied with the current system. Furthermore, it proves that there is a strong consensus amongst Belgian official institutions and social partners to take action against fraudulent abuse of A1 certificates.

INSTITUTIONAL IMBALANCE - The *Altun*-case[15] was warmly welcomed by all Belgian actors. However, the Office of the Labour Prosecutor, whilst welcoming the judgement, still questioned the current institutional (im)balance. It did not believe that a receiving state should be bound by a certificate of a foreign institution, without its courts having the option of annulling the certificate based on an objection of illegality.[16] This institutional imbalance is said not to stroke with the principles of the rule of law.
That is to say, in various cases where a request was made to a foreign institution to review an A1 certificate, it was carried out from a formal standpoint, but the case was not sufficiently investigated on a substantial level. The inability for the Office of the Labour Prosecutor to efficiently cooperate with other governmental actors was a recurring problem.

[13] CJEU 26 January 2006, C-2/05, *Banks*, ECLI:EU:C:2006:69; CJEU 27 April 2007, C-620/15, *A-Rosa Flussschiff,* ECLI:EU:C:2017:309; and CJEU 6 February 2018, C-359/16, *Altun,* ECLI:EU:C:2018:63.
[14] CJEU 11 July 2018, C-356/15, Commission v. Belgium, ECLI:EU:C:2018:555.
[15] CJEU 6 February 2018, C-359/16, *Altun*, ECLI:EU:C:2018:63.
[16] Objection of illegality (in Dutch: *exceptie van onwettigheid*) is a legal principle that is applicable in the Belgian legal system. It is based on article 159 of the Belgian Constitution, which states that "*Courts only apply general, provincial or local decisions and regulations provided that they are in accordance with the law*". Accordingly, a judge is competent to exclude a governmental act from its judgement if the court decides that it is not in accordance with the law.

DIFFICULTIES TO WITHDRAW AN A1 CERTIFICATE - First of all, the procedure to do so has no guarantee that this will be done in a quick and efficient manner. In addition, the procedure is perceived to be very cumbersome. The time indications which are given for the procedure are too long. This is to say; the Belgian penal courts are bound by the legal principle of '*reasonable period*'.[17] Thus, in certain cases where a withdrawal was obtained, courts could no longer make use of this because the reasonable period had elapsed. What is more, the Administrative Commission cannot make binding decisions. As a result, there is a sphere of legal uncertainty.

The legal consequences and the difficulty to withdraw an A1 certificate are demonstrated by a new legal trend in Belgian courts. Here, lawyers have used the tactic of getting a hold of a retroactive A1 certificate of a foreign MS for their client during a legal dispute before a court, who previously did not have one. Subsequently, the procedure before a court is obstructed. That is to say, a court cannot proceed with a case from the standpoint of social security, for as long as it has not been established that Belgian social security law is applicable. In reference to the reasonable period mentioned above, this might cause the lawsuit to land in a deadlock causing the reasonable period to expire, regarding the applicable social security law.

In order to attain the revocation of an A1 issued by a foreign institution, a certain procedure has to be followed. This procedure consists of three stages: two focussing on dialogue and one on conciliation. In stage I, the requesting institution exchanges information with the requested institution. It could ask for a clarification of its decision or for the withdrawal of the A1 certificate. If this stage offers no solution to the situation, the parties can proceed to stage II. Here, each institution appoints a contact person who shall seek to find an agreement. If no solution was found once again, the conciliation stage of the system can be used. Thus, stage III allows for a procedure before the European Conciliation Board[18] which gives an advice on whether or not the certificate should be withdrawn.[19]

Therefore, governmental actors are forced to work together both at the national level as well as transnationally. This cooperation is not always as efficient or effective as it should be. The cooperation amongst the relevant Belgian institutions and between Belgian and foreign institutions will be discussed in chapter 2.2.2.

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[17] Reasonable period is a legal principle deriving from article 6 §1 European Charter of Human Rights. It states that: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Thus, if a defendant's case is not dealt with in a reasonable time, given the circumstances of the case, his human right to a fair trial will have been violated.

[18] The conciliation board is an institution set up by the Administrative Commission itself. It has done so pursuant to article 72 of regulation 883/2004

[19] Decision No A1 of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council, OJ C 106, 24.4.2010, p. 1–4.

The procedure before the Administrative Commission is a reconciliation procedure which is meant to avoid legal discussions. However, this is often not the issue at stake. In other words, actors can often not agree on the facts. Currently, this problem cannot be effectively addressed through official channels. This creates a legal vacuum that has to be addressed. For example, a solution could be that a national judge could give a binding decision on what the facts are, which can subsequently be used by the Administrative Commission.

Even though the procedure for the annulment of a foreign A1 certificate is not optimal, Belgium has been able to work in close cooperation with multiple foreign actors. Because of this, 650 unjust certificates have been withdrawn by the competent institution at the request of Belgium in 2017 alone. Since 2015, 2.462 unjust certificates have been revoked at the request of Belgium.[20]

2.1.2.4 POTENTIAL SOLUTIONS

REQUIREMENTS TO OBTAIN AN A1 - Allegedly, it is too easy to obtain a certificate. To remedy this, a solution might be to increase the threshold in order to obtain a certificate. This could, for example, comprise of a better coordination of requirements or of better uniform standards of transfer to acquire an A1.

More specifically, a condition to procure an A1 should be that the potential recipient is at that moment not a party to a dispute before a court of a MS where the applicable social security law is a legal question at stake. This could resolve the current ongoing problem of retroactive A1s being issued during a legal dispute, further complicating the court proceedings and often performed with the sole intention of doing so. However, these proposals will undoubtedly have an impact on free movement in the internal market. Accordingly, a balancing act will have to be made.

ENFORCEMENT OF A1 CERTIFICATES - What is more, improvements are needed at the level of enforcement of A1 certificates. It is currently too cumbersome and too difficult to revoke a foreign awarded A1. On the one hand, the aspirations of the EU are clear; it wishes to eliminate the possibility of two social security systems being applicable at the same time, which would undermine legal certainty.[21] On the other hand, the current system is not capable of efficiently dealing with the revocation of unjust certificates in a cross-border setting. The authors believe that, from a Belgian standpoint, too many actors with too many different backgrounds are involved in the process. Reshaping the procedure to fewer types of actors seems desirable. Solid efforts will also have to be made regarding the duration of the revocation process.

[20] *Questions and Answers* Parl., Q. no. 0477, 7 May 2018, (M. Kitir).
[21] Article 11, regulation 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.*

Potentially, the EU MS should look at the possibility to allow national courts to revoke unjustified awarded certificates. Ultimately, this could be the solution that would combat the current weaknesses of the system the most. However, this will be at the expense of the unilateral aspect of a MS declaring its legislation applicable. By way of explanation, the downside of this would be that the MS at issue could interpret this as its sovereignty being undermined.

More realistically, a potential solution might be offered through the process of digitalisation. This could lead to better cooperation amongst the various institutions, more transparency and more uniformity in the granting-process of A1 certificates. Specifically, blockchain technology or a European work permit were proposed. Blockchain technology would enable an open-ended platform possible to guarantee a better dissemination of information.

2.2 ENFORCEMENT

2.2.1 COMPETENCES AND BEST PRACTICES OF BELGIAN INSTITUTIONS

In this chapter, the relevant Belgian institutions will be briefly but concisely introduced. In doing so, only competences of these actors that are relevant to the research will be scrutinised. Additionally, the key elements of the best practices will be discussed.

CABINET OF MR. DE BACKER - The governmental institution that is responsible for social fraud. As a political actor, one of its competences is to undertake stage II and III of the process to revoke a foreign awarded A1 certificate.[22]

OFFICE OF THE LABOUR PROSECUTOR - The office of the labour prosecutor is a specialised section of the public prosecutor's office and has the competence to enforce labour and social security laws. Furthermore, it has the monopoly to charge before a labour court. In order to be able to carry out that task, it has the ability to undertake certain investigation measures. However, some of these investigation measures can only be performed after the authorisation or under the control of an investigating judge, namely those that are too invasive of someone's rights. The Office of the Labour Prosecutor can decide in full sovereignty which cases it will close and which cases it will bring before a court, in line with the enforcement priorities given by the ministry of justice.

[22] See Chapter 2.1.2.3 for a discussion on the dialogue and conciliation procedure before the Administrative Commission.

BELGIAN FEDERAL PUBLIC SERVICE OF EMPLOYMENT, LABOUR AND SOCIAL DIALOGUE (FPS ELS): Public Service at the federal level, competent to ensure the balance between employees and employers in their employment relationship. To achieve this, they have the mandate to conduct inspections, negotiations and impose administrative fines. The inspections that this institution conducts are different from the investigations that are carried out by the Office of the Labour Prosecutor. The latter is a judicial investigation whereas the former is an inspection. Depending on the gravity of the infringement, it can refer the case to the Office of the Labour Prosecutor.

After the discovery of an infringement, there is a wide margin of discretion to impose an administrative sanction. This implies that it can choose in which instances it imposes administrative sanctions and to what degree. This has led the institution to apply a certain open-door-policy. This policy entails that the SPF ELS wishes to engage with undertakings in a fruitful and effective manner, with the intention to increase the adherence and correct application of labour and social security law. In doing so, this policy increases the overall efficiency of the institution. It enables an environment of mutual trust which encourages undertakings to take initiative and disclose information regarding their situation. As a result, this technique combats the legal uncertainty experienced by many undertakings.

2.2.2 COOPERATION AMONGST GOVERNMENTAL AGENCIES

INSPECTION PROCESS - The SPF ELS itself has indicated that it is not cooperating enough with other Belgian institutions, as well as foreign institutions. Major problems are encountered with the efficient dissemination of data and the access thereto. For example, data that is readily available to employers regarding their trucks' whereabouts cannot be practically accessed by the SPF ELS. As a structural problem, it has experienced that for certain foreign institutions it is not a priority to deal with social security cases when these are vested in their country but operate elsewhere

SOCIAL SECURITY - As mentioned above, Belgian actors have to work together alongside with their foreign colleagues if the first wishes to revoke an A1 certificate awarded by the latter. This collaboration is not as efficient or effective as it could be, this can be examined both at the national as well as EU level.

NATIONAL LEVEL - Nationally, the cooperation between the different relevant state actors is not optimal. The Office of the Labour Prosecutor has to cooperate with the National Social Security Office, which is too bureaucratic at the moment, as no direct contact can be had between the first actor and foreign institutions. In other words, all communication that the office of labour prosecution wishes to have, has to pass through the National Social Security Office.

Furthermore, in the event that phase II or phase III for the revocation of a certificate has to be started, a cooperation with the Cabinet for social fraud is needed. At this stage, the Cabinet will have to decide if they are willing to proceed with the process to revoke the certificate, according to their political objectives. If they do so, a diplomatic cooperation will ensue at the level of the Administrative Commission.

EU LEVEL - On the EU level, not all actors are interested in an intense cooperation. By way of explanation, certain governmental institutions are reluctant to withdraw a decision - even when they know it is the right thing to do - because revoking an A1 certificate could potentially lead to accountability of that institution. What is more, discovering letterbox companies and acting accordingly is not seen as a priority by certain foreign institutions. For these institutions, it is an investment of resources; time and money, without it providing a direct and tangible short-term benefit to them. Indeed, it could seem not desirable since this will cause social contributions to stop. In the long term however, it is counterproductive to the aspiration that legal fiction should reflect reality. Moreover, it is also counteractive to the principles upon which the European coordination of social security systems is build.

The procedure is very intricate because multiple actors, with different backgrounds and/or nationalities, having different objectives, are needed if a foreign awarded certificate is to be revoked. What is more, in the event that this procedure has to be followed in light of an ongoing case, this cooperation needs to attain its goal in a short time frame in order to respect the reasonable period-principle, which is applicable in penal law. Indeed, the entire process for revoking a foreign awarded certificate is very complicated. Judicial processes have to be combined with political and diplomatic ones. Due to the inherent different nature of these actors, collaboration is not optimal, as indicated above.

Despite the shortcomings of the system, Belgium has been able to get 2.462 unjust foreign awarded certificates revoked. This shows that Belgium managed to cooperate to a certain degree with foreign institutions. Indeed, Belgium, across all levels of governmental agencies, sees itself as the front-runner when it comes to communication on a transnational level. Contrary to the immense number of requests for the withdrawal of an A1 certificate Belgium issues, it receives very little of such requests itself.

2.3 INSPECTION OF LABOUR AND SOCIAL STANDARDS

Inspections regarding labour and social standards are carried out by the FPS ELS. The greatest challenge the FPS ELS is facing is the difficulty to detect an infringement of the legal framework. This is especially the case considering the very limited number of inspectors the institute has. Currently, it is only able to put a very limited number of full-time equivalents into operation. Adding to this, is the difficulty to employ more inspectors, or rather, the difficulty to train more inspectors. This is because it takes approximately three years to fully train an inspector. In general, three different types of inspection can be distinguished: road inspections, seat inspections and other forms of inspections.

ROAD INSPECTIONS - Road inspections mean literally inspecting trucks which pass through Belgium. In reality, this method is perceived by the FPS ELS as finding a needle in a haystack and subsequently not being very efficient. However, a big discrepancy in perception exists here, as the government (cabinet social fraud) as well as certain of the social partners believe that the focus should lie on roadside checks. On the contrary, the FPS ELS believes that this is not an efficient use of their resources.

SEAT INSPECTIONS - Inspections at the seat of the company are also possible. However, most of the companies that infringe upon labour or social security laws have their seat in a different MS than Belgium. Even though cooperation is possible with foreign institutions in these instances, it would still make it difficult to detect infringements.

OTHER FORMS OF INSPECTION - The FPS ELS is of the opinion that it has to strive for new methods of inspection. That is to say, it wishes that investments are made to digitalise the inspection process, in order to take full advantage of today's technological possibilities. As of now, this potential has not been used. Nevertheless, this option has broad support by all social partners, as well as by the government to some degree.

Firstly, data collected by the digital tachograph or kilometrage toll-system should also be able to be used for inspection purposes. Currently, this is not possible due to the legal framework that does not allow this practice. The government was of the opinion that a careful balancing act has to be made between collecting and using such data and privacy concerns. At this moment, it does not believe that it can justify collecting and using this data for such purposes to legitimise an infringement of privacy.

Secondly, an EU platform should be made which indicates all the wages for truck drivers for the MS. If this information is easily accessible, it would make it much easier for inspectors to find out if the relevant wage has been correctly payed. Be that as it may, this would still raise some difficulties regarding the discrepancies in the terminology of "*salary",* which will be discussed in chapter 3.1.2.

Lastly, a European declaration system, similar to Belgium's Limosa system, should be realised. In this European unified system, any cross-border transport (or cross-border work/posting in general) should be declared. This declaration could for example include: license plate, identification of driver and CMR document (in the future, this could be the E-CMR).[23] Such a system would allow inspections to be carried out in one of the most efficient manners, namely through the use of big data. Such innovative ways forward are warmly welcomed by all Belgian stakeholders, in stark contrast to the support at the EU level.

2.4 PARTICULARITIES OF BELGIAN CASE LAW

An analysis of recent case law is necessary to fully understand the implementation of the legal framework. Generally, there is a remarkable aspect in the Belgian case law. Namely, trade unions can be a direct party to the legal proceedings.[24] The claim of a trade union can solely regard a failure to comply with commitments and obligations arising from an agreement to the extent that this is explicitly regulated in said agreement. The nature of the judgement will be declaratory. This provision is not used very often. However, there is a case pending that was brought before the labour tribunal by a trade union. Hereinafter, an analysis of the Belgian case law is presented, structured by certain trends that can be distinguished.

2.4.1 THE APPLICABLE LAW

CRITERIA - The Koelzsch[25] and Voogsgeerd[26] case law play a fundamental role in Belgian case law and provide the necessary criteria to determine the applicable law. If the transport activities are carried out exclusively in Belgium, then Belgian labour law is applicable. If the case concerns international transport, then there are the following criteria to determine which labour law should be applicable. From where does the employee carry out his transport assignments? In which countries does he receive the instructions for his assignments? From which country is his work organized? And in which country are the labour instruments situated? Guidelines[27] regarding the applicable law have been drafted by the Belgian inspectorates. They do not only contain the previous criteria, but also additional ones, such as the place where the transport is mainly carried out, where the goods are unloaded, where the employee reports before starting his work and where he returns after his work. Whenever the answers to these questions is mainly "Belgium", the Belgian labour law must be applied, including Belgian wages. It is however not clarified in the guidelines how this should be interpreted. The guidelines are drawn up to give some direction to the

[23] A CMR document, also known as a CMR waybill, is a transport document used for international transport. It derives from the Convention on the Contract for the international Carriage of Goods by Road.
[24] Art. 4 Act of 5 December 1968 regarding the collective labour agreements and the joint committees, *Belgian Official Journal* 15 January 1969, 267.
[25] CJEU 15 March 2011, C-29/10, *Koelzsch*, ECLI:EU:C:2011:151.
[26] CJEU 15 December 2011, C-384/10, *Voogsgeerd/Navimer*, ECLI:EU:2011:842.
[27] Available at:
http://www.siod.belgie.be/sites/default/files/content/download/files/guidelines_transport_24_04_17_nl.pdf (last accessed on 11 Januray 2019).

inspection services. They must apply these guidelines in a uniform manner to construct a level playing field for all actors in the transport sector.

IN PRACTICE - We can find these criteria in several Belgian cases. For example, in a case from 2017, the Criminal Court of Bruges[28] decided that the choice of law clause was not valid due to fraud (*fraus omnia corrumpit*). The case concerned three undertakings, established in Belgium, Luxembourg and Slovakia, which were active in international transport services. The drivers were recruited in Slovakia and so Slovakian law was applicable to the employment agreement. Social inspections, however, uncovered that there was only a genuine activity in the Belgian undertaking. The Slovakian company was solely established to recruit cheap drivers and avoid Belgian labour and social security law. The drivers were in fact instructed by the Belgian company and the transport operations commenced and ended in Belgium. The court reasoned that the choice of law clause is valid, but that mandatory provisions of the objectively applicable law must be considered. Following the *Koelzsch* and *Voogsgeerd* case law, the court decided that the objectively applicable law, the law of the country of the habitually place of work, was Belgian law. Especially in cases concerning fraud, the reality trumps the situation the parties formally agreed upon amongst each other, namely the illegal posting of workers through letterbox companies. From the facts of the case, it was inferred that the employment relationship was more closely connected to Belgium than to Slovakia, so Belgian law was considered to be the applicable law.

Similar reasonings regarding requalifying the applicable law to Belgian law can be found in other recent cases.[29] In December 2015[30], the Court of Appeal of Ghent decided in a similar case that the employment relationship was closely linked with Belgian labour law and that therefore Belgian labour law should be applicable to it. Like the previous case, drivers were employed by a letterbox company, this time established in the Czech Republic. The Czech drivers were posted to Belgium where a dispatcher of a Belgian transport company gave them instructions and assignments. The dispatcher was their primary contact person and the authority the drivers had to report to. These circumstances regarding their employment relationship and the fact that the drivers where mainly active in Belgium, led the Court to use the escape clause from article 8 §4 of the Rome I Regulation[31] to establish Belgian labour law as the applicable law.

[28] Criminal Court Bruges, 10 May 2017, S/85/15 BG.69.98.1226-16 1121.

[29] Criminal Court Bruges, 10 May 2017, S/694/15 BG.69.98.1228-16; Labour Tribunal Antwerp, 14 April 2016, A.R.nr. 13/4166/A; Court of Appeal Ghent, 3 December 2015, 2014/PGG/61 2014/VJ12/53; Criminal Court Leuven, 9 September 2014, LE.69.I1.76/13; Criminal Court Brussels, 26 March 2014, S/838/2012-FDK-mdj BG.69.98.1373/13; Criminal Court Ghent, 7 September 2016, GE.69.98.1743/13 – S/2013/0442-D; Criminal Court Bruges, 10 May 2015, S/553/15 BG.69.98.1584-16; Criminal Court Antwerp (afd. Mechelen), 10 February 2017, S15/0246-S16/0232.

[30] Court of Appeal Ghent, 3 December 2015, 2014/PGG/61 2014/VJ12/53.

[31] Regulation (EC) NO 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, *OJ L* 2008, 177/6.

In another case[32], a lorry driver, working for a Slovakian transport company, contested his Slovakian employment contract. The Slovakian company was a subcontractor of a Belgian transport company and the lorry driver argued that this Belgian company was his true employer. This was mainly because the lorry in which he drove, was owned by the Belgian company, he received his instructions and assignments from this company, he commenced and ended his assignments in Antwerp, bills of carriage were drawn up by the Belgian company and the tachograph cards were read out by it. Moreover, the Slovakian company could not even prove that the lorry driver was employed by them. No written agreement was presented, nor was there proof that the Slovakian company had any sort of authority over the drivers. The labour tribunal of Antwerp ruled that there only existed a relationship of authority between the lorry driver and the Belgian firm and not with the Slovakian firm. Therefore, Belgian Law must be considered as the applicable law.

2.4.2 LETTERBOX COMPANIES

CRITERIA - In several cases the court considered that the company which formally employed lorry drivers was a letterbox company, after which it often decided that the law applicable on the employment relationship must not be the law of the country where the letterbox company was established. But what is exactly a letterbox company? There exists nor a clear definition of this concept, nor a consensus on a definition or the criteria. The main criterium the Belgian courts use, is the presence of a genuine activity conducted by the company, or the lack of any such activity. In its assessment, the court considers all relevant elements of the case and these are similar to the relevant factors listed in article 4 of the Enforcement Directive. Comparable to the Directive, the court focusses on the performance of a substantial business activity, the employment of administrative staff, the place where workers are recruited and from where they are posted, the place where the registered office and the administration is located, the use of office space and the number of contracts performed or the size of the turnover realised.

IN PRACTICE - The Criminal Court of Bruges[33] determined in a case regarding a Bulgarian transport company, that there exists a genuine activity when there are actual employees working in the establishment, the dispatching is carried out from there and the employment agreements are being signed there. The connection between the lorry drivers and the Bulgarian company contributed to the substantial activities that were carried out in the establishment. In light of the facts of the case and guided by the presumption of innocence, the court considered that the Bulgarian company conducted a genuine activity and that it was not a letterbox company.

[32] Labour Tribunal Antwerp, 14 April 2016, A.R.nr. 13/4166/A.
[33] Criminal Court Bruges, 10 May 2017, S/1598/15 BG.69.98.1802-16.

However, the court suspects a lack of genuine activity when the administrative and operational functioning of a company is conducted from another company which is established in another Member State. The Court of Appeal of Ghent ruled this way in December 2015.[34] As mentioned above, this case concerned a Czech company which posted workers to a Belgian company. The Czech company was considered to be a letterbox company because all the operational and administrative functioning of the company was conducted from Belgium. Moreover, the Czech company did not even have a commercial property in the Czech Republic. The lorries were owned by the Belgian company and the mail addressed to the Czech company was automatically forwarded to the Belgian company.

The Criminal Court of Leuven ruled in a similar way in its case from 2014.[35] The case concerned a Belgian transport company and a Slovakian company which was established by the manager of the Belgian company. The former focused on national transport in Belgium, whereas the latter conducted international transport assignments. The drivers were recruited by the Slovakian company but were immediately referred to the Belgium to sign their employment agreements. They have never actually been in the Slovakian company. Moreover, the centre of economic activity was situated in Belgium for both companies. The manager and two Belgian employees controlled the dispatching and distributed the assignments to the drivers of both companies. The drivers commenced and ended their assignments in Belgium and bills of carriages were filed in the Belgian company along with tachograph cards. Considering all the previous facts, the court concluded that the Slovakian company was a letterbox company that was only established in order to circumvent Belgian labour and social security law.

Other relevant criteria stemming from the case law are: the presence of buildings, adequate infrastructure and equipment, the place from where transport services commence and end, the size of the turnover realised, the place where driving schedules are prepared and where assignments are distributed. In May 2015[36], the Criminal Court of Bruges considered that a Bulgarian company which had its registered office at the private address of one of its employees and which had no genuine activity in Bulgaria, was in fact a letterbox company. In reality, the drivers never went to Bulgaria to load or unload their lorry. They received their instructions from a Belgian company at which they parked their lorries in the weekends. The Belgian company was also the place where the lorries were repaired and where the drivers stayed during the weekends, while benefitting from its facilities.

[34] Court of Appeal Ghent, 3 December 2015, 2014/PGG/61 2014/VJ12/53.
[35] Criminal Court Leuven, 9 September 2014, LE.69.I1.76/13.
[36] Criminal Court Bruges, 10 May 2015, S/553/15 BG.69.98.1584-16.

2.4.3 THE POSTING OF WORKERS

CRITERIA – The guidelines[37] of the inspection agencies also set out what the posting of workers is supposed to mean. A posted worker is an employee who carries out work in Belgium, but usually works in another country or has been hired in another country. The guidelines put forward some criteria and conditions regarding the subject. These include the existence of an employment relationship between the posting undertaking and the posted employee prior to the temporary posting to Belgium and the maintenance of this relationship during the posting period. Most importantly, there needs to be an agreement between the principal (dispatcher) and the receiver of the service in Belgium. Either the principal or the receiver needs to be established in Belgium for there to be a posting in Belgium. This will, for example, be the case for permitted cabotage, but not for purely international transit operations. In general, the relevant factors presented in the guidelines are different from the ones set out in the Enforcement Directive. The guidelines seem to focus on the employment relationship between the driver and the posting company, whereas article 4 of the Enforcement Directive puts forward the connection with the Member State from which the worker is posted. The guidelines do not even mention the duration of the posting, while the limited period is the first element on the list in the Enforcement Directive.

The posting of drivers will most likely be considered illegal when the posting company is a letterbox company. As a consequence, the driver and the company to which he or she was posted are deemed to be bound by an employment agreement for an indefinite period starting from the beginning of the labour performance of the driver. When this company to which the driver was illegally posted, is a Belgian company and the work is mainly carried out in Belgium, Belgian law will be applicable to this established employment agreement. In a legal posting context, there must exist an organic relationship between the employee and the employer in the home state, from which he or she is posted.[38] This means that the authority relationship is a prominent factor to determine the validity of the posting.[39] When assessing this, certain questions come to mind. Where is the employer who has the authority over the driver located? Where is the habitually place of work of the driver? From where does the driver receive orders? Where did he sign his or her employment contract?

IN PRACTICE - In May 2014[40], this reasoning was used in a case concerning subcontracting. A Czech transport company worked as a subcontractor for a Belgian company. However, there existed no written agreement concerning this subcontracting, nor did there exist any written agreements on what sort of instructions the Belgian company could give the employees of the Czech company. In reality it was the permanent representative of the Belgian company that gave instructions to the drivers of the Czech

[37] *Supra* footnote no. 21.
[38] Criminal Court Bruges, 10 May 2017, S/1598/15 BG.69.98.1802-16.
[39] Criminal Court Leuven, 9 September 2014, LE.69.I1.76/13.
[40] Criminal Court Ghent, 19 May 2014, 2014/1659 GE69.98.883/13.

company. It prepared their daily work schedules and had a certain influence on the hiring and firing process. In general, it was their main contact person and their true employer with which an authority relationship was established. In light of the facts, the Criminal Court of Ghent decided that this was no case of subcontracting and that the drivers should be considered as been bound by an employment agreement with the Belgian company.

In a case before the Criminal Court of Brussels[41], again the same reasoning was used, but this time in a case concerning posting. Bulgarian lorry drivers went to the Belgian harbour-police with complaints regarding the payment of wages and working conditions. They worked for a Bulgarian company, which also had an establishment in Zeebrugge, Belgium. A social inspection was carried out and the social inspectors considered that the Bulgarian drivers worked in reality for the Belgian affiliated company. According to the court there is only one relevant criterium to determine whether or not there exists a legal posting or not. Were the drivers de facto under the authority of the company they were posted to? If yes, then it is a case of an illegal posting. The reality of the employment relationship trumps the qualifications the companies make. Since the Belgian company was in reality the true employer, the posting was considered illegal.

2.4.4 SOCIAL SECURITY LAW

CRITERIA - The combination of a letterbox company and the posting of workers is often used to circumvent not only Belgian labour law, but also social security law. A judge is bound by an A1 certificate, as the revocation is an exclusive competence of the authorities of the home Member State of the posted worker. However, in the *Altun*[42] judgement of February 2018, the ECJ decided that in cases of fraud and under specific conditions, a national judge can disregard the A1 certificate and apply its own national social security legislation.

IN PRACTICE - The same reasoning can be found in several Belgian cases, that were concluded prior to the *Altun* case itself. The facts of the case of October 2017[43] are different then the previously discussed cases, since it is not a case concerning the transport sector. The social inspection discovered that some self-employed Slovakian construction workers were in fact employees. The Court of Appeal of Ghent was first of all of the opinion that the situation has to be considered as being bogus self-employment. This requalification of the employment relationship implicates that DIMONA declarations[44] have to be submitted. However, it does not automatically mean that social security contributions have to be paid. This

[41] Criminal Court Brussels, 26 March 2014, S/838/2012-FDK-mdj BG.69.98.1373/13.
[42] CJEU 6 February 2018, C-359/16, *Altun*, ECLI:EU:C:2018:63.
[43] Court of Appeal Ghent, 19 October 2017, *NJW* 2017, afl. 371, 801-805.
[44] DIMONA is an electronic system that requests all Belgian employers to register new employees with the National Office for Social Security Office. The declaration should be made immediately after an employee is hired by or leaves the employer. By using an electronic notification system, all social security agencies are informed at the same time.

is, according to the court, only the case when the court considers the A1 certificates to be fraudulent. Having regard to the *fraus omnia corrumpit* principle and the fact that the main purpose of the A1 certificates was to circumvent Belgian social security contributions, no legal effects can be derived from these A1 certificates. However, prior to the *Altun* case, the A1 certificates were binding until revoked, even for national courts. So, in this judgement, the Court breaches EU law. It seems like the court was sympathetic to the workers because it considered them to be a vulnerable group who ended up, because of the inappropriate use of the free movement principles, in a situation that the defendants constructed to circumvent Belgian social security law.

In September 2016[45], the Criminal Court of Ghent considered a Slovakian transport company to be a letterbox company and the Belgium company the true employer of the drivers. The posting was illegal and therefore, the Belgian company had to submit DIMONA declarations for the workers. The court distinguished two situations. For the drivers without an A1 certificate it was considered to be proven that the Belgian company did not submit the DIMONA declarations. For the other drivers, the Belgian authorities requested the revocation of the A1 certificates from the Slovakian authorities, but no answer was received during the penal proceedings. The court considered that the revocation of these certificates was only a matter of time since the drivers had never been employed in Slovakia and this situation of illegal posting through a letterbox company was found to be fraudulent by the Slovakian labour inspection itself. In the opinion of the court, the defendants could not rely on the A1 certificates, having regard to the *fraus omnia corrumpit* principle. It was thus considered to be proven that the Belgian company did not submit the necessary DIMONA declarations. It has to be borne in mind that this judgement was also concluded before the *Altun* case.

From these two cases alone, it is clear that the Belgian courts were very ecstatic with the *Altun* judgement. In fact, they were already implementing the reasoning behind the *Altun* case, before it was ever concluded. By ruling in such a way, they were clearly in breach of EU law. But in fact, it is not that surprising that they reasoned this way. The courts were bound by the certificates. Only state authorities could request a revocation of them. This made the courts not only dependent on the Belgian authorities, but also on foreign authorities and the cooperation between these authorities. The *fraus omnia corrumpit* principle provided them with the means to reach the desired end, to let the reality trump the effects on social security of the illegal posting. So, on one hand, the Belgian courts clearly breached EU law, but on the other hand, the courts used a general principle that is recognised by the ECJ and were 'simply' ahead of the latter's case law.

[45] Criminal Court Ghent, 7 September 2016, GE.69.98.1743/13 – S/2013/0442-D.

2.4.5 SANCTIONS

NATURE - Generally, the sanctions are penal in their nature and mostly include a fine and sometimes even imprisonment. However, the imprisonment is usually a suspended prison sentence and is therefore not often executed. Fines can be of a substantial amount and are attributed to natural persons and legal persons, namely the transport firms. The profits that the transport firm gained directly from the criminal act are usually confiscated. Sometimes, the prosecutor even demands the closing of a transport firm. Occasionally, the sanctions are civil in nature.[46] This is the case when there is a civil party in the penal proceedings or when the case is not based on provisions of the social penal code but for example on provisions of the collective labour agreements. The civil proceedings usually follow after or simultaneously with the penal proceedings. As mentioned above[47], administrative sanctions can be imposed with a wide discretion by the FPS ELS.

3 SOCIAL PERSPECTIVE

In chapter three, an analysis will be made of the Belgian position on EU road transport from a social perspective. It discusses: employment conditions (chapter 3.1) and the ongoing social dialogue (chapter 3.2)

3.1 EMPLOYMENT CONDITIONS

3.1.1 WORKING CONDITIONS

In their attempt to circumvent social security law, employers often forget the needs of workers. Trade Unions and Case Law report multiple issues surrounding the working and living conditions of international truck drivers.

TRADE UNIONS – During the interviews, various trade unions reported situations of workers living and working in distressing circumstances. While the trade unions do see the Mobility Package (MP) as a substantial step forward, they do not consider it to be sufficient in ameliorating the working conditions of the workers in practice. They are particularly concerned about workers staying away from home for months on end.

[46] Criminal Court Brussels, 26 March 2014, S/838/2012-FDK-mdj BG.69.98.1373/13.
[47] *Supra* Chapter 2.2.1.

In the MP it is stated that workers have to go back to the country of establishment of the company, every four weeks. The country of establishment however, is often different from the home country of the worker. A Bulgarian driver working for a company registered in Poland, will have to go back to Poland every four weeks, without having the chance to see his family in Bulgaria. The Trade Unions would like to see this changed to the worker's home country in order to provide them with the much-needed contact with their families.

Another issue that was raised considered cabotage. The MP allows for three days of cabotage with a five-day cool down period in which no cabotage can be undertaken. However, this cool down period only applies to the truck, not the driver. It is possible for the driver to use another truck and continue engaging in cabotage, again staying away from home for a long time.

Lastly, the unions reported that the vast majority of workers do not have any social insurance. In an attempt to provide themselves with some protection, they resort to travel insurance for the time they spend driving abroad.

CASE LAW - Some cases demonstrate the brutal working conditions drivers have to face. To illustrate, human trafficking allegations were made in a case in 2014[48]. The working conditions were scandalous. The wages were already minimal (e.g. 191 EUR per month) and on top of that, what they actually received was only a fraction of what was agreed upon. Their salary was withheld for various reasons. They had to sleep in their trucks, sometimes even with two drivers in one cabin, since there was no housing and even if there was a residence, it resembled a hovel. Those responsible received not only a penal but also a civil sanction, due to the fact that the Interfederal Centre for Equal Opportunities was a civil party in the criminal proceedings.

CLOSING OF PARKING LOTS FOR TRUCKS – Due to the sudden and significant increase of irregular migration by road transport, various local governments have taken the decision to close parking lots that are situated on popular roads for migration. In doing so, they hope to combat the negative side effects that are experienced on their territories due to the practise of irregular migration by road. However, measures that lead to the closing of parking lots are disliked by both the trade unions as well as employers. Trade unions are not in favour of these measures as they complicate the ability of lorry drivers to take their mandatory, or voluntary, rest. This could potentially lead to dangerous outcomes in case a lorry driver is forced to continue driving to find a place to rest, even when they are legally no longer allowed to. Similar in their reasoning, employers are also against these measures as it is a restriction to their ability to efficiently conduct their operations. What is more, such measures do not tackle the underlying problems that lead to the abovementioned negative effects. Thus, the social partners are of the opinion that measures aimed at

[48] Criminal Court Brussels, 26 March 2014, S/838/2012-FDK-mdj BG.69.98.1373/13.

closing parking lots for trucks are not proportionate nor effective. Ultimately, the social partners are of the opinion that measures should be taken in consultation with the social partners and that in this specific instance, a more holistic approach to the problem is preferred

3.1.2 REMUNERATION

REMUNERATION - Minimum rates of pay are regulated in collective labour agreements which have general binding effect.[49] Using these collective labour agreements, it is very easy to establish the correct minimum pay in a certain situation. The Collective Labour Agreement for Road Transport and Logistics on Behalf of Third Parties, specifically for the subsector of mobile workers, [50] makes a distinction according to the payload of the vehicle and the seniority of the driver in the sector. Furthermore, a distinction is made between drivers with a 38-hour workweek or a 39-hour workweek with 6 days paid compensation. In the most recent version of the collective labour agreement, the wages range from € 10,7295 to € 12,1040 gross per hour across the various categories mentioned, with an indexation percentage of 2,10.

However, in reality it is often difficult to calculate the total monthly wage due to several elements being open to discussion. That is, a difference is being made between "working time" and "periods of availability". Furthermore, a distinction is made between "extra hours" and "overtime". Consequently, it is often a complex undertaking to calculate and check the correct total monthly wage. As a result, the correct calculation of one's monthly wage is often a point of contention before a labour tribunal. To put it shortly; while it is easy to determine the correct hourly wage, establishing the exact monthly wage is complex and open to discussion.

PRACTICE - Workers often get a monthly salary of 250 EUR to 500 EUR. Apart from that monthly salary, they also receive daily allowances. Since these are normally only meant to cover the costs that workers face in the execution of their job, no contributions need to be paid on these daily allowances. In reality however, employers systematically use them as a replacement for the salary. Daily fees allowances of over 50 EUR per day on average, add up to the largest portion of the wage that the workers receive.

While this provides them with rather large salaries, workers do not build up any decent social security rights. In times of illness they fall back on their monthly wage, which is only a fraction of their actual remuneration. Lastly, this could entail unfair competition for Belgian workers. Since labour costs are considerably higher for national workers, Belgian transport companies prefer outsourcing the job to cheaper foreign workers.

[49] Royal Decree of 24 September 2006, making generally binding the collective labour agreement of 27 January 2005 of the Joint Committee for transport, to establish the working conditions and wages for driving personnel of undertakings performing road transport for third parties, Moniteur Belge 28 November 2006.
[50] For an overview of the applicable Collective Labour Agreements concluded in the Joint Sub-Committee for road transport and logistics on behalf of third parties (JSC 140.03): Subsector Mobile Workers, see: http://www.employment.belgium.be/WorkArea/DownloadAsset.aspx?id=48129 (last accessed: 22 March 2019).

PRINCIPLE OF EQUAL PAY - According to the Collective Labour Agreement of March 13th, 2014, equal pay must be guaranteed for equal work.[51] This collective agreement applies to employers that belong to the Joint Committee on Transport and Logistics, and their employees.

The principle of equal pay stems from the desire to protect Belgian transport companies against unfair competition from foreign European undertakings exercising their Freedoms. The social partners agreed that employees who have their place of employment in Belgium, must be paid a Belgian wage. Furthermore, the agreement provides a clear definition of what is to be understood by the *place of employment*. The agreement states that this is "*the place from which the employee usually carries out his orders and instructions. The place where he picks up his lorry at the start of a new period of employment or where he parks, or should park, his lorry after the end of the period of employment. The following factors are taken into account: the place in which the transport is mainly carried out, the place in which the goods are loaded and unloaded and the place to which the employee returns after his assignments".* This means that foreign drivers working from a Belgian place of employment must be paid the Belgian wage. Furthermore, following the *Koelzsch* judgement, workers have to be paid the minimum wage of their habitual place of work.

COMPLEXITY OF THE TERM 'SALARY' - In reality, the enforcement of the principle of equal pay for equal work proves to be difficult. When assessing the conformity of wages, inspectors are often confronted with issues regarding the complexity of the term *salary*. Since the definition of the term is a national matter, each MS has a different idea of what is to be understood by it. For example, it is not clear whether daily fees are part of the salary in different MS. Thus, making it very difficult for inspectors to investigate whether the minimum wage is respected.

POTENTIAL SOLUTIONS - The logical solution would be to strive for a uniform European definition of the term salary. In reality however, this would be a highly unlikely option, since it would be unfeasible to reach the consensus needed within the EU. The sudden change of one of the basic concepts of employment and social security law, would have a vast impact on the national law of MS. A viable option could be to create a European database with all the minimum wages and ways of calculation in the different MS. This would not only make it easier for inspectors to verify conformity, but also provide workers and employers with the necessary legal certainty. The FPS ELS, in charge of upholding Belgian legislation on pay and working conditions, adheres to this solution as it could provide the necessary tools to alleviate the issues they are facing now.

[51] Collective labour agreement concerning equal pay for equal work of 13 March 2014, available at: http://www.emploi.belgique.be/CAO/140/140-2014-003626.pdf.

3.2 SOCIAL DIALOGUE

3.2.1 NATIONAL LEVEL

Social dialogue is important for the legislative decision-making process in Belgium. Different actors, representing both employers and employees, come together to collaborate and discuss issues faced by the transport sector.

JOINT COMMITTEES - The social dialogue at a sectoral level in Belgium happens by virtue of joint committees. They oversee the conclusion of collective labour agreements by the representative organizations and settle disputes between employers and employees. They form a system of constant social dialogue. In the case of the road transport sector, there is the joint committee for transport and logistics. This Joint Committee has some sub-committees, the most important one being the joint sub-committee for road transport and logistics on behalf of third parties.

Not all truck drivers fall under this joint committee, as the worker's individual occupation is irrelevant for determining its jurisdiction. The committee has jurisdiction for workers employed by an employer whose enterprise belongs to a branch of industry for which the joint committee has been set up. For example, a driver working for a textile company can fall under the jurisdiction of a joint committee for the textile sector and not for the road transport sector.

COLLECTIVE LABOUR AGREEMENTS - A collective labour agreement is an agreement concluded between one or more employee organizations and one or more employers. These are concluded by the Unions and can be made generally binding by royal decree, making them legally binding to all employers and employees falling under the scope of the joint committee in which the collective agreement was concluded. When parties do not comply with the collective agreement, they are subject to penal law.

In the transport sector, various collective labour agreements have been concluded within the joint sub-committee for road transport and logistics on behalf of third parties. These are applicable to all transport activities carried out in Belgium, irrespective of the place of business of the employer. In reality however, these are not applied to temporary transport activities such as cabotage by companies not established in Belgium.

WORKS COUNCIL - Collaboration between employers and employees is organized by the works councils. These have to be set up in every enterprise habitually employing an average of at least fifty workers. Its most important task is providing advisory opinions. Furthermore, the works council decision-making authority in a number of cases are defined by law. These include, among others, changing work rules and setting op general criteria for collective dismissal.

SOCIAL PARTNERS - Both employers and unions are organized in professional associations, these are involved in social consultation at all levels. Employers join the professional organizations of their branch of industry. While these are organized geographically, they are centralized at a national level in multi-industry organizations. These multi-industry organizations are considered to be representative for social consultation. In the case of road transport, the most important social partners for the employers are the Royal Federation if Belgian Haulers and Logistic Services (FEBETRA), Transport and Logistics Flanders (TLV) and the Professional Union of Road Transport (UPTR). Employees are represented by the trade unions. The most important ones being the Belgian Transport Workers' union (BTB) and Christian Transport Workers Union (ACV-Transcom).

PLAN FOR FAIR COMPETITION - An example of the good functioning of the sectoral dialogue on a national level, is the conclusion of the plan for fair competition in which all of the social partners, botch representatives from employers and employees, agreed on a plan for the future of the transport sector. This included cooperation between government and social partners in combating social fraud and illegal work in the road transport sector. Some of the measures agreed upon in this plan include the formulation of guidelines[52] regarding interpretation by the inspection agencies and the conclusion of a checklist for control in the transport sector.

ROLE OF THE TRADE UNIONS - The trade unions in Belgium are particularly active in the field of road transport. Not only do they have separate entities dealing solely with the interests of transport workers, they also form a strong political and social pressure group. They take the lead in the negotiations of collective labour agreements and are actively involved by the authorities in the legislative process. Furthermore, as mentioned above, they play an important in bringing legal proceedings against employers who do not comply with the rules.

They also have an important investigative role, in which BTB has been the forerunner. Through conversations with drivers and undercover investigations, they try to sketch a picture of the social problems that exist in practice. In doings so, they often function as a whistleblower for relevant issues. Thereupon, these findings are published in their *Black book on transport*, which is often mentioned as a source by the inspection services. The most recent rendition dates from 2017, when a team of BTB went undercover to Bratislava in an attempt to set up a letterbox company.

There they found an entire industry of consultants helping Belgian companies in setting up letterbox companies. These companies were often nothing more than office spaces filled with documents and one or two people acting as the representative of multiple letterbox companies simultaneously. There was no sign of a genuine activity, since the necessary infrastructure was not present nor was there any staff present.

[52] *Supra* footnote no. 21.

The same consultants also provide Belgian companies with the necessary drivers. These are found not only in Slovakia, but also in Romania and Bulgaria. They are hired by the letterbox company and then 'shipped' in a mini-van to Belgium, where they actually carry out their work. The team also found a number of consultants in Belgium, often with a subsidiary in Slovakia, that assist transport companies in the financial and practical issues of setting up a letterbox company, in Belgium.

While this investigation does provide valuable information for the authorities, it has not led to any major breakthroughs. This is mainly because most of the companies operate within the boundaries of the law. The BTB handed over a large list of letterbox companies to the EU, which only led to the license of one company being withdrawn. The trade unions therefore call for more legislative action on a European level. They realize however, that considering the current climate, this is will not be easy. This will be further elaborated on in the next section regarding the European level.

3.2.2 EUROPEAN LEVEL

Belgian Social Partners are actively involved in social dialogue at a European level. Belgium has also implemented the framework of the European social dialogue. There is a sectoral social dialogue on road transport, organized by the EU Commission, in which the Belgian Trade Unions and Employers are represented.

EMPLOYEES - The Belgian Transport Workers' union (BTB) is a founding member of the European Transport Workers Federation (ETF), which is comprised of unions from all over the EU. The current president of BTB is also the president of ETF. The Belgian Trade Unions are represented in the European social dialogue by ETF. While the BTB finds it useful to discuss such a cross-border topic on a transnational level, it states that ETF is far less influential to European politics than BTB is to national politics. According to BTB the main cause of this lack of clout, is the political interests of unions from Eastern-European countries. These countries often see social-dumping-related issues as a threat to their national prosperity. Therefore, they are less concerned with issues surrounding working conditions.

EMPLOYERS - The employers are represented in the European social dialogue via the International Road Transport Union (IRU), of which FEBETRA is a founding member. TLV is a member of the European Road haulers Association (UETR) which has a close connection to the European Commission.

4 POLITICAL PERSPECTIVE

Regarding the political discussion, attention is drawn to the balancing act between market freedoms and the protection of workers' rights, the opinion of the government concerning the MP and a more general political and public discussion on the topic.

MARKET FREEDOMS - The Cabinet of Mr. De Backer is very supportive of the internal market. The market freedoms as applied to the transport sector receive great support from the government. Services, including international transport services, can be provided freely in the internal market. However, it is not possible to turn a blind eye to some effects of these freedoms, one of them being social dumping. Little attention was given to this situation, just like the rights of the workers. The Cabinet therefore insisted on the enforceability of the rules. There exists a need for minimum social protection. Moreover, the objectives of the European Union have to be kept in mind; "*the internal market shall be a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment*"[53]. The competitiveness of the internal market cannot be at the expense of social progress.

The social partners detect no fundamental issues regarding the freedoms in itself. However, the way in which the freedoms are used - or even misused - is not only detrimental for the rights of the workers, but also for the Belgian transport sector. Propelled by competition, Belgian companies combine the freedom of establishment and the freedom of services to establish letterbox companies in Eastern-European MS. From this company they will recruit drivers to perform international transport services. This is perceived by our society as a wrongdoing, whereas they are in reality enjoying the beneficial regulation of that specific MS. This practice has an enormous social impact. In this regard, the social partners are striving for an adequate social framework, compromising the principle of equal pay for equal work conducted in the same place, to complement the freedoms.

MOBILITY PACKAGE - The Belgian government is highly supportive of the MP. It is clearly a step in the right direction and it has to be welcomed that the subject is put back on the table. However, it cannot be perceived as the finish line. The discussions on the European level are ongoing and the cabinet fears that the MP will not be finalised before the elections of May 2019. This is so because currently, there is an impasse between Western-European MS that want to combat social fraud opposed to Eastern MS who do not want to lose their competitive advantage.

[53]Article 3 §3, Treaty on European Union, *OJ C 326, 26.10.2012, p. 13–390.*

The proposal to amend the directive on the posting of drivers in the road transport sector[54] is very auspicious according to the Cabinet. They are a proponent of the principle of equal pay for equal work conducted in the same place. Both the real-wage and the sectoral obligations must be paid. The Belgian government is in favour of keeping the basic wage of the country of origin as the starting point. Applying different wages for every country the driver passes through is unrealistic and unworkable. Regarding cabotage, the Cabinet believes that the proposal to simplify the rules, namely by working with days and not with cabotage operations, will be easier to monitor. The simpler and clearer the rules, the easier the enforcement. The social partners, however, are not so keen on this liberalisation of cabotage.

PARLIAMENTARY QUESTIONS - The posting of workers is a highly discussed subject in Belgium. In 2018 alone, there were a number of discussions in the federal parliament focusing on this topic. Several questions are asked regarding the number of LIMOSA declarations[55], when the posting commences and ends[56], the duration of posting[57], the cooperation between EU MS regarding posting[58] and the fight against cross-border social fraud[59]. In these records, it is clear that the European discussion influences and intensifies the Belgian discussion. Questions appear about the interpretation of the *Altun*-judgement, the proposal for amending the posting of workers directive[60] and the role of letterbox companies in social dumping[61].

MEDIA COVERAGE - The discussion on international transport and the social dumping it sometimes entails, can also be followed in the national newspapers and magazines. Firstly, there are certain sector specific websites and magazines, such as 'transportmedia.be', which constantly follow and report on the European and national proposals, negotiations and discussions. Secondly, the social partners publish articles regarding posted workers and social dumping on their websites. Thirdly, newspapers and magazines are also picking up on the topic. In October 2018, 'Knack', a high-quality magazine, published a five-page long article titled '*The transport sector recruits its drivers now outside the EU - "Even the Polish driver has become too expensive"*'. Additionally, the quality newspapers, namely '*De Standaard*' and *'De Morgen'*, cover the evolutions of the European and national discussions and negotiations.

[54] Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, 31 May 2017, COM/2017/0278 final - 2017/0121 (COD).
[55] *Questions and Answers* Parl., Q. no. 0503, 5 June 2018, (W. RASKIN).
[56] *Questions and Answers* Parl., Q. no. 0504, 5 June 2018, (W. RASKIN).
[57] *Questions and Answers* Parl., Q. no. 2054, 2 March 2018, (J.M. NOLLET).
[58] *Questions and Answers* Parl., Q. no. 2051, 2 March 2018, (J.M. NOLLET).
[59] *Questions and Answers* Parl., Q. no. 0481, 18 April 2018, (B. FRIART); *Questions and Answers* Parl., Q. no. 0446, 1 March 2018, (B. FRIART).
[60] *Questions and Answers* Parl., Q. no. 2264, 3 May 2018, (J.J. FLAHAUX).
[61] *Questions and Answers* Parl., Q. no. 2058, 5 March 2018, (J.M. NOLLET); *Questions and Answers* Parl., Q. no. 0508, 5 June 2018, (F. DAERDEN).

5 CONCLUSION

As it became apparent over the course of this position paper, the legal framework regarding the cross-border transport sector is facing a number of issues. This paper tries to identify the most prominent issues by listening to the first-hand experiences by the various stakeholders active in the sector. Wherever possible throughout the chapters of this paper, specific future perspectives have been described.

From this position paper clearly came forth that various stakeholders see different ways forward. Even within a same department, opposing viewpoints can be discerned. This was for example the case for the government, where the cabinet and the FPS ELS had contradictory proposals with regard to the allocation of resources in the inspections of labour and social standards. It would therefore be rather short-sighted to even generalize the views of one branch of stakeholders, yet due regard has to be given to the proposals of all actors. Nonetheless, it is possible to discern from the results of this research a number of elements all actors agreed upon.

The most outstanding element is the demand for an easier, clearer legislative framework. Currently, there is legal uncertainty in many cases as to which rules are applicable in various situations in the context of cross-border transport. It is argued that the reason for this is the vague and obscure legislative framework. If the legislative framework would be comprehensible to begin with, many issues with regard to compliance and enforcement would become non-existent. Thus, a solution the EU should strive for is to increase the accessibility of EU law.

Related to this is the argument that there is no uniform interpretation of the legal concepts and procedural rules, thus creating barriers for a uniform application, effective enforcement and cooperation amongst the various stakeholders. For example, this is the case for the term 'salary' or the procedures to obtain an A1 certificate.

Lastly, all stakeholders are firmly in favour of enhanced, strengthened and more efficient cooperation amongst all MS and their actors. The argument advanced here is that the cross-border nature of the transport sector necessarily demands for multilateral solutions.

6 WAYS FORWARD

From our analysis, we would like to propose several specific ways forward to address the problems that are present in the European transnational road transport sector.

6.1 POSTING OF WORKERS

With regard to any way forward concerning the legal framework relating to the posting of workers, some necessary preliminary considerations have to be made. From the analysis of the transposition of the Directives into the Belgian legal order, it has become clear that Belgium is strongly devoted to tackle the issue of social dumping. This has been done by submitting parties to extensive obligations on the one hand and introducing mechanisms to monitor and control more effectively the situations of posted workers on the other. From a legal point of view, some of these legislative measures undertaken by Belgium to combat social dumping may be regarded as going beyond the limits of what a MS is allowed to do.

By way of example, this is firstly the case for the supposition that all labour provisions subject to penal law are public policy provisions in the meaning of the PWD. This might be questionable since roughly all labour law provisions are subject to penal law. As a consequence, parties in the context of posting of workers are subject to Belgian labour law as a whole. This is problematic in the light of the judgement of the CJEU in Commission v. Luxembourg, in which the Court restricted the possibility for MS to impose far-reaching obligations on employers from other MS, relying on posting of workers in order to provide services. [62] For the considerations regarding the LIMOSA declarations, it is appropriate to once more emphasize the same legal context in which posting takes place; namely the free movement of services.[63]

Taking into account these preliminary considerations, an overall way forward can be proposed with regard to the Belgian legislative framework on the posting of workers. Generally speaking, it seems that Belgium attempts to tackle the issues on social dumping by adopting unilateral measures. However, given the cross-border character of the issues surrounding the posting of workers, it is doubtful whether those can be effectively dealt with by purely national measures. Besides the effectivity argument is the consideration that Belgium might encounter challenges as to the compatibility of its measures with EU law as well. Therefore, our proposed way forward with regard to future legal measures for Belgium is to give due consideration to the broader context in which the discussed issues take place, namely within the EU internal market in the context of the free movement of services. Ideally, a way forward would involve close cooperation with all MS in finding appropriate and effective solutions.

[62] CJEU 19 June 2008, C-319/06, *Commission v. Luxembourg*, ECLI:EU:C:2008:350.
[63] *Supra* p. 7 for further considerations on LIMOSA.

6.2 A1 CERTIFICATES

We perceive the current system to deal with the withdrawal of foreign awarded A1 certificates to be inadequate and too cumbersome to deal with the challenges it faces. In response, a modification of the legislative framework seems fit. If a political consensus could be reached at the European level, a revision of the regulatory framework should focus on the system's ability to deal with cases of abuse or fraud, something which was initially not taken into account. In this regard, we see two ways forward. Either the judicial or the executive branch's competences to withdraw an awarded A1 certificate should be expanded. From the perspective of the Belgian legal tradition, the first option seems to be more desirable. By way of explanation, it would get away with the current institutional imbalance of the judicial power's inability to set aside administrative acts which are contrary to the law. For as long as this remains the case, the fundamental principle of *fraus omnia corrumpit* would not have full effect in relation to A1 certificates. Alternatively, an expansion could be made to the executive branch's ability to deal with cases of fraud. One way that this could have effect is by bolstering the Administrative Commission's competence to give binding decisions, or even by allowing it to declare an A1 invalid. In this way, problems regarding A1 certificates are dealt with at a transnational level and would ensure legal certainty regarding the applicability of social security systems. However, while we believe that ideally, modifications should be made to the regulatory framework, we also acknowledge that these types of changes are most likely not feasible in the short term.

Accordingly, actors should concentrate on making the current system, and the implementation thereof, more effective on an operational level. This means that the focus should be on enhancing the cooperation between the various institutions at stake, both national as well as foreign. What is more, clear guidelines could be provided to the different institutions to facilitate this cooperation by showing, for example, who should be contacted in which cases.

6.3 INSPECTION

The deplorable circumstances in which drivers often have to work, are partly maintained through a lack of efficient inspection. Like the trade unions, we see a need for more inspectors. While the government has promised an additional 117 inspectors, these positions have yet to be filled in. However, the efficiency of physical inspections on the road or at the seat of an undertaking have been called into question if they are not used in conjunction with other tools. Consequently, we support the ongoing efforts to innovate the methods of inspection. We are of the opinion that the future for the inspection of labour or social security standards lies within the application of technological and digital advances such as big data or block chain. Similarly, attention should be given to the possibilities of creating a transnational platform to allow a more efficient dissemination of information.

An example of such an approach is the previously mentioned proposal of the FPS ELS, to create a European database of wage structures to ameliorate the issues it faces surrounding the enforcement of equal pay. Through the creation of a platform that is connected to this database, on which international transport has to be notified, inspection can be made more efficient. Since it makes it easier for different inspection authorities to share information and provides them with the necessary information for targeted inspection. Since it has been proven to be very difficult to find more inspectors, we believe this approach to be the right one

Still, we believe that the current policies regarding inspection are made in a too top-heavy manner. That is, more attention should be given to the perspectives and experiences from the FPS ELS, as experts in the field. From our interviews, we believe that it was possible to discern that the communication between the cabinet and the FPS ELS could still be improved upon. Therefore, we advise both actors to increase their cooperation since reciprocal communication would be mutually advantageous.

6.4 ENFORCEMENT

The Belgian case law is quite straightforward and consistent. However, the criteria used by the Belgian courts are not always comparable to the criteria proposed in EU law. They are comparable regarding the applicable law and letterbox companies. However, the criteria that the Belgian courts use regarding the posting of workers slightly differ from the relevant factors put forward in the PWED. The Belgian courts focus on the relationship the drivers have with the company he is posted from and the relationship with the company he is posted to. Especially when the latter can be described as an authority relationship, that company is perceived to be the true employer of the driver. These criteria cannot be found in EU law. However, especially in the transport sector, we believe that the criteria the Belgian courts use are accurate. Because of the use of letterbox companies, it is imperative for the courts to establish who the true employer is. When this true employer is a Belgian company, the case is more connected to Belgium and so Belgian law should be applicable on the employment agreement, including Belgian wages. We are supportive of this practice of requalifying the employment contracts to Belgian law. That is to say, this practice provides an effective tool to redefine the legal situation to reality.

The subject where the Belgian courts are - or were - completely in contrast with EU law, was the A1 certificates and their binding nature. Long before the *Altun* judgement was concluded, the Belgian courts used the *fraus omnia corrumpit* principle to disregard fraudulent A1 certificates. This was clearly a breach of law at that time. However, in February 2018, the ECJ used the same reasoning as the Belgian courts to come to the same conclusion; in cases of fraud and under certain circumstances and conditions, the national courts can disregard the fraudulent A1 certificates and apply its own national social security legislation. We welcome the active role of the Belgian courts in this matter, but we cannot ignore that prior to the *Altun* judgement, this practice was breaching EU law. Since it is a difficult subject with profound implications, it is recommended that the Belgian courts act with more caution in the future. This to be in conformity with the obligation of sincere cooperation.

Annex I: Questionnaire SENSE-project – Interviews stakeholders

1. European Union law regarding the posting of workers (Posting of Workers Directive; applicable labour law (Rome I Regulation); applicable social security law (Regulation 883/2004):
    a. What are the primordial issues regarding social dumping in Belgium? What are the priorities of your institution (trade union, office of the labour prosecutor, organisation of employers) in carrying out your task?
    b. What is the role of the European legislation concerning these issues? To what extent does the European legislation address this phenomenon or contributes to it?
    c. What could be improved upon: are there certain proposals on any of the issues? (Both on a national as on the European level)
2. Political discussion on international road transport:
    a. How does Belgium interpret the relationship between the transport sector, the internal market and the freedoms and the rights of the employees?
3. Labour conditions:
    a. What is the Belgian position regarding the applicable labour legislation?
    b. What is your stance on the interpretation of the term "remuneration"?
    c. What is the Belgian position regarding the revised Posting of Workers Directive? Does the Directive apply in Belgium in the case of international road transport?
4. Social security:
    a. What is the Belgian position regarding the granting and control of A1 certificates?
    b. Which initiatives did Belgium undertake to improve the cooperation between the authorities of the EU Member States?
5. Social dialogue:
    a. Which stakeholders are included in the social dialogue? How are they included?
    b. Does legal uncertainty play a role in the implementation of the applicable rules by the undertakings?
6. Sanctions:
    a. Which sanctions are imposed when the legislation regarding posting of workers is violated? What is the nature of these sanctions (penal or civil)?
    b. What is the probability of being caught in the transport sector? Is the number of inspectors sufficient to monitor and to detect violations?
    c. How are the inspectors deployed? What is their primary task (investigation or inspection)?
7. Way forward:
    a. What are the current initiatives?
    b. Which ways forward do you propose?